

**ONTARIO SECURITIES COMMISSION NOTICE 11-732  
PROPOSAL FOR THE ONTARIO *SECURITIES ADMINISTRATION ACT***

**OVERVIEW AND BACKGROUND**

Concurrently with this Notice, the Canadian Securities Administrators (the "CSA") are publishing for comment a consultation draft of a Uniform Securities Law ("USL") legislative proposal that includes a *Uniform Securities Act* ("USA") and a *Model Securities Administration Act* ("Model SAA"). The Model SAA is based on Alberta legislation. It is intended that other CSA jurisdictions will consider this model in developing their own Securities Administration Acts. The Ontario Securities Commission (the "Commission") is publishing this Notice in order to explain the framework of and the types of provisions anticipated to be included in the Ontario *Securities Administration Act* ("Ontario SAA"), which will be a companion act to the USA in Ontario. We note that the proposals discussed in this Notice have not been reviewed or approved by the Ontario government.

As explained in the concept proposal, *Blueprint for Uniform Securities Laws for Canada* ("Concept Proposal"), it was intended that the substantive and procedural provisions of the provincial Securities Acts would be separated into the USA and the Model SAA, respectively. While the Model SAA published as part of the USL legislative proposal is based on Alberta legislation, each jurisdiction will have its own SAA that will address the structural, administrative and procedural components, as well as certain substantive components, which necessarily differ from jurisdiction to jurisdiction. The objective is to develop Securities Administration Acts that are similar in structure to the Model SAA and have common elements. As explained in the CSA Commentary published with the USL Consultation Drafts, each jurisdiction's SAA will contain provisions for the following common elements:

1. The formation, constitution and governance of the SRA and the SRA's ability to delegate powers, functions and duties to its staff;
2. Information sharing;
3. Powers and procedures respecting investigations;
4. Powers and procedures for hearings by the SRA and public interest orders that may be made by the SRA after a hearing;
5. The review of decisions by the SRA and the appeal of decisions of the SRA;
6. The powers for the Lieutenant Governor in council to make regulations; and
7. The procedure for the SRA to make rules.

The framework of the Ontario SAA, outlined below, will be based largely on that of the Model SAA. The descriptions below are conceptual and we are continuing to consider what new provisions may be needed and what changes, if any, should be made to existing provisions of the *Securities Act* (Ontario) ("OSA") for purposes of the Ontario SAA. Once we have had an opportunity to review the comments received on the Consultation Drafts, we anticipate that we will publish for comment a draft Ontario SAA.

**PART 1: DEFINITIONS**

**Definitions** - The Model SAA contemplates that unless otherwise defined in the SAA, words and terms defined in the USA will have the same meaning in the Model SAA. The Ontario SAA will take a similar approach.

**Purposes and Principles** - Part 1 of the Ontario SAA will also contain a purposes clause based on section 1.1 of the OSA and a principles clause based on section 2.1 of the OSA. The OSA currently directs the Commission to have regard to six fundamental principles in pursuing the purposes of the OSA.<sup>1</sup> In addition, we propose to include in the Ontario SAA the following four new principles, which were recommended by the Ontario Ministerial Five Year Review Committee (the "Five Year Review Committee") in its Final Report:

- Effective and responsible securities regulation should promote the informed participation of investors in the capital markets.
- Capital markets are international in character and it is desirable to maintain the competitive position of Ontario's capital markets.

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<sup>1</sup> See OSA s. 2.1.

- Innovation in Ontario's capital markets should be facilitated.
- The administration and enforcement of Ontario securities law should not unnecessarily impede or distort competition among persons carrying on regulated activities.<sup>2</sup>

## **PART 2: SECURITIES REGULATORY AUTHORITY**

We anticipate that the provisions of Part 2 of the Ontario SAA will contain the same types of provisions as those in Part 2 of the Model SAA, and a number of additional provisions. Part 2 of the Ontario SAA will deal with the mandate and composition of the Commission and the Commission's structure, governance and accountability to the Minister of Finance, and will contain most of the provisions currently contained in Parts I, II, III, and IV of the OSA, modified as necessary to conform to the terminology used in the USA.

