

November 27, 2003

DELIVERED

Mr. John Stevenson
Secretary
Ontario Securities Commission
20 Queen Street West
Suite 1903, Box 55
Toronto, Ontario
M4H 3S8

Dear Sirs/Mesdames:

**Re: Request for Comments
Proposed Rule 48-501 – Trading During Distributions, Formal Bids
and Share Exchange Transactions**

We are making this submission in connection with the Notice and Request for Comments in respect of Proposed Rule 48-501 – Trading During Distributions, Formal Bids and Share Exchange Transactions (the “Proposed Rule”), issued on August 29, 2003.

We would recommend that the Ontario Securities Commission (the “OSC”) and Market Regulation Services Inc. reconsider the inclusion of all “insiders” within the definition of “issuer-restricted person” in the Proposed Rule and in the proposed amendment to Uniform Market Integrity Rule 1.1. The expansion of the “issuer-restricted person” definition in this manner represents a significant departure from the requirements of paragraph 26 of OSC Policy 5.1 and is not consistent with Regulation M adopted by the United States Securities and Exchange Commission. In particular, Regulation M extends trading restrictions in connection with a distribution of securities only to “distribution participants” (generally, underwriters and broker-dealers involved in the distribution), issuers and selling securityholders, together with any “affiliated purchasers” and joint actors¹. For this purpose, the “affiliated purchaser” definition would look to relationships of control and would not cover other parties that have a shareholding or other relationship with the issuer.

We respectfully submit that this expanded “issuer-restricted person” definition may unduly prejudice the bona fide investment activities of an arms’ length market participant

¹ The prohibition on market manipulation activities identified in Rule 104 of Regulation M is of general application.

that is an insider of the relevant issuer by virtue of its ownership of 10% or more of the issuer's voting securities (referred to as an "insider shareholder"). In particular, the definition of "issuer-restricted person" would include an insider shareholder that does not (i) have a controlling interest in the relevant issuer, (ii) participate in the management of the issuer, whether through board representation, rights to designate senior management or other contractual arrangements, or (iii) otherwise possess an informational advantage with respect to the issuer's intended transactional activity. We would concede the point that an insider shareholder, like any other shareholder, has "an interest in the outcome" of the relevant transaction, as noted in the Notice and Request for Comments. However, unlike the other parties covered by the Proposed Rule, the insider shareholder does not necessarily have a role in, or influence over, the transaction. The lack of such a role or other nexus between the insider shareholder and the issuer, selling securityholder, dealer or other affiliates actively engaged in the transaction is, we submit, a key distinction that favours the manner in which restricted persons are defined in OSC Policy 5.1 and Regulation M. In this circumstance, we believe that the provisions of section 126.1 of the *Securities Act* (Ontario), upon proclamation, would be sufficient to address fraudulent or deceptive market activity by insider shareholders.

We also note that the application of the "issuer-restricted person" definition to an insider shareholder could, in the circumstances listed in items (i) to (iii) above, result in inadvertent violations of the Proposed Rule as a result of circumstances outside the insider shareholder's knowledge or control. For example, such an insider shareholder would not be able to determine when a particular issuer-restricted period has commenced, in the case of a public distribution, prior to a public announcement being made by the issuer (a concept that is reflected in clauses (b) and (c) of the "issuer-restricted period" definition). Similarly, transactions contemplated by an insider shareholder independent of the issuer, such as an insider bid, could conceivably be defeated by the issuer triggering an issuer-restricted period.

In conclusion, we would recommend the elimination of "insiders" from the definition of "issuer-restricted person" in the Proposed Rule and UMIR Rule 1.1. Alternatively, to avoid the application of the Proposed Rule's trading restrictions to insider shareholders that are not connected with the relevant distribution or other transaction, an additional exemption could be added to section 3.3 of the Proposed Rule. Such an exemption could be modelled after the formal valuation exemption for insider bids in paragraph 2.4(1)2 of OSC Rule 61-501, to exempt from the application of section 2.2 of the Proposed Rule an insider that does not have board or management representation in respect of the relevant issuer and does not have knowledge of any material non-public information concerning the issuer or its securities. It may also be appropriate to clarify the scope of the exemption in subsection 3.3(a) of the Proposed Rule, consistent with the provisions of paragraph 175(2)(c) of the regulation made under the *Securities Act* (Ontario), to permit a purchase "made to fulfil a legally binding obligation entered into" by an issuer-restricted person prior to a restricted period (an example of such a transaction would be a market purchase to cover a short position).

Thank you in advance for your consideration of this submission. Please contact me at 416-865-8146 if you would like to discuss these comments in further detail.

Yours truly

GRJ/jf

cc: *James E. Twiss, Market Regulation Services Inc.*
Bob Karp and Jennifer Friesen, Torys LLP