FIVE-YEAR REVIEW OF SECURITIES LEGISLATION

Set out below are comments on certain Issues on the Issues List in the Securities Review Advisory Committee's Request for Comments on the Five-Year Review of Securities Legislation in Ontario.

The Closed System

Issues 4 through 7 of the Issues List solicit comments on various aspects of the closed system. With respect to the exemptions themselves, the Concept Paper for Revamping the Exempt Market represents a substantial improvement over the existing patchwork quilt of private placement exemptions. We believe that the Concept Paper requires minimal changes and should be implemented as soon as possible.

Beyond improving upon the current regime of the exemptions, revamping the exempt market will not solve the fundamental problem that now exists in the Canadian provincial securities regulatory system even if the identical changes are made in securities legislation across Canada. The current Ontario statute eliminates the vague concept of distributions to the "public" on which the previous regime was based. The price for greater certainty under the current regime is the closed system. The effect of the closed system is to turn each province into a watertight compartment in which private placement hold periods only commence to run for issuers that are reporting issuers in that province. This model was appropriate in 1979 when issuers and private placees tended to be restricted to one province, stock exchanges were provincial or regional in nature and information could only be retrieved in paper form from a public search office. The model is no longer appropriate in a national and global securities market, particularly now that information concerning any reporting issuer is electronically

accessible from anywhere in the world. In this environment, regulatory harmonization does not address the underlying problem of hold periods that do not commence to run when a private placement is made by a reporting issuer in one province to investors in another province even though its public filings are readily available. We believe that a solution to this problem would significantly contribute to the efficiency of the Canadian capital markets and the reduction of unnecessary costs. Possible approaches to consider would be mutual recognition of reporting issuers in other (or certain other) provinces, mutual recognition of issuers listed on stock exchanges other than The Toronto Stock Exchange or hold periods of different lengths depending on the jurisdictions in which an issuer is a reporting issuer or the number of jurisdictions in which the issuer is a reporting issuer.

Continuous Disclosure Obligations

Issue 19 of the Issues List asks whether additional regulatory tools are needed to deal with inappropriate disclosure practices in order to encourage issuer compliance. It is suggested that if continuous disclosure practices are felt to be inadequate, more stringent enforcement of the current remedies available to securities regulatory authorities (thereby encouraging more complete compliance) are preferable to expanding regulatory tools and perhaps chilling disclosure. In this regard we note with approval the initiatives of the OSC through its continuous disclosure team and support the team's efforts to promote improved disclosure practices. We also note the recent example of the SEC in the context of perceived overly-aggressive accounting practices. In September of last year, Arthur Levitt gave a speech identifying certain of these practices and indicating that the SEC would be reviewing issuers in this regard and taking action where appropriate. A few weeks later over 60 separate actions were brought against various issuers relating to these accounting practices.

In May 1998 the Canadian Securities Administrators released the Proposal for a Statutory Civil Remedy for Investors in the Secondary Market. If a statutory civil remedy is to be made available, it is suggested that the proposed Integrated Disclosure System cannot be considered in isolation. For example, the Supplemental Information Forms under the IDS would require disclosure of certain specified events which would not necessarily constitute material changes but which would involve statutory liability. It is suggested that broadening the disclosure required while at the same time attaching civil liability places an undue burden on issuers since, as in the past, the difficulty will be more in determining when an event has crystallized to the point of requiring disclosure rather than identifying such an event. Moreover, attaching civil liability is likely to slow the timing of disclosure of material changes.

We would agree with the conclusion of the final report of the Allen Committee in that, if there is to be statutory civil liability, it should be crafted in such a way as to be a deterrent rather than compensatory so that the strike suits seen in the U.S. are not duplicated here. In addition, extending civil liability to directors and officers in respect of all as opposed to mandatory disclosure may also unduly chill disclosure.

