Kenmar
Dedicated to investor education and protection

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John Stevenson
Secretary to the Commission
Ontario Securities Commission
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RE: NOTICE OF PROPOSED ONTARIO SECURITIES POLICY 51-604 DEFENCE FOR MISREPRESENTATIONS IN FORWARD-LOOKING INFORMATION

Dear Mr. Stevenson:

Kenmar is delighted to have the opportunity to comment on the proposed disclosure policy -OSC Policy 51-604. Kenmar is an organization 100 % dedicated to investor education and protection. We publish a bi-weekly Newsletter geared to investor protection and maintain www.canadianfundwatch.com as an educational resource. As a consequence of out strategic thrust we also make presentations and file submissions with regulators that we believe are in the public interest. An affiliate, Portfolio Analytics , assists investors with the filing of complaints and restitution claims.

While the proposed policy focuses on forward –looking information, it seems to us that other, perhaps equally important, issues facing small investors are: non-disclosure of important events, half-truths, exaggerated claims, outright lies, delayed disclosure, failure to update important information or sudden shocks such as CIBC's unexpected and controversial announcement of a record breaking $2.4 billion Enron settlement so well covered by the media .The biggest disclosure issue by far is the more basic one of loose accounting standards –the preferred tool of choice by Canadian scammers in publicly released audited financial statements . This is the cause of the vast majority bulk of small investor distress. Why is nothing being done to make Nortel's auditors account for repeated accounting errors and restatements ? Investors cannot understand how Atlas Cold Storage misstatements remain unenforced. Business income trust investors continue to be duped by foggy and disparate definitions of "distributable cash" and so-called distribution yield.

A recent OSC targeted review of insider trading revealed that an astounding 42 % of reviewed files were identified as having exhibited unusual trading activity around material events or just prior to an earnings release or material change report. Another OSC review of prospectuses and CD's resulted in 18% having to refile or make retroactive changes due to major deficiencies. All of these corporate mis-steps unduly cost small investors money .We must not allow legal finessing have us lose sight of the common sense end-game principle-using disclosure as a critical tool for investors to make informed investment decisions.

As a proud member of the CDAC committee, the document appears to me to be wholly incongruent with the positive spirit, deliberations and ongoing proceedings of the Committee. It is evident from a reading of the proposed policy that the effect, no doubt unintended , of the document will be to water down corporate and executive accountability for defective or misleading and/or untimely disclosure by complementing an already rich list of defences. It is sending the wrong message to investors, capital markets and international observers.

Safe harbours will be so safe that the intent of Bill 198 will have been neutered - this would be unjust and inconsistent with the OSC's mandate. Most of the proposed language, if embraced by the judicial system, could virtually blunt legal remedies and class actions in Ontario. There is no doubt in our mind, that despite the disclaimer that the OSC's views are not legal advice and should not be relied on as such, that courts will in fact give a heavy weighting to the OSC Policy. Indeed it should not be called a Policy at all given that the legislation has yet to be tested in the courts and its title, is to say the least, controversial –it is ironic for a regulator devoted to protecting investors to provide issuer arguments for defending misrepresentations.

While we appreciate the Commission has received a number of enquiries from various corporations and law firms who have expressed uncertainty with respect to the requirements of the defence for misrepresentations in forward-looking information, the OSC should realize that small investors do not have equivalent resources to request that the OSC clarify the other side of the uncertainty i.e.. under what conditions would a claim legitimately proceed? On this basis alone, we do not see why the OSC should respond to only one party to the exclusion of the important other-the investor/shareholders.

In our view, this proposal is not investor -friendly and parallels the offensive changes brought about by the Ontario Limitations Act (2004) that struck a severe blow at investor redress. Together, they are a toxic mix that investors should not be made to swallow. This proposal could effectively shut down investor activism and the ability to claim restitution for misleading or untimely disclosure in Ontario. The intent of the civil liability provisions of Bill 198 were to provide a modest opportunity for investors to deal with corporations and managements continuous disclosures excesses that have for years been unassailable. No action, especially one by a provincial securities regulator, should stand in the way of the original constructive intent of the legislation.

Small investors, seniors, retirees and widows have lost billions of dollars based on corporate misdeeds, many as a result of defective disclosure and unenforced disclosure regulations. The promise of Bill 198, which was long sought by investor advocates, should not be murdered at birth.

A clause-by-clause commentary is neither necessary nor warranted given the orientation of the proposals. Instead, we offer some constructive ideas that we believe will assist corporations, boards and executives to produce better forward- looking or other statements and provide shareholders and investors a measure of protection against stock-price enhancing disclosures/ non-disclosures.

