



July 14, 2008

By E-mail

David Murchison
Executive Director
Expert Panel on Securities Regulation
Ottawa ON
E-mail: submissions@expertpanel.ca

Dear Sirs/Mesdames:

Re: *A Public Consultation Paper Issued By the Expert Panel on Securities Regulation in Canada – Request for Submissions*

This submission is made by the Business Law Section of the Ontario Bar Association (OBA) in response to the request for submissions on *A Public Consultation Paper Issued by the Expert Panel on Securities Regulation in Canada* dated April 17, 2008 (Consultation Paper). This letter was prepared by members of the Securities Law Subcommittee of the OBA Business Law Section.

Please note that the Canadian Bar Association (CBA), of which the OBA is the Ontario branch, intends to participate in the consultation process initiated by the Expert Panel by providing input on the draft legislation to be prepared later this year, but does not intend to file a formal submission on the matters raised in the request for submissions. However, the CBA has advised the OBA (and the CBA's other provincial branches) that they are free to make submissions to the Expert Panel if they wish to do so.

The OBA Business Law Section supports the efforts of the Expert Panel on Securities Regulation in examining ways to improve securities regulation in Canada and appreciates the opportunity to comment on the Consultation Paper. Our comments are limited to the issues raised in *Consultation Item 5: Securities Regulatory Structure*. We believe that replacing the existing 13 provincial and territorial securities regulators with a single securities regulator is essential and that without this reform the other issues outlined in the Consultation Paper cannot be adequately addressed.

As the Consultation Paper notes, improving the securities regulatory structure has been the subject of much debate in recent years. It is widely acknowledged that the current system is inadequate in today's ever-changing, highly competitive, global financial markets. We also note that there is increasing recognition, both within Canada (as reflected in the creation of the Investment Industry Regulatory

Organization of Canada (IIROC)¹) and internationally (as reflected in the *Blueprint for a Modernized Financial Regulatory Structure (Blueprint)* published by the U.S. Treasury Department this spring²) that consolidation of regulatory agencies is necessary to help capital markets remain competitive in the face of globalization.

A background paper prepared for the Crawford Panel on a Single Canadian Securities Regulator (Crawford Panel) identified the major problems of the current system under the headings high costs, delayed and inconsistent policy development, lack of a unified international presence, impediments to effective enforcement and lack of coordination with other financial sector regulators. We endorse these specific criticisms, as set out in more detail in the background paper.³

We believe that Canada must have a single securities regulator that administers and enforces a single set of securities requirements⁴ that the regulator can, in most cases, change without the involvement of other governmental entities. No form of coordinated regulation, including an enhanced passport system in which Ontario fully participates, will be adequate.

Passport System

You have asked for our views of the strengths and weaknesses of the passport system as it is currently being implemented. Since the passport system only came into effect in March 2008, it is too early to assess its practical impact. While we believe that the passport system will provide an improvement over previous regulatory coordination mechanisms, it still suffers from several major flaws.

Under the current system, provincial and territorial securities legislation is not entirely harmonized, with the result that issuers must still review the requirements of multiple jurisdictions. At present the system helps issuers to comply with only prospectus, continuous disclosure and take-over bid requirements⁵. We look forward to its extension to deal with registration requirements. However, we still believe that a national enforcement system, which is not contemplated by the passport system, is essential.

¹ In June 2008 the Investment Dealers Association of Canada and Market Regulation Services merged to form IIROC. See the IDA Bulletin of November 15, 2007 for an explanation of the rationale for the merger, some of which is also applicable to a consolidation of governmental securities regulators.

² *Blueprint* sets out short-term, intermediate-term and long-term recommendations. It calls for merger of certain U.S. financial services regulators in the intermediate-term and their replacement with just three regulators over the long-term.

³ Various Models of Securities Regulation, Background Paper A to the *Report of the Crawford Panel on a Single Canadian Securities Regulator*.

⁴ As set out in securities legislation, rules and policies.

⁵ Including applications for relief from these requirements.

The most obvious problem with the current passport system is that Ontario is not a full participant. Ontario requirements, while often the same as those of the passport regulators, are not set out fully in national instruments. Together these deficiencies require issuers to review at least two sets of requirements and expose non-Ontario based issuers to the possibility of two reviewing jurisdictions.

For the reasons set out below, we do not believe the passport system can offer an adequate solution to the current problems even if it is based on harmonized securities legislation and Ontario is a full participant.

Problems with Coordinated Regulation

We believe that if the existing multiplicity of provinces that can act as the principal regulator is not replaced with a single entity, the structural reform will be inadequate because it will fail to address the concerns set forth below.

1. Costs and Delays Involved in Maintaining a Coordinated System

It is both time consuming and expensive to reach a consensus on the myriad issues which arise when drafting rules to be adopted by 13 regulators.⁶ When, as now, a substantial percentage of securities regulatory resources must be devoted to achieving harmonized requirements and consistent application of those requirements there are far fewer resources to be devoted to crafting new rules or reforming current rules. The resulting delay in responding to rapidly-developing market conditions or new investment products can prejudice market participants and erode investor confidence. Market participants also suffer from delays in reforming the system to make it more efficient. Coordinated regulation may also result in delays that inhibit innovation in the capital markets – where rules related to new products, or patterned after regulatory developments in other jurisdictions, cannot be implemented promptly or on a consistent basis and proximate timetable across multiple jurisdictions. Stock exchanges, self-regulatory organizations (SROs) and other market participants must devote scarce resources to consulting and compromising with a multiplicity of regulators on both their own and the regulators' proposals. Sometimes, compromise results in more burdensome or less protective regulation than necessary.

2. Lack of Uniformity

We believe it is inevitable that without a single regulator, securities requirements will become disharmonized over time. Eventually there will be a fundamental disagreement causing one or more provinces to drop out of the coordinated system or to impose additional requirements on participants in the co-coordinated system.

⁶ This is true even if a number of them do not take an active role in developing many of the rules.

We also believe that it is inevitable that harmonized requirements will not be applied in a uniform manner, although significant resources are devoted to ensuring that they are. In addition, investors may perceive that a principal regulator will exercise its discretion⁷ so as to favour a local issuer or industry which has a significant impact on the provincial economy at the expense of its investors, the preponderance of whom reside outside the province. A single regulator, whose commissioners are appointed with a view to achieving geographical balance but who are committed to creating a Canadian regulatory regime, would be better able to balance the needs of all Canadians, so investors need not have the same fears. Foreign investors are also more likely to expect a single regulator to act in an even-handed manner.

3. Inadequate Enforcement

Coordinated regulation will not support the development of a national system to enforce securities laws. We believe a national system is essential if Canada is to improve its enforcement track record. Without a national system, resources which should be devoted to investigation and enforcement will continue to be spent on coordination. Jurisdictional limitations will continue to hamper investigations. Enforcement efforts will continue to be uneven because some jurisdictions will devote more resources to enforcement than others and differing priorities will drive which cases are pursued.

In addition, the lack of a single securities regulator contributes to the perception, both nationally and internationally, that enforcement is seriously deficient. When investors suffer major losses because of their investment in significant Canadian issuers such as Bre-X Minerals and Nortel Networks, we need a national spokesperson to assure investors that a thorough investigation is being conducted and steps will be taken to ensure that the conduct cannot be repeated by other Canadian issuers. Press releases issued by separate regulators, even if framed as joint releases, do not inspire the confidence or get the coverage they would if they were issued by a national securities commission. Press releases issued by the Canadian Securities Administrators (CSA) have similar problems because the CSA has no legal authority to direct the conduct of enforcement proceedings in multiple jurisdictions.

4. Impedes Coordination of Financial Services Regulation

Increasingly the products and services offered and risks faced by banks, insurance companies, credit unions and mortgage brokers overlap those of the investment funds, specialized issuers and registrants whose activities are governed by securities requirements. Thus, financial services regulation must be highly coordinated to provide a level playing field for all participants, comparable investor protection and to avoid potential regulatory gaps. Much of the regulation

⁷ For example, by granting relief from a provision of a national instrument or issuing a prospectus receipt.

of the larger suppliers of financial services is carried out at the federal level⁸ or through SROs recognized in most or all provinces and territories⁹. The lack of a single securities regulator makes ensuring coordinated regulation¹⁰ of the financial services industry much more time consuming and expensive than Canada can afford.

Internationally, the trend is away from a stand alone securities regulator and towards regulation of all financial services through a combination of regulators charged with regulating business conduct, providing prudential regulation and ensuring market stability¹¹. If we do not have one entity regulating securities it will be impossible to move towards this international standard or to properly interact with those countries that have abandoned their stand alone securities regulator.

5. International Problems

Canada is the only major country in the world without a single securities regulator. In 2007, it was one of two members out of the 182 members of the International Organization of Securities Commissions (IOSCO) who did not have a single securities regulator. The fact that no one entity speaks for Canada on the international stage leaves doubts about the soundness and efficiency of Canadian capital markets. Canada's participation in IOSCO is more expensive and less effective than it could be because of the need to coordinate provincial responses.

The U.S. Securities and Exchange Commission will soon complete a process agreement to open the way for discussions of potential U.S.-Canada mutual recognition arrangements. However, Canadian issuers and investors have been harmed by the reluctance of other countries to consider mutual recognition of Canadian securities requirements because of the difficulty of dealing with so many regulators. When mutual recognition discussions do take place they are much more time consuming and expensive than need be. Given the comparative size of the Canadian capital markets it is unreasonable to expect other countries to go to the trouble of dealing with more than one Canadian securities regulator.

In its *Blueprint*, the U.S. Treasury Department says that in order to improve the competitiveness of U.S. capital markets in an increasingly global market place all U.S. federal financial services regulators should ultimately be consolidated into

⁸ Through the Bank of Canada, the Office of the Superintendent of Financial Institutions, the Canadian Deposit Insurance Corporation and the Financial Consumer Agency of Canada

⁹ For example, the Mutual Fund Dealers Association of Canada and IIROC. As well, TMX Group operates both securities and commodities exchanges in Canada that are recognized as SROs.

¹⁰ The Financial Institutions Supervisory Committee established by the Department of Finance includes the heads of the federal regulators and of the securities regulators of Ontario, Quebec, Alberta and British Columbia.

¹¹ *Blueprint* calls ultimately for three regulators, a business conduct regulator, a market stability regulator and a prudential regulator.

three regulators. In order for Canadian capital market to be competitive we need to look at applying the U.S. recommendations to our own market. We must start by establishing a single securities regulator.

Proportionate and Principle-Based Regulation

We believe that a single securities regulator will best support the adoption of new regulatory approaches, including more proportionate regulation and a more principle-based approach. As was illustrated with the debate over corporate governance and audit committees, proportionate regulation, while sometimes needed, is difficult to formulate. Smaller issuers and registrants often appear in need of greater regulation than larger issuers. Balancing the costs of regulation against the needs of investors is best done by a single regulator so it is perceived to be fair, even-handed and takes into account differing regional perspectives. Taking a more principle-based approach to regulation increases the need for a uniform approach to its explanation, application and enforcement. Each of these objectives is more difficult and expensive to achieve with multiple regulators.

Transition

We do not believe that moving to a single securities regulator would be disruptive to the marketplace if clear transitional provisions were adopted and the majority of provincial securities regulatory staff is initially transferred to the new single regulator.¹² Transitional rules could provide that all filings made and all enforcement activity commenced after a specified date (irrespective of when the alleged lack of compliance occurred) would be dealt with by the new single regulator. Matters filed or commenced before this date, if not resolved within six months or a year, could at that time be transferred to the new single regulator. Prior to the specified date, a trial period could be established during which filing with the new single regulator was optional but not mandatory.

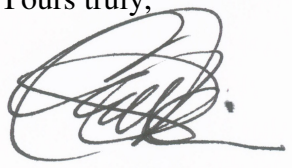
Alternatives

We favour a proposal in which provinces and territories have the ability to participate in the selection of commissioners and adjudicators but not in the approval of rules. We would prefer a proposal acceptable to all jurisdictions. However, we believe that if some jurisdictions do not wish to participate at this time it will still be worthwhile to establish a single securities regulator for the participating jurisdictions. Market forces may cause the dissenters to join in at a later date. If agreement cannot be reached among a significant number of provinces and territories, we believe that the only viable solution is to use the constitutional authority of the federal government to establish a federal securities regulator.

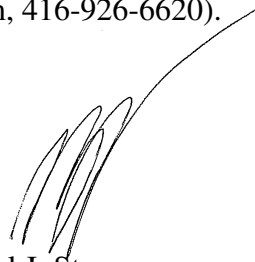
¹² Provinces and territories would be permitted to retain their existing securities regulatory structure to regulate intra-provincial or intra-territorial offerings. It is unlikely that after conducting a cost-benefit analysis any jurisdiction will elect to do this.

Thank you for the opportunity to comment. If you have any questions, please direct them to Susan McCallum (simccallum200650@aol.com, 416-483-6678) or Richard Lococo (richard_lococo@manulife.com, 416-926-6620).

Yours truly,



Greg Goulin
President
Ontario Bar Association



Paul J. Stoyan
Chair, Business Law Section
Ontario Bar Association