Materiality

Issue 20 of the Issues List asks whether the existing standard of materiality for purposes of triggering continuous disclosure obligations is appropriate or whether a focus on “material information” would be more appropriate. A focus on “material information”, regardless of whether or not there has technically been a “change” in the issuer’s affairs, would be more appropriate. As stated in National Policy 40, it is a cornerstone principle of securities regulation that all persons investing in securities have equal access to information that may affect their

investment decisions. Accordingly, all information regarding the business and affairs of an issuer that results in or would reasonably be expected to result in a significant change in the market price or value of the issuer's securities should be publicly disclosed, even if the information is not technically a "change" in the issuer's business or affairs. It would not, however, be appropriate to change the standard for materiality (as proposed in Request for Comments 51-901) to that which would be "substantially likely to be considered important to a reasonable investor in making an investment decision". The proposed standard is too subjective. The test of whether information is likely to result in a significant change in the market price or value of securities is somewhat more objective for issuers in making a determination as to materiality. We note that U.S. commentators have observed that, notwithstanding that the U.S. materiality test does not go to market price, U.S. courts tend to use it as the *de facto* test.

We do not support the concept of requiring the reporting of specified events rather than information that meets a certain standard of materiality. It would be virtually impossible to provide an exhaustive list of every type of event that should be publicly disclosed; rather, the provision of a standard to which all information should be measured is more appropriate. It would, however, provide guidance to issuers in determining materiality if securities regulators were to provide an update to the types of events outlined in NP 40 which may be considered material in the form of a staff notice or companion policy.

Selective Disclosure

Issues 22 and 23 of the Issues List ask whether the practice of "selective disclosure" is an issue which should be addressed by regulation. A collateral question has been raised as to

whether the approach of the SEC as formulated in Regulation FD and proposed Rule 10(b)5-1 should be adopted.

Existing Ontario provisions dealing with disclosure of material changes and material facts as well as insider trading are probably sufficient, at least on paper, in addressing the practice. However, as noted above in response to Issue 20, a focus on “material information” may be more appropriate. Rather than amendment by regulation, the OSC might consider whether additional attention to increased surveillance and enforcement might be helpful in maintaining equality of access between retail and institutional investors. Consideration should also be given to a number of “best practices” which might be suggested by way of policy statement and which discourage one-on-one situations (particularly with analysts) where advertent or inadvertent selective disclosure may occur. Presentations to analysts should obviously be prepared and reviewed to ensure that they do not contain material changes. If something is advertently or inadvertently disclosed, the information should be immediately disseminated. As to conference calls, current technology permitting “listen only mode” for audio participants coupled with continuous playback and internet broadcast availability are desirable practices. In addition, the practice of quiet periods/black-outs for trading 48 hours prior to the issue of financial results and ending 48 hours after the issuance of such results might be suggested as desirable, but not made compulsory by way of regulation.

As to the question regarding the impact of selective disclosure on traditional views with regard to “road show” presentations, a broader issue is involved relating to “testing the waters”. Saskatchewan has in place General Ruling/Order 47-901 which specifically addresses this issue for the purposes of gauging potential interest in a proposed offering. Ontario might consider

such a rule as well as whether it should be expanded to cover the situation of share exchange take-over bids.

Shareholder Communications

Issue 28 of the Issues List asks whether reforms are necessary or desirable under the Act or the Business Corporations Act (Ontario) to complement the proposed amendments to the Canada Business Corporations Act which are intended to encourage and facilitate communications among shareholders. Currently the CBCA, the OBCA and the Act do not allow communications to shareholders "under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy". The proposed amendments to the CBCA would permit communications with shareholders as long as there is no solicitation of a proxy and would permit solicitations by public broadcast or publication in prescribed circumstances. The proposed amendments to the CBCA are intended to increase the rights of shareholders to communicate among themselves and to eliminate obstacles to the exchange of views and opinions by shareholders and others regarding management performance and initiatives presented for a vote of shareholders. Solicitations by public broadcast or publication may lower the costs to shareholders and others of conducting a proxy solicitation. In order for the CBCA amendments to be effective for Ontario reporting issuers, complementary amendments must be made to Part XIX of the Act. Similarly, in order for OBCA and CBCA companies to be on a level playing field, complementary amendments to Part VIII of the OBCA are required.

