



November 9, 2004

John Stevenson, Secretary to the Commission
Ontario Securities Commission
20 Queen Street West
Suite 800, Box 55
Toronto, Ontario
M5H 3S8

Dear Mr. Stevenson:

**Re: Notice and Request for Comments – Amendments to Proposed OSC Rule 48-501
– Trading during Distributions, Formal Bids and Share Exchange Transactions**

This submission is being made in connection with the Notice and Request for Comments issued by the Ontario Securities Commission (the “OSC”) on September 10, 2004 in respect of certain amendments (the “Proposed Amendments”) to Proposed OSC Rule 48-501 – *Trading During Distributions, Formal Bids and Share Exchange Transactions* (the “Proposed Rule”). We are submitting these comments on behalf of ourselves, as a registered investment dealer and broker, as well as on behalf of UBS AG, UBS Securities LLC, and UBS Financial Services Inc., each a registered international dealer, UBS Global Asset Management (Canada) Co., a registered limited market dealer and investment counsel and portfolio manager, UBS Investment Services Canada Inc., a registered mutual fund dealer and limited market dealer and UBS Trust (Canada), a registered investment counsel and portfolio manager (collectively, “UBS”). Our comments focus on some of the implications the Proposed Rule and Proposed Amendments will have for investment dealers and those multi-service financial institutions, like UBS, whose business includes a broad range of investment dealer or broker, investment advisor and portfolio management activities. UBS appreciates the opportunity to make these submissions in connection with the Proposed Rule and the Proposed Amendments.

Overall, UBS supports the objectives of clarifying the law for securities industry participants and bringing regulation in Ontario into greater harmony with Regulation M, the parallel regulation to the Proposed Rule in the United States. However, we believe that further refinements are still necessary to align Ontario requirements to Regulation M,

and to ensure that an unintended burden is not placed on dealers and multi-service financial institutions.

On November 27, 2003, UBS submitted comments regarding the Proposed Rule. Our comments focused on the scope of the definition of “dealer-restricted person”, and on the commencement and termination of certain restricted periods. We are pleased to note that the Commission has taken our comments into consideration. In particular, we are pleased that the Commission has decided to significantly narrow the scope of the definition of “dealer-restricted person”, and that the Commission has decided that dealer-restricted periods in respect of formal bids will begin on the day that proxy solicitation or offering materials are first disseminated to shareholders.

Limitations on Market Stabilization Activities

UBS is concerned with the limiting effect of Section 3.1(1)(a) on its ability to engage in market stabilization activities in respect of offered and connected securities. At present, UBS can buy securities at the last independent sale price regardless of independent bids. The new requirement that the purchase price not exceed the lesser of the last independent sale price or the best independent bid unduly restricts the ability of dealer-restricted persons to engage in stabilization activities.

Restrictions on the Publication of Research Reports

UBS is concerned with the asymmetrical result of the Proposed Amendments with respect to the restrictions on the dissemination of research reports. As a result of the Proposed Amendments, Part 4 of the Proposed Rule is now markedly different than its U.S. equivalent, Rules 138 and 139 made under the *Securities Act of 1933* (together the “U.S. Rules”). This divergence poses significant compliance challenges for multi-service financial institutions during participation in cross-border offerings involving inter-listed securities.

Ontario Requirements

The Proposed Rule prohibits single issuer research reports in respect of restricted securities, and requires that any reports disseminated during a distribution, take-over bid, issuer bid or similar transaction be part of a compilation report providing similar coverage in respect of a significant number of other issuers (generally no less than six). Such a research report must be issued in the normal course of business, and can give no materially greater space or prominence to the issuer of the restricted security. The Proposed Amendments remove the requirement that a previous report have been issued that was equally favourable or more favourable to the recommendation given in the subject report.

Section 3.1(b)(i) of the Proposed Rule exempts dealer-restricted persons from the requirement in Section 2.1(b) not to attempt to induce any person to purchase a restricted security. This highly liquid security exemption does not, however, exempt dealer-

restricted persons from their obligations under Section 53 of the *Securities Act* (Ontario) not to engage in any act in furtherance of a distribution unless a preliminary prospectus has been filed. The result is that dealer-restricted persons cannot, in the absence of exemptive relief, issue a research report in respect of an offering of a highly liquid security in which they are involved until a prospectus has been filed. This requirement is broader than similar requirements in many other jurisdictions, as the OSC recognized in OSC Notice 47-701 – *Advertising and Use of Marketing Materials During the Waiting Period*.

As they pertain to research reports, the Universal Market Integrity Rules of Market Regulation Services Inc. (“UMIR Rules”) are substantively identical to the Proposed Rule, as amended. These rules are also buttressed by Policy 11 of the Investment Dealers’ Association, which regulates the conduct of investment dealers in providing research reports.

United States Requirements

The U.S. Rules only apply to offerings, and do not affect research reports in the context of issuer bids, takeover bids, or similar transactions. In contrast to the Proposed Amendments, the U.S. Rules allow both single issuer and compilation reports to be issued during an offering where:

- The report is issued in the normal course of business and relates solely to common stock or to debt or preferred stock convertible into common stock, where the subject offering is only in relation to debt or non-convertible, non-participating preferred stock;
- The report is issued in the normal course of business and relates solely to debt or non-convertible, non-participating preferred stock, where the subject offering is only in relation to common stock or to debt or preferred stock convertible into common stock; or
- The report is issued in the normal course of business and the issuer to whom the report applies is actively traded, meaning it meets certain minimum volume and market capitalization thresholds.

Where none of these three provisions apply, the U.S. Rules allow only compilation research reports to be issued, and impose restrictions on such compilation reports that are substantively the same to those set out in the Proposed Amendments. In addition, the U.S. Rules require that the broker or dealer have published an opinion or recommendation as favorable or more favorable to the registrant or any class of its securities in their most recent publication regarding the issuer. This last requirement mirrors the provisions of the originally proposed Section 4.1(d), which has now been removed by the Proposed Amendments.

Treatment of Private Placements

We note that the OSC has included in the Proposed Amendments an amended definition of “public distribution” which expands the scope of the Proposed Rule to all private placements.

As a technical matter, the U.S. Rules only apply to public offerings. However, the Securities and Exchange Commission (“SEC”) has stated, through interpretive provisions, that during a private placement research reports that would otherwise qualify under the U.S. Rules may be published. Underwriters may also issue any research report (including ones that do not comply with the U.S. Rules) to accredited or otherwise exempt investors during a private placement. We respectfully submit that OSC Rule 48-501 and the corresponding UMIR Rules should not impose any restrictions on the publication of research reports during private placements. In contrast to the U.S. situation, no restriction on the publication of research reports is imposed by Section 53 of the *Securities Act* (Ontario) during a private placement. Accordingly, the publication of research reports during private placements will only be restricted if such a restriction is included in the Proposed Rule.

The Need for Harmonization

UBS submits that research reports must be viewed in a North American context because the information they provide is typically relied on by market participants across North America. Especially in an age where research is available electronically, it is nearly impossible to stop the flow of research-type information across borders. The Proposed Amendments could therefore have the effect of restricting the publication of research reports regarding Canadian inter-listed issuers during a public offering, private placement, or securities exchange, takeover bid, or issuer bid, while their U.S. issuer counterparts – who are competing with Canadian issuers for capital in the U.S. markets – are able to issue reports to market participants across North America. This has an obviously inequitable impact on Canadian issuers.

The Proposed Amendments also affect U.S. and other foreign issuers accessing the Ontario private placement markets. No research may be posted on their websites during such private placements, because it would be accessible in Ontario. The impact of the Proposed Amendments could be for US and other foreign issuers to choose not to access Canadian private placement markets.

This asymmetry between Ontario and U.S. requirements is not the result of major policy differences between Ontario and the United States, but rather a result of slightly different choices in how to best regulate the publication of research. Both the SEC and the OSC recognize that research is essential to an efficient market, but that it needs to be regulated at certain times to avoid potential misuse by persons with an incentive to manipulate the market. The two regulators simply have slightly different approaches as to how and when to regulate this research. These slightly different approaches, however, can impose onerous burdens on market participants, especially those involved in cross-border transactions involving inter-listed securities.

The OSC received considerable comment relating to the research report requirements set out in the Proposed Rule. Many of the comments received by the OSC in response to the Proposed Rule either supported the restrictions on research reports as originally proposed, or suggested easing the restrictions. The OSC noted, in its summary of comments received, that “when only a limited number of dealers are permitted to publish, clients are detrimentally affected by a reduction in the information available.” We agree with this statement.

UBS is of the view that, at worst, allowing single issuer reports to be published in relation to securities that are connected to those being offered marginally increases the risk that a publisher of reports might try to use research to influence the market. At best, however, allowing this minor carve out increases the breadth and quality of information in the marketplace, and resolves the prejudice to Canadian issuers and Ontario institutional clients created by the asymmetry between Ontario and U.S. law.

UBS accordingly submits that Part 4 of the Proposed Rule should be amended to be consistent with the U.S. rules by:

- exempting single issuer reports in respect of certain connected securities from the requirements of Section 2.1 of Rule 48-501 and Section 53 of the *Act*; and
- exempting research reports in respect of highly liquid securities from the requirements of Section 53 of the *Act*.

UBS further submits that no restrictions should be placed on the publication of research reports during private placements.

Thank you for your consideration. Please call James Stuart (416) •, email james.stuart@ubs.com or Kevin McCoy •, e-mail kevin.mccoy@ubs.com if you have any questions.

Yours truly,

Kevin McCoy
Compliance