July 17, 2000

DELIVERED

Mr. Purdy Crawford
Osler, Hoskin & Harcourt LLP
Barristers & Solicitors
Box 50, 1 First Canadian Place
Toronto, Ontario
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Dear Sirs:

Re: Five Year Review of Securities Legislation in Ontario

I would make the following comments on the Issues List as published in the April 28, 2000 OSC Bulletin in connection with the above-noted matter. My comments and defined terms correspond with the numbering and deferred terms in the Issues List.

5. Implementation of the so-called "accredited investor" exemption as proposed in the "Revamping the Regulation of the Exempt Market" Concept Paper (the "Exempt Market Concept Paper") would be of very significant benefit to the capital markets, particularly for smaller issuers. The existing system has the perverse result noted in the said Concept Paper, i.e., the current $150,000 limit increases an investor's risk by forcing the investor to invest a much larger sum in a single issuer than prudent investment practice might suggest as well as creating difficulties for issuers in raising capital due to the $150,000 minimum investment required. Clearly, a specified minimum investment is not a very good proxy to measure investor sophistication nor does it necessarily indicate the ability to withstand a loss, particularly when the minimum investment level can often itself have the result of causing a loss to be significant.

As well, implementation of the accredited investor exemption would in and of itself significantly simplify the closed system and reduce the number of discretionary exemptions that are sought from the OSC, both of which have cost saving implications to the public markets.

Lastly, implementation of the accredited investor exemption would also address a number of the issues raised in the Final Report of the Task Force on Small Business Financing.

In my view, the proposed inception of an accredited investor exemption is perhaps the most important policy initiative of the OSC over the past number of years for smaller issuers.

19.b. The matters currently being addressed in the Concept Proposal for an Integrated Disclosure System should be given high priority, together with the changes to improve disclosure that are currently being addressed by the OSC in various other initiatives (e.g. Rule 54-501 – Prospectus Disclosure and Certain Information Circulars, the new prospectus and short form prospectus disclosure requirements, etc.).

19.c. There has been ample prior debate and discussion with respect to the implementation of statutory civil liability for misrepresentations in continuous disclosure documents ("statutory civil liability") as per the Allen Committee report, the OSC's Request for Comments re Civil Liability for Continuous Disclosure and various other publications and commentaries. It is worth noting, however, that, in Section 5.4 of the Allen Committee final report, it was stated that "(a)t the current levels of funding of, e.g., the OSC, it is idle to expect that the OSC will be fully able to utilize its expanded remedies under Section 128 of the Ontario Securities Act except in the most egregious cases. Awareness on the part of issuers that these provisions are not likely to be used against them reduces their apparent effect". It would appear in hindsight that the Allen Committee was unduly pessimistic in this regard. Accordingly, the comments made to the Allen Committee in the course of its deliberations that suggested that statutory civil liability was too draconian a measure to introduce without first trying some other deterrent and that adequate funding to regulatory authorities could enforce disclosure violations are now more persuasive, particularly given the OSC's more recent emphasis on enforcement, review of continuous disclosure, etc. (On a personal note, as a member of the Allen Committee, I fully concurred with the statement quoted above and such was, for me at least, a significant consideration underlying the recommendations made therein re imposing statutory civil liability.)

20.b. On the assumption that the issue being is raised is whether there should be a requirement to disclose "material information" (or, in effect, "material facts") as opposed to "material changes", I would have the following comments should such in fact be recommended.

The issue of when to disclose becomes much more problematical and difficult for issuers when material information or facts must be disclosed, such as merger negotiations, financial difficulty, etc., especially when such can and will be viewed with hindsight and in particular should statutory civil liability be instituted. (Note also that the disclosure obligation is higher under Canadian law than U.S. law as, under U.S. law, there is no general or affirmative disclosure obligation to disclose material information or facts and issuers may refuse to comment thereon, unless otherwise required under periodic or other SEC filing requirements or to correct prior incorrect or forward looking disclosure or in order to trade in its own securities.)

The usual response to the concern of being required to disclose material information is that issuers are relieved of the obligation to make timely disclosure of material information should such disclosure be "unduly detrimental to the interest of the reporting issuer" as per the Securities Act (Ontario) or if such disclosure would be "seriously prejudicial to the interests of the issuer" as per the Securities Act (Quebec).

