

Rule-making in Ontario

Events leading to rule-making by the Commission in Ontario

The Commission was given rule-making authority pursuant to the *Securities Amendment Act, 1995*. By delegating this authority to the Commission, the Legislature empowered the Commission to use its expertise to create the detailed rules necessary to meet the purposes of the *Securities Act*. Rules made under the *Securities Act* are binding and a person or company that contravenes a rule may be subject to enforcement action.

Prior to getting rule-making authority, and faced with the practical constraints of amending securities legislation, the Commission often used policy statements and other instruments to respond quickly to the regulatory needs of the market.

In March 1993, the Commission adopted Policy Statement 1.10, which related to the business practices of securities dealers engaged in the marketing and sale of "penny stocks". Certain securities dealers challenged the authority of the Commission to adopt the policy. In what became known as the "Ainsley decision", the court found that the Commission did not have the statutory authority to adopt the policy, since it was effectively a binding rule.

At the request of the Commission, the Minister of Finance appointed a Task Force to consider the appropriate legislative response to issues raised by the Ainsley decision. After significant public input, the Task Force recommended that the Commission be given rule-making authority, subject to appropriate accountability mechanisms. The Task Force's final report (entitled *Responsibility and Responsiveness - Final Report of the Ontario Task Force on Securities Regulation*) was published in June 1994 and served as the basis for the *Securities Amendment Act, 1995*. Within months of the release of the final Report, the *Securities Amendment Act, 1995* was adopted with all party consent by the Legislature.

A summary of the Commission's rule-making authority

Subsection 143(1) of the *Securities Act* specifies the matters in respect of which the Commission may make rules of a binding nature.

Unless an exception to the notice requirement applies, the Commission is required to publish proposed rules for public comment (s. 143.2). This publication must include, among other things, the proposed rule, a summary of the rule, the anticipated costs and benefits of the rule, and a reference to the authority under which the rule can be made. The public is provided at least 90 days to consider a proposed rule and submit comments to the Commission. If the Commission makes material amendments to a proposed rule after the initial comment period, the

Commission must republish the proposed rule for comment.

In order for a rule to come into force, the Commission must make the rule in its final form and deliver it to the Minister of Finance for review (s. 143.3). Within 60 days after a rule is delivered to the Minister, the Minister may approve or reject the rule, or return it to the Commission for further consideration (s. 143.4). If the Minister does not approve, reject or return the rule, it becomes effective 15 days following the conclusion of the 60-day period.

Policy-making function of the Commission

The Commission also may adopt policies of a non-binding nature, including the Commission's interpretations of rules made by it. The Commission must publish proposed policies for public comment (s. 143.8). If the Commission proposes a material change to a policy following its publication, it must re-publish the policy for comment. Following the notice and comment process, the Commission may adopt a proposed policy. Policies do not require Ministerial approval to become effective.

Unlike rules, policies may not be prohibitive or mandatory in character. Policies inform market participants of (a) how the Commission may exercise its discretionary authority, (b) how the Commission interprets Ontario securities law, and (c) the practices followed by the Commission in performing its duties under the Act.