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TORONTO OTTAWA CALGARY MONTRÉAL NEW YORK

November 19, 2004

SENT BY COURIER

Ontario Securities Commission
20 Queen Street West
Suite 800, Box 55
Toronto, Ontario M5H 3S8

Attention: John Stevenson, Secretary to the Commission

Dear Sirs/Mesdames:

Proposed OSC Rule 48-501 "Trading During Distributions, Formal Bids and Share Exchange Transactions"

This letter is submitted in response to the Request for Comment concerning changes to proposed OSC Rule 48-501 "Trading During Distributions, Formal Bids and Share Exchange Transactions" (the "Proposed Rule"). The Request for Comment was published at (2004) 27 OSCB 7766.

General Comments

1. Definitions of "offered security" and "public distribution"

The proposed changes in the scope of the above definitions to include, in the case of "offered security", all securities whether or not listed in Canada and, in the case of "public distribution", distributions of securities on a private placement basis, give rise to concerns for a number of our underwriter clients who distribute foreign securities in Canada on a private placement basis. In addition, there may be other unintended effects and considerable uncertainty introduced because of the significant widening of the scope of the Proposed Rule as a result of the changes in these two definitions.

Specifically, the changes in these two definitions will mean that the Proposed Rule will now apply to every single distribution of a security in Ontario, equity or debt, made by prospectus or on a prospectus exempt basis (assuming this is what is intended by the term "private placement") whether or not an underwriter or selling agent is involved in the transaction. This is significantly broader in scope than the existing rules and the first proposal. The inclusion of unlisted debt securities in the Proposed Rule was completely unanticipated and no policy rationale is given to support this change.

The Proposed Rule will apply to most dealers involved in private placements even if the dealer is participating as agent and the amount distributed is less than 10% of the issued and outstanding securities in the class. With respect to foreign or international offerings that are being extended to Canada on a private placement basis, nearly all of these transactions will be caught by virtue of the fact that the dealers are generally acting as "underwriters". Even if a dealer is, in fact, not an underwriter but is only a selling agent, many of these foreign offerings comprise more than 10% of the class of securities in question.

In the absence of any "de minimus" exemption, a foreign or international offering will be caught if just one trade in the course of the distribution is effected in Ontario. Clearly, it is not practical for issuers and lead underwriters or selling agents involved in foreign or international offerings to consider compliance with the market stabilization rules in Ontario in circumstances where Canada is not a principal target market. In our view, the result will be broad non-compliance because the issue will be overlooked or, alternatively, issuers and their underwriters will simply determine not to make foreign or international offerings available in Canada. Both of these outcomes are clearly undesirable.

Recommendation: We recommend that the definition of "offered security" be limited to securities of a class that are listed or quoted in Canada (or in respect of which an announcement has been made that such a listing or quotation will be pursued). We also recommend that consideration be given to defining "private placement" as an offering or distribution of securities that is being made on a prospectus exempt basis through an underwriter (which should include a selling agent) where the amount being offered exceeds 10% of the issued and outstanding securities in the class. This will help define more clearly the scope of the Proposed Rule as it applies to prospectus exempt distributions and, in particular, limit its application to significant exempt underwritten or agency offerings instead of all possible exempt distributions that an issuer might make.

2. Definition of "highly-liquid security"

In responding to the 2003 request for comments on the previously proposed rules, we commented that worldwide trading activities should be taken into account in determining whether an offered security should be exempt from the underwriter trading restrictions. This comment does not appear to have been the subject of a response from the Commission and RS. It may be that the Commission and RS take the view that the branch of the definition relating to listed or quoted securities that are subject to Regulation M under the 1934 Act and considered to be an "actively-traded security" thereunder addresses this concern. Even if this is true, we continue to submit that worldwide trading volume would better indicate those securities that are widely followed by the investment community, and that any manipulative or abnormal trading activity in

such securities would quickly be noticed. In our view, it is unfair to treat an issuer differently because its securities are interlisted and a material portion of its public float is traded in a non-Canadian marketplace. As we pointed out in our previous comment letter, Regulation M takes into account worldwide trading volume in determining whether a security meets the US$1,000,000 average daily trading volume exception.

3. Meaning of "Marketplace"

We had previously commented on the fact that there was no definition of the term "marketplace" included in the rule as originally proposed. In response, a definition has now been included in the proposed Companion Policy published with the Proposed Rule. While we support the added clarity, we question the decision to limit the scope of this term to a "recognized marketplace" for purposes of National Instrument 21-101-Marketplace Operation. While there is no express use of this term in NI21-101, use of this term would appear to have the result of excluding an ATS from the meaning of the term "marketplace" in the Proposed Rule such that trading in ATS markets is not counted for purposes of determining whether a security is a "highly-liquid security". In order to avoid this result, we recommend that the word "recognized" be deleted from the definition.

4. Definition of "Dealer-Restricted Period"

We note that a new provision has been added as subsection 1.2(5), which seeks to clarify when the dealer-restricted period ends in the context of a public distribution. We submit that this new provision has two potential undesirable consequences. First, the point at which the selling process shall be considered to end in the context of a prospectus offering is effectively being extended to the date the prospectus is delivered to purchasers. Historically, as a matter of practice the selling process has been considered to end when the receipt for the final prospectus has been issued and the dealer has allocated all of its portion of the securities to be distributed. The extension of the selling process to include prospectus delivery will clearly extend the dealer restricted period in many cases. To the extent that securities legislation provides dealers with up to 48 hours to deliver the prospectus once a binding sale has been made, this change could result in an extension of the restricted period by up to two days.