However, while the unduly detrimental/seriously prejudicial safe harbour works in the context of situations such as merger negotiations and financial difficulty, it is of less use in the context of avoiding premature disclosure or where the information is not "ripe" for disclosure[1]. This can be particularly problematical if statutory civil liability is implemented in circumstances where there is an extended period of time through which the potential event may be pending, with the consequent impact on the potential total damages for failure to disclose on a timely basis. Accordingly, if disclosure of material information or facts is to be required, the safe harbour under which information otherwise disclosable may be kept confidential should be broadened to also provide a safe harbour for situations which may not strictly fall within the "unduly detrimental" test. (Perhaps the disclosure being unduly detrimental to an issuer could be broadened to include disclosure unduly detrimental to the market place for the issuer's securities, i.e. where information is not "ripe" for disclosure?)

As to a related matter, the safe harbour provided in the draft legislation proposed to implement statutory civil liability would be triggered by, and effective upon, the actual filing of the confidential material change (information) report. It would perhaps be preferable to adopt the current approach as per the Securities Act (Québec) whereunder the issuer is entitled to keep confidential the prejudicial information but such entitlement is not predicated upon the actual filing of a report with the CVMQ. From a policy point of view, not requiring a report to be filed in order to access the safe harbour is the preferable approach as the timing of the actual filing is not really that important – the important issue is when public disclosure should actually have been made, and innocent shareholders of the issuer should not suffer due to a "late" filing. (Ultimately, in any event, whether a confidential report is required to be filed or not to create a safe harbour, a Court will have to decide whether the issuer had been justified in keeping confidential the material change or information.) As a practical matter, the foregoing also avoids a huge number of confidential reports being filed (and re-filed every 10 days) with the OSC in an excess of caution by issuers in order for them to ensure their ability to have the shelter of the safe harbour. It is recognized that the OSC would under the non-filing alternative not be made aware of, and consequently not have the ability to monitor, non-disclosure decisions by issuers; however, given the potential consequences that result therefrom for failure to disclose, particularly if statutory civil liability is imposed, it is arguable that such monitoring is not required as statutory potential civil liability (and the OSC's Sect. 128 expanded enforcement rights) will serve to police the use of this safe harbour by issuers. (Alternately, the safe harbour could be deemed to be triggered at the time an issuer would have been entitled to so file a confidential report regardless of whether it did so or not; however, this would be a clumsy way of attempting to permit the OSC to monitor such disclosure and, in any event, under this route there would arguably be no real incentive for an issuer to ever make such a confidential filing.)

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1 Tests which have been used to determine when it is appropriate to disclose information have included "announcements of intention to proceed with the transaction or activity should not be made unless the issuer has the ability to carry out the intent (although proceeding may be subject to contingencies) and a decision has been made to proceed" (as per National Policy 40 and the TSE Timely Disclosure Policy); "..... when an issuer has both the present intent and the present ability to affect the change" (as per *Joseph Burnett*), that "..... the contents must be verified sufficiently to permit ..... full confidence in their accuracy" (as per *McDonnell Douglas*) and that disclosure of material changes should be made "upon their occurrence no sooner, and no later" (as per the OSC Chairman's April 1983 letter to *Norcen Energy*).

On a related issue, should statutory civil liability imposed, the obligation to disclose material information "forthwith" should perhaps be conformed to the test in the Securities Act (B.C.) to be "as soon as practicable" as the specific wording accordingly becomes significantly more important.

Lastly, I would add that, should statutory civil liability not be implemented, the requirement to disclose material information, as opposed to material changes, would be more palatable to the reporting issuer community. The sensitivity to being required to disclosure material information, as opposed to material changes, is substantially less should the reporting issuer community not fear an avalanche of "strike suits" given the increased element of judgement required vis-à-vis the disclosure of "information" instead of "changes". See also the second paragraph of item 20 in the Commentary and Additional Questions to the Issuers List.

20.c. Ontario securities laws should not require the reporting of specified events rather than the current approach based on materiality. Lists may provide guidance, as per NP40 and the TSE Policy; however, I do not believe it practicable to create a list that realistically applies to all issuers indiscriminately given the differences in size, nature of business, etc. in the universe of reporting issuers.