## **PART 3: PROCESS AND PROCEDURES**

Part 3 of the Model SAA deals with several matters including the service and sending of records, non-compellability of Commission members and employees in court proceedings, information-sharing and disclosure of information and records, a general power of the Commission to make inquiries, and the appointment of experts or consultants to advise or inquire into and report back on matters.

A number of the provisions in the Model SAA are not currently contained in the OSA. We are considering whether provisions similar to some of these provisions should be included in the Ontario SAA. There are certain provisions that we do not anticipate including. For example, we do not anticipate including in the Ontario SAA provisions similar to section 3.1 (Accepting service), and section 3.6(1) (Protection for witnesses), or section 3.12 (Inquiry by securities regulatory authority) of the Model SAA.

We propose to include in Part 3 of Ontario's SAA a provision similar to the non-compellability provision in section 3.5 of the Model SAA. This section provides that Commission members and employees or agents of the Commission are not compellable witnesses before the court and may not be compelled to produce or give evidence in court proceedings, without the consent of the Commission (in the case of a member) or the Chair or Vice-Chair (in the case of an employee or agent).<sup>3</sup>

## **PART 4 – INVESTIGATIONS**

Part 4 of the Model SAA is based on Part VI of the OSA. We anticipate that the provisions of Part 4 of the Ontario SAA will be similar to those of the Model SAA. We would propose to provide a detailed comparison of the SAA and the current OSA investigation provisions at such time as we publish a draft Ontario SAA for comment.

## **PART 5 – RECEIVERS, RECEIVERS-MANAGERS, TRUSTEES AND LIQUIDATORS**

Part 5 of the Ontario SAA will be different from Part 5 of the Model SAA. Part 5 of the Ontario SAA will include provisions dealing with receivers, receiver-managers, trustees and liquidators, which will be similar to those in section 129 of the OSA.<sup>4</sup>

## **PART 6 – REVIEWS, DECISIONS, APPEALS AND ADMINISTRATIVE PROCESSES**

Part 6 of the Ontario SAA will be similar to Part 6 of the Model SAA, which deals with reviews and appeals of decisions, including delegated decisions, and administrative orders, freeze orders and court orders, as well as certain procedural matters. We would not propose to include provisions from Part 6 of the Model SAA that deal with matters covered by the SPPA or the OSC Rules of Practice.<sup>5</sup>

Section 6.14 of the Model SAA deals with freeze orders. We are considering whether to include in the Ontario SAA a provision dealing with freeze orders, similar in concept to section 6.14 of the Model SAA.<sup>6</sup>

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<sup>2</sup> Five Year Review Committee Final Report: Reviewing the Securities Act (Ontario), March 21, 2003 (the "Final Report") at 67.

<sup>3</sup> A similar provision was included in the OSC/FSCO merger Consultation Draft published in April 2001. See: Establishing a Single Financial Services Regulator: Consultation Draft, April 2001, section 20 (Information, documents and things obtained in performing duties).

<sup>4</sup> The Model SAA is different in this area to reflect the applicable scheme in Alberta.

<sup>5</sup> See, for example, sections 6.6, 6.8 and 6.11 of the Model SAA.

