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By email: comments@osc.gov.on.ca

The Secretary
Ontario Securities Commission
20 Queen Street West
Suite 1900, Box 55
Toronto, ON
M5H 3S8

Dear Sirs:

Re: Proposed OSC Policy 11-602

I am pleased to provide my comments on the proposed OSC Policy 11-602 *Guidelines on the Application of the Prohibition against Orders of General Application to the OSC for Exemptive Relief*. The comments contained in this letter are my own and should not be taken as the views of Borden Ladner Gervais LLP or any other lawyers or any clients of this firm.

In recent years I have noted with concern the practice of the Ontario Securities Commission of granting orders or rulings that appear to be of general application and, therefore, prohibited by section 143.11 of the *Securities Act* (Ontario) (the "**Act**"). I am surprised that the Commission has not resorted (with one exception[1]) to its existing power to accomplish essentially the same goal by the use of the provisions of subsection 143.2(5) of the Act.

I am also surprised that the proposed Policy 11-602 does not refer at all to the Commission's power to make rules without first publishing them for comment under subsection 143.2(5) of the Act. It is clear to me that this subsection was designed to deal with some, if not all, of the circumstances in which the Commission has issued rulings or orders that could be construed as being of general application. However, neither the proposed Policy nor the accompanying notice provides any reason why the Commission is not able to rely on subsection 143.2(5) of the Act.

The normal rule-making steps include (i) the publication of the proposed rule under subsection 143.2(1); (ii) a 90 day comment period; (iii) consideration by the Commission of the comments received; (iv) the making of the final rule, the delivery of the rule to the Minister and the

[1] The one exception was the making of National Instrument 33-106 Year 2000 Preparation Reporting in 1998 under clause (d) [urgency] of subsection 143.2(5).

publication of the rule (assuming material changes are not made to the proposed rule); (v) a period of up to 60 days for the Minister to approve or reject the rule; and (vi) 15 days after the approval by the Minister or the expiry of the 60 day period.

Subsection 143.2(5) of the Act eliminates, for certain types of rules, the first three of these steps described above. The result is that the Commission can make a rule within a maximum of 75 days and (with some co-ordination and the co-operation of the Minister) a minimum of 15 days.

The circumstances to which subsection 143.2(5) would apply are:

(a) all persons and companies who would be subject to the proposed rule are named, the information set out in subsection (2) is sent to each of them and they and any other person or company whose interests are likely to be substantially affected by the proposed rule are given an opportunity to make written representations with respect to it;

(b) the proposed rule grants an exemption or removes a restriction and is not likely to have a substantial effect on the interests of persons or companies other than those who benefit under it;

(c) what is proposed is only an amendment that does not materially change an existing rule;

(d) the Commission,

(i) believes that there is an urgent need for the proposed rule and that, without it, there is a substantial risk of material harm to investors or to the integrity of the capital markets, and

(ii) has the approval of the Minister to make the rule without publication of notice; or

(e) [no longer relevant]

The concern of the Commission that gave rise to the publication of the proposed Policy is set out in the accompanying notice as follows:

> "The Commission recognizes that there is a need to address developments in the capital markets on a timely basis. Orders for exemptive relief are tools which the Commission and Director use to provide targeted and responsive securities regulation. While Commission staff work to harmonize our regulatory response to exemption applications across the CSA, we are challenged in our efforts to respond to applicants' requests for exemptive relief where, if granted, they would constitute prohibited blanket orders. The exemptive relief process is not a substitute for the exercise by the Commission of its authority to make rules under section 143(1) of the Act, which is subject to a notice and comment process and to

ministerial approval. Rather, exemption applications and orders for exemptive relief help to inform the Commission's rulemaking priorities."

The Commission is focussing on applications for exemptive relief. Instead of granting an exemption order or ruling, the Commission can, without having published it for comment, make a rule that grants an exemption or removes a restriction if it is not likely to have a substantial effect on the interests of persons or companies other than those who benefit under it. In those circumstances, it is difficult to see how clause (b) of subsection 143.2(5) would not apply. In any granting of exemptive relief, the Commission has to determine that to do so would be in the public interest. Although the tests are worded differently, if the Commission is of the view that to grant the exemptive relief is not contrary to the public interest, it should also be of the view that it is not likely to have a substantial effect on the interests of persons or companies other than those who benefit under it.

I would also suggest that clause (c) could be used, for example, to extend a transition period, a type of situation where the Commission has issued what it has called an "omnibus order".

In my view any ruling or order that is granted to a specified class of market participant, as opposed to one or more specific market participants, is a ruling or order of general application. In effect, I agree with the first paragraph under the heading "Scope of the Proposed Order" in the draft Policy except that I would change "it is more likely to be viewed as a prohibited blanket order" to "it *is* a prohibited blanket order".

Although I believe such interpretation is the natural one in any event, it is also supported by the legislative history. The *Securities Amendment Act*, 1994, which gave the Commission rule-making powers and which enacted section 143.11, removed certain words from the exemption granting powers as follows: from subsection 37(1) or (2) "or class of persons or companies"; from clause 80(b) "or class of reporting issuers"; from subsection 118(3) [since repealed] "or class of portfolio managers"'; and from subsection 121(2) "class of persons or companies or class of transactions". The reason given for this, as set out in *Responsibility and Responsiveness: Final Report of the Ontario Task Force on Securities Regulation*, was "subsection 143(1) now authorizes rule - and regulation-making in relation to classes of persons or companies, securities or other matters that are now contained in the Act. This requires amendment of the Act to remove existing powers of the OSC to make rules by order" (at page I-65). However, the Task Force also recognized that there were certain circumstances where the notice and comment period were not necessary and proposed a subsection that was ultimately enacted as subsection 143.2(5).

Although the factors listed under "Impact of the Proposed Order" and "Permanence of the Proposed Order" in the draft Policy may be factors why the avoidance of the notice and comment period may not be harmful to the capital markets, I do not believe that they are relevant to the determination of whether an order or ruling is of general application. Accordingly, even where these factors are present, granting an order or ruling providing exemptive relief to a class of persons or transactions would be *ultra vires* to the Commission.

I am sympathetic to the fact that on occasion the Commission receives an application for exemptive relief where, if the Commission grants the relief, a number of other applicants are

likely to apply for the same relief. In such circumstances the Commission may wish to issue a blanket order or ruling to avoid having to deal with a multitude of similar applications and in some cases to keep market participants on a level playing field. However, it is my view that in such circumstances, absent legislative changes, the Commission should make a rule and invoke clause (b) of subsection 143.2(5). This may entail a delay of up to 75 days, but I would expect that with some proactive liaison with the Minister's office, this could be shortened.

I would, of course, be pleased to discuss this letter and the draft Policy with the staff or any member of the Commission.

Yours truly,

"Paul G. Findlay"

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