A disclosure, whether forward-looking or not, should be considered as vulnerable to civil action when it:

1. is demonstrably inaccurate, incomplete or untimely

2. is not based on sound accounting or logic or uses non GAAP measures without proper explanation and substantiating rationale as to applicability

3. is not supported by a robust underlying analysis or model

4. is at significant variance with publicly available industry market forecasts, sales projections and other relevant industry/market statistics

5. is inconsistent with either other disclosures issued at about the same time or with financial data and trends contained in publicly available financial statements i.e. sales forecast very positive, inventory levels swelling i.e. the words don't match the numbers

6. is at variance with corporate actions and executive behavior e.g. dumping stock while providing a positive forecast

7. is revealed that the underlying assumptions are unwarranted, poorly researched or unsupported by facts i.e. gut-feel, hearsay and rumour

8. is evident that key assumptions that a professional manager acting reasonably should be cognizant of , were not considered at all

9. demonstrably fails to exhibit common sense (i.e. gross negligence) or utilize past experience and historical information

10. has not been approved in writing by the Board or Disclosure committee of the Board or worse, was objected to by one or more members

11. is clear that the issuer does not have a structured process or Disclosure Committee for vetting disclosures for accuracy, quality and timeliness

12. it is clear that those responsible for disclosure have not been adequately trained or educated in what constitutes acceptable disclosure

13. is an outright lie, is knowingly based on defective or deceptive accounting or is unduly delayed (as measured from the time a reasonable person ought to have detected a defect or fraudulent activity)

14. a result of inadequate staffing, internal controls, accounting standards and audits to prevent the defective disclosure [" I didn't see because I didn't look"]

15. has been highlighted by internal staff, auditors, the media or shareholders and not promptly acted upon with appropriate level of intensity and speed [either before or after the disclosure].

16. has not been updated promptly and with a sense of urgency in the light of new information. This is based on the principle that if the original disclosure was worth making, then any significant change should be promptly communicated to investors who may have purchased the security on the basis of the original disclosure. [We realize that Bill 198 does not even require this reliance].

17. is poorly executed e.g. timed to be lost in the noise or missed, use of small font, excessively complex/ industry-jargon without regard to the intended reader etc.

Any of these, acting alone or in combination, should indicate a high degree of vulnerability .We are not lawyers and realize such a list needs to be refined but it indicates some of the thoughts of investors that have suffered financially and emotionally at the hand of defective disclosure practices.

In our view, the entire tone of the proposal needs to be changed from effective legal post-mortem defences to what should be positive preventive actions to protect against legal liability exposures due to defective disclosure. The end goal of the legislation and any interpretive policies should not be to improve a defence against legal liability, but should be to encourage issuers to adopt standards for disclosure where investors will fully understand that forward-looking information is based on certain assumptions, what those assumptions are, that there are associated risks and what those risks are. It is far better to receive valid information than hope, dreams and hype. If our suggestions are considered, our capital markets will be stronger, the chance of another Bre-X, Nortel, Hollinger or Portus will be reduced and investor nest eggs will be better protected against financial assault.

To the extent the OSC's role is to protect investors, it is to that extent that subject proposal be rewritten or discarded and left to the courts to decide. The very fact that the OSC is requesting comments rather than issuing a Staff Notice suggests to us that it is seeking input as to whether or not its interpretations are meeting the expectations of issuers-it is doubtful that retail investors will be heavily represented in the submission population . The argument for abandonment is further supported by the fact that the TSX, , other provincial securities regulators ,Bar Associations, CIRI, AcSB, CICA or other significant stakeholders may have a significantly different view on defences. Additionally, at least one key aspect –updating of information- has yet to be tested by the Supreme Court of Canada in the Danier Leather case. This case is seen by many as one that will clarify fuzzy corporate disclosure rules, the application of business judgment rules and other matters of import that have resulted in so many corporate scandals. Danier has national implications so it likely best that the OSC defer articulating defence strategies until a judgment is rendered in this pivotal case.

The OSC's stated 2006/2007 priorities are focused on investor protection and we would, as a priority , much rather see precious regulatory resources diverted to PPN/hedge fund

regulation, income trust accounting and sales (mal)-practices, mutual fund governance, the FDM and enhanced regulatory enforcement. The 2-year Ontario Statute of Limitations is another law that needs prompt attention by the Government as it is oppressive and harmful to small investors, seniors and retirees. Our broken dispute resolution system ,OBSI, is severely broken and needs emergency repair.This is a wonderful opportunity for the new Chair, David Wilson, to demonstrate his stated commitment to investor protection

While we strongly recommend withdrawal of the proposal, should it go forward, it should contain a sunset clause, as new information will no doubt become available in the next 2 years as a result of legal proceedings. Indeed , the Policy t should have a formal Disclaimer of its own.

As a relevant aside, we would request that SEDAR be revised so that there is no delay in disclosing information to main Street investors simultaneously [a privileged few paid subscribers should not have access to advance information.]

Should you have any questions, please do not hesitate to contact us.

Respectfully,

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