<sup>6</sup> Section 6.14 of the Model SAA is a departure from the current freeze order provisions in section 126 of the OSA, in that section 6.14 does not require court review of a freeze order made by the Commission. This is consistent with current legislation in several other provinces, but is not the case in Ontario. (We note that in its Final Report, the Five Year Review Committee recommended that the issue of whether the Commission or the court should order the continuation of a freeze order should be studied further, with the benefit of further input.) In addition, section 6.14 of the Model SAA provides that in the case of a Canadian financial institution, the

Section 6.15 (Cease trading orders for failing to file records) of the Model SAA contains a provision that permits the Commission to make a cease trade order without a hearing, for failure to file records. We are not proposing to include this provision in the Ontario SAA.<sup>7</sup>

We anticipate that Part 6 of the Ontario SAA will include a section similar to section 6.16 (Securities regulatory authority orders) of the Model SAA. Section 6.16 reflects recommendations by the Five Year Review Committee for additional powers for the Commission to make orders under section 127 of the OSA.<sup>8</sup>

With respect to appeals from a decision of the Commission<sup>9</sup>, we note that under the Ontario SAA these will continue to be to the Divisional Court.

## PART 7 – REGULATIONS AND RULE-MAKING

In Part 7 of the Ontario SAA, we propose to retain the current provisions in the OSA with respect to the regulation-making power of the Lieutenant Governor in Council.<sup>10</sup> Part 7 of the Ontario SAA will contain the rule and policy-making procedures that are applicable in Ontario. We propose to use the current provisions found in Part XXIV of the OSA. These provisions contemplate transparency in the rulemaking process, as illustrated by the mandatory notice and comment period, the requirement to republish when a material change has been made to a proposed rule and the provision for Ministerial review of proposed rules.

Most of the Commission's heads of rulemaking authority are in the USA. It should be noted that these heads of authority are broader than what appears in the OSA. There are several reasons for this expansion. First, new heads of authority have been added because the USA was drafted with the intention of harmonizing and consolidating existing rule-making authority across the CSA. Second, new heads of authority have been added to facilitate the development of the USA as "platform" legislation. Finally, new heads of authority have been added in contemplation of future CSA rulemaking initiatives. Particular examples of new heads of rulemaking authority for Ontario include, but are not limited to, the following:

- Rulemaking authority to impose liability on dealers or advisers in the context of non-employment relationships (*i.e.*, independent contractors).<sup>11</sup>
- Rulemaking authority to facilitate the introduction of an integrated disclosure system.<sup>12</sup>
- Rulemaking authority to regulate purchases and offers to purchase securities.<sup>13</sup>
- Rulemaking authority to regulate clearance and settlement issues and to facilitate straight-through processing.<sup>14</sup>

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freeze order will apply to all offices, branches or agencies of the financial institution if the order is served on its principal place of business. This is a change from section 126 of the OSA, which provides that the order applies only to branches of the financial institution that are identified in the order.

<sup>7</sup> We believe the subject matter of this provision is already dealt with under the Commission's power to make public interest orders.

<sup>8</sup> See Final Report at 231. These are the power to order that:

- a person resign one or more positions that the person holds as a director or officer of a registrant or investment fund manager;
- a person be prohibited from acting as a director or officer of any registrant or investment fund manager;
- a person or company be prohibited from becoming or acting as an investment fund manager or as a promoter; and
- a person or company comply with securities laws, or a decision, order ruling or direction issued by a recognized entity.

<sup>9</sup> See sections 6.19 and 6.20 of the Model SAA.

<sup>10</sup> See OSA s. 143(2).

<sup>11</sup> See section 11.3(3)(xxi)-(xxvi) of the USA. These heads of rulemaking authority currently exist under the Nova Scotia Securities Act.

<sup>12</sup> See section 11.3(4)(xix).

<sup>13</sup> See section 11.3(15)(iv). Such a head of rulemaking authority could be used, for example, to regulate mini-tenders.

<sup>14</sup> See section 11.3(16), (17), and (18).

- Rulemaking authority over corporate governance matters more generally.<sup>15</sup>
- Rulemaking authority to define “profit made” and “loss avoided” in the context of fines to be imposed in a quasi-criminal prosecution for front-running and insider trading.<sup>16</sup>

We anticipate that Part 7 of the Ontario SAA will include a number of heads of rulemaking authority that relate to the substantive provisions contained in the Ontario SAA. For example, we anticipate that the Commission’s rulemaking authority relating to the following subject matters will be contained in the Ontario SAA: the conduct of the Commission and its employees, including the conduct of investigations and hearings<sup>17</sup>; the establishment of conditions for any exemption that the Commission is authorized to give by certain sections of the *Business Corporations Act* (Ontario)<sup>18</sup> and fees payable to the Commission<sup>19</sup>.

Part 7 of the Ontario SAA will include a provision similar to section 7.8 of the Model SAA (Limitation period).<sup>20</sup>

## PART 8 – GENERAL MATTERS

To the extent that certain provisions in the OSA could not be accommodated in either the USA or the Model SAA and are not appropriate to Part 7 or other parts of the SAA, we expect that we will create a new Part 8 to deal with “general” matters, and such provisions will be included in this new part. We anticipate that this part will ultimately be divided into different divisions according to subject matter and will include:

- Mandatory recognition for SROs and clearing agencies carrying on business in Ontario.<sup>21</sup>
- A provision that makes clear that in Ontario, form requirements may only be made by rule.<sup>22</sup>
- Many of the remaining provisions in Part XXIV of the OSA (i.e., those not included in any other part of the SAA or the USA)<sup>23</sup>.
- Referral of a question relating to a prospectus from the Director to the Commission.<sup>24</sup>
- Provision for an opportunity to be heard in connection with a designation of a person as a reporting issuer on application of the Director.<sup>25</sup>

<sup>15</sup> See section 11.3(29). These heads of authority currently exist under the Alberta Securities Act.

<sup>16</sup> See sections 12.18(4) and 11.3(35)(ii).

<sup>17</sup> See OSA s. 143(1)(41).

<sup>18</sup> See OSA s. 143(1)(42).

<sup>19</sup> See OSA s. 143(1)43.

<sup>20</sup> See OSA s. 129.1.

<sup>21</sup> In our view, these entities play a crucial role in the Canadian capital markets and in preventing systemic risk. The regulation and oversight of these entities contribute to the confidence of investors in the capital markets and it is in the public interest for the Commission to have oversight of their activities. In addition, it should be noted that the USA will mandate recognition for quotation and trade reporting systems and exchanges.

<sup>22</sup> Section 1.8 of the USA provides that subject to any other requirements of securities laws, a commission may specify by order the form, content and other particulars relating to records. The Ontario SAA will provide that form requirements can only be specified in a rule.

<sup>23</sup> This would include OSA sections 141(2) and (3) (Immunity regarding intended compliance; and liability of the Crown), 142 (Application to Her Majesty), 143.9 (Commission priorities), 143.10 (Memorandum of understanding between the Commission and another body), 143.12 (Five Year Review Committee), 143.13 (Confidential information), 143.14 (Electronic communication), 149 (Costs award by a court), and 150 (Decision by the Commission under more than one provision of Ontario securities law).

<sup>24</sup> See OSA s. 61(4).

<sup>25</sup> See OSA s. 83.1(2).

- Certain provisions from Part XXII of the OSA (Enforcement) relating to section 122 proceedings and certain other procedural matters.<sup>26</sup>

## **PART 9 – TRANSITIONAL AND CONSEQUENTIAL PROVISIONS AND COMING INTO FORCE**

We anticipate that Part 9 of the Ontario SAA will be similar to Part 8 of the Model SAA and will deal with transitional provisions, consequential amendments to other legislation, and the repeal of the OSA and coming into force of the Ontario SAA.

### **COMMENTS**

Comments relating to this Notice may be incorporated into comments on the Uniform Securities Law legislative proposal. We will consider submissions received by March 16, 2004. Please address your submissions to:

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<sup>26</sup> See OSA ss. 122(7) (Consent of Commission) and 122(8) (Trial by provincial judge); OSA s. 124 (Information containing more than one offence); and OSA s. 125 (Execution of warrants issued in another province).