Section 153(4) of the CBCA, subsection 49(4) of the Act and section III.1 of Part V of National Policy Statement 41 currently require that voting instructions from beneficial shareholders to intermediaries be in writing. The OBCA does not contain a similar provision. In

1998, the Commission granted an order In the matter of ADP International Investor Communications Corp. (1998), 21 OSCB 1686 exempting intermediaries from the requirements of section 49 of the Act and NP 41 in certain instances, thereby facilitating telephone voting by non-registered holders of OBCA companies. Proposed amendments to the CBCA include an amendment to subsection 153(4) of the CBCA which would eliminate the requirement that such voting instructions be in writing, thereby extending telephone voting to non-registered shareholders of CBCA companies. The 1998 order by its terms will terminate on February 13, 2001. Accordingly, amendments to section 49(4) of the Act and NP 41 in advance of that date are advisable.

Take-over Bids

Issue 29 of the Issues List deals with the Zimmerman Committee Report. Sections 211, 212, 213, 220(4), 220(6) and 222 of the *More Tax Cuts For Jobs, Growth and Prosperity Act, 1999* are awaiting proclamation pending harmonizing amendments by other provinces, notably Québec. The changes are long overdue and hopefully will become effective before year end. We note that Rule 61-501, which came into effect on May 1, 2000 provides some relief with respect to valuations in insider bids so that the fact that issuer bids do not have the option of being commenced by advertisement should hopefully not slow down the process.

Impact of Regulatory Harmonization and Globalization Trends

Issues 32 and 33 of the Issues List solicit comments with respect to various aspects of harmonization on an inter-provincial and international level. While harmonization is, obviously, a desirable goal, unfortunately the experience in Canada has not been encouraging (see above re: Zimmerman Committee Report) other than, on occasion, the mutual reliance review system of

National Policy 12-201. There has been a proliferation of discrepancies in the securities legislation from province to province. We believe that, as between mutual recognition and harmonization, the former might be a more efficient alternative.

Impact of Technology

Issues 34 through 38 of the Issues List deal with the impact of technology. As market participants increasingly conduct securities transactions through the Internet and other non-conventional means, we believe that our "paper-based" system of securities regulation must be modified to contemplate and effectively regulate such transactions in the electronic age. Failure to do so, coupled with the transnational nature of securities transactions which the Internet has helped to foster, risks the exclusion of the Ontario capital markets in securities transactions where the time and costs of compliance with a paper-based system of regulation are seen to outweigh the benefits of the inclusion of Ontario participants.

The advent of new technologies is forcing a re-examination of several areas of securities legislation which are the subject of specific requests for comment in the Issues List, some of which are responded to elsewhere in this letter. In addition to these responses, we have the following comments.

We note that there is generally no requirement in the U.S. for issuers to be registered as "securities issuers" in circumstances which would otherwise require such registration in Ontario and elsewhere in Canada. This has allowed issuers in the U.S. to conduct direct public offerings and operate direct purchase plans through the Internet. We believe that the "security issuer" registration requirement in Ontario is formalistic and does not in practice afford investors with additional protections where an issuer intends to issue securities without the involvement of an

intermediary. Accordingly, and as the attendant form requirements are cumbersome in the context of electronic transactions, we advocate the elimination of the "security issuer" registration requirement.

While sections 2.1 to 2.4 of National Policy 47-201 provide some assistance in the assessment of jurisdictional considerations arising in connection with Internet trading in securities, we believe that the increasingly international nature of securities trading activities dictates that clearer jurisdictional standards be set by securities regulators. In this regard, we recommend the reformulation of Interpretation Note 1.5 as a policy to provide clearer standards relating to jurisdictional considerations arising in connection with trades in securities through means of the Internet or otherwise. While such reformulation would best be undertaken nationally, we recommend that, because of its importance, the OSC undertake such reformulation regardless of provincial and territorial consensus regarding the jurisdictional scope of securities legislation.