21.a. In respect of the treatment of compensation options, the additional disclosure now required under the CICA's new EIC-98 - Stock Based Compensation Plans is sufficient. I do not view it as being advantageous to expand such disclosure these to match the current U.S. requirements.

22. The issue of "selective disclosure" needn't be addressed by regulation as it is addressed under current securities legislation. Rather, the issue is one of adequate enforcement of the existing law in order that the practice of selective disclosure be deterred. As has been experienced in a number of areas, there is always the concern of regulatory overkill where pages of regulations are promulgated and impose a significant burden on all issuers as a mechanism to attempt (usually futile) to address a relatively few incidences of breaches of the relevant laws. In any event, my view is that the SEC's proposed regulation FD simply states what is the current law in Ontario, in the case of intentional disclosures, and what is the current practice in the case of a non-intentional disclosures.

28./37. The key change that should be implemented with respect to shareholder communications is that, given SEDAR and the prevalence of issuers with websites, issuers should not be required to send all shareholders all materials. Rather, issuers should only required to send these materials to shareholders who so request them. In the real world, the vast majority of shareholders do not read the materials distributed to them, these are simply dumped in the garbage and the whole exercise is largely a waste of dollars and of paper. Issuers should only be required to mail each year to each registered and beneficial shareholder a communication, together with a stamped addressed return envelope, whereunder the shareholder can request to be sent the relevant disclosure materials. If any shareholder does not have sufficient interest to fill out and mail the relevant return card or similar document, it is difficult to argue that such shareholder has any real interest in being sent the materials or any purpose is served thereby.

36. One would expect that the referenced types of offerings would be permitted and implemented over time as a offshoot of the Integrated Disclosure System. See comment 19.b. above.

39. I support the continued requirement to the OSC to republish for comment any rule proposal where there have been material changes to the original rule proposal.

In addition to the Issues List, I would also make the following comments with respect to current securities legislation:

1. Hold Periods

The "hold periods" for privately placed securities should be decreased to more realistic levels given the increased market volatility which now characterises the market and which in turn increases the disincentive attached to purchasing securities subject to extensive hold periods. The foregoing disincentive could be reduced if hold periods were applicable on a graduated scale so that, say, 25% of the private placement could be free trading immediately with the remaining securities becoming free trading in quarterly tranches every three months until all of the securities are free trading. It should be noted that, as far back as 1970, the Merger Study recommended against the imposition of lengthy hold periods. Further, the recommendations of the OSC Corporate Finance Department working group formed in 1988 to propose revisions to the Securities Act (Ontario) (the "Act") stated that "there appears to be little reason to impose a hold period where the issuer is a reporting issuer and the issue is de minimus" as well as stating that a uniform certified disclosure record would obviate the need for hold periods (see also comment 19.b. above). Lastly, the Final Report of the Task Force on Small Business Financing also questioned the utility and structure of the hold periods currently specified in the Act.

Graduated hold periods would also alleviate the policy concern that a complete elimination of hold periods would encourage "backdoor underwritings", that is, the indirect sale of treasury issues to the public without a prospectus. The significance of this latter concern is also lessened given the continuous disclosure regime currently in place under the Act, given the easy access to issuer disclosure through SEDAR, given the overwhelming predominance of secondary market trading compared to primary issues, given the potential implementation of the Allen Committee recommendations and given the potential implementation of the Integrated Disclosure System. A second stated policy goal for the initial imposition of hold periods was to discourage private placements and hence indirectly encourage public offerings; again, however, as per the Exempt Market Concept Paper, the foregoing would no longer appear to be an appropriate policy goal nor, in fact, particularly relevant given the POP System and the likely implementation of the Integrated Disclosure System.

2. Deemed Reporting Issuer Status

Companies which have achieved reporting issuer status or its equivalent in jurisdictions other than Ontario (or at least in Uniform Act jurisdictions and/or the United States) be able to obtain reporting issuer status in Ontario simply by filing with the OSC its continual disclosure documents in

its home jurisdiction for the past two years, together with an Annual Information Form (or 10K).

I would be happy to discuss or clarify the above comments should you wish such to be done. A disk containing the text of this letter on Microsoft Word 1997 is also enclosed.

Yours very truly,

Peter McCarter

PMC/sf