Second, this provision seeks to clarify when stabilization arrangements shall be considered to have terminated. The provision considers stabilization arrangements to be operative until such time as purchases or sales of restricted securities by a participating dealer are no longer being made jointly for the underwriting syndicate. In circumstances where an over-allotment option has been granted to the underwriting syndicate, this provision will effectively extend the dealer-restricted period for so long as the syndicate is maintaining an over-allotment short position with a view to making market purchases or exercising the over-allotment option, whichever market conditions dictate. As over-

allotment options are typically outstanding for a period of 30 days following closing of the offering, this could subject the dealers in the syndicate to a much longer restricted period than has historically been observed by dealers in public offerings where an over-allotment option has been utilized.

Recommendation: We recommend that the previous rules and practises concerning the end of the restricted period be retained.

5. Research Reports

Section 4.1 of the Proposed Rule provides an exemption from the prospectus requirement in section 53 of the Securities Act for certain dealer communications that are in the nature of compilations and industry research. In our view, it would be preferable to avoid changing the Ontario regulations concerning dealer communications in the context of public offerings in a rule that is focused on regulating market stabilization and other trading that may be considered manipulative of the public markets. Rather, we would prefer to see the Canadian Securities Administrators take a wholesale approach on a national basis to reform of the regulations concerning issuer and dealer communications in the context of public offerings. In this regard, we note that the SEC has very recently proposed wholesale reforms to the public offering rules in the U.S., including the rules regulating dealer communications in the course of a public offering.

As a drafting matter, if the reference to section 53 of the Act was removed, then the exemption in section 4.1 could neatly be included in subsection 3.1(1) with all of the other exemptions available to dealer-restricted persons.

As a separate matter, we wish to confirm our understanding under the Proposed Rule that dealer-restricted persons will be free to publish or disseminate single issuer research in respect of a security that is a "highly-liquid security".

As a final comment on this section, we suggest that it might be helpful to market participants if the Commission would clarify in the proposed Companion Policy the specific types of single issuer research communications that would be precluded by section 2.1 of the Proposed Rule. For example, we assume that it would be open to a dealer-restricted person to comment on a significant development affecting an issuer covered by the restricted dealer, provided the report did not have the effect of inducing or causing investors to purchase a restricted security. In circumstances where issuance of such a report would have the effect of inducing or causing investors to purchase a restricted security, presumably the restricted dealer would have to suspend its rating or recommendation in respect of the restricted security. Ideally, any guidance provided to restricted dealers in the context of the Proposed Rule should be consistent with the standards and guidelines contained in IDA Policy 11 as it relates to the issuance of research in the context of public distributions.

Specific Requests for Comment

In addition to the comments made above, we wish to respond to the specific requests for comment included in the request for comment as follows:

1. Definition of "dealer-restricted person" – carve out for related parties

   One comment in response to this specific request is to note that, in our experience, the carve-out for related parties would not likely have the effect of exempting affiliated broker-dealers in the U.S. and other countries from the operation of the Proposed Rule. It is our experience, information regarding any public distribution or transaction regulated by the Proposed Rule is fully shared within the investment banking divisions of affiliated broker-dealers. As such, the carve-out for related parties is more likely to benefit certain departments or divisions within a broker-dealer or group of affiliated broker-dealers that do not ordinarily have access to information regarding public distributions or other transactions regulated by the proposed rule.

   As a separate matter, we submit that clause (b)(ii) of the carve-out is likely to be difficult to apply to a department or a division of a dealer given that the employees of the department or division will also be employees of the dealer itself. As such, it can always be said that the dealer's officers or employees are acting in common with the dealer's department or division. Perhaps, additional clarification concerning the manner in which this clause is intended to operate could be added to the Companion Policy.

2. Definition of "dealer-restricted person" – addition of agents

   The change to the definition of "dealer-restricted person" to add dealers participating as agent in significant public distributions is somewhat confusing given that the definition of "underwriter" in the *Securities Act* (Ontario) already includes a dealer acting as a selling agent in a public offering. As such, there is no need for the additional clause unless the intent is solely that of including selling group participants who do not fall within the definition of "underwriter" in the Act. In our view, the use of selling groups to distribute securities is not all that common in current practice and, more importantly, selling group members would not have committed time and effort or have reputational reasons to manipulate.

3. Commencement of "dealer-restricted period"

   In our view, the date of the dissemination of the materials may be preferable to the extent that it is determined by the actions of the issuer whereas the date of the circular or other similar materials may be fixed arbitrarily by the draftsperson. In most cases, we would expect a draftsperson to date the circular or similar document contemporaneously with dissemination of that document. However, there is an opportunity to pre-date or post-

date documents in certain circumstances and this may cause some difficulty for market participants seeking to carefully time the cessation of restricted activities. In the circumstances, we believe that full harmonization with Regulation M is the preferred course of action.

We are please to have had this opportunity to offer you our comments on the Proposed Rule. If you have any questions or comments please contact Mark DesLauriers at 416.862.6709.

Yours very truly,

OSLER, HOSKIN & HARCOURT LLP
JMD/jh: