BLUEPRINT FOR UNIFORM SECURITIES LAWS FOR CANADA

Canadian Securities Administrators

Autorités canadiennes en valeurs mobilières

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LETTER FROM THE USL PROJECT STEERING COMMITTEE

January 30, 2003

The Canadian Securities Administrators' ("CSA") Uniform Securities Legislation ("USL") Project Steering Committee is pleased to release this Concept Proposal for public comment. This Concept Proposal is the result of research and analysis of the securities laws in force in British Columbia, Alberta, Manitoba, Ontario and Québec. The decisions reflected in this Concept Proposal were made in many areas in which it has been previously difficult to reach consensus.

This Concept Proposal outlines proposals for the harmonization of securities laws across Canada. In some areas, substantive changes to current laws are proposed. For the most part, these proposed changes are either well-advanced CSA initiatives for which the USL Project presents an ideal opportunity to make necessary legislative amendments or the proposed changes would further the project's complementary goal of streamlining and harmonizing the system of securities regulation in Canada. The following are the most significant proposed policy changes:

- The ability of a securities regulatory authority to delegate decision-making across all regulatory functions to another securities regulatory authority. Please see our discussion at page 9.
- A streamlined system for inter-jurisdictional registration of firms and individuals. Please see our discussion at page 20.
- A civil liability regime for secondary market participants. Please see our discussion at page 49.
- A streamlined securities act with details largely contained in rules to allow future changes to securities laws to be made in a timely and harmonized manner through the rule making process. Please see our discussion at pages 5 and 60.

The USL Project presents a unique opportunity to shape Canada's securities laws to reflect the needs of industry participants. We invite you to participate by reading our Concept Proposal, considering its recommendations and providing your written comments. The comment period will run until **April 30, 2003**.

Please address comments to

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Unless confidentiality is requested, submissions will be made public and posted on CSA websites.

Sincerely,

The USL Project Steering Committee

Stephen Sibold, Q.C., Chair
Doug Hyndman
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Claire Richer
Les O’ Brien, Q.C.

I. INTRODUCTION

1. The Importance of Harmonized Securities Laws

Efficient and effective securities regulation is a pressing issue. The CSA recognize that co-operation and co-ordination among Canada's provincial and territorial jurisdictions are essential to a streamlined, seamless system of securities regulation.

The CSA have worked together for many years to co-ordinate Canada's decentralized system of securities legislation. In the past decade, the CSA have significantly harmonized securities laws and the administration of those laws through the following initiatives:

- The development and implementation of 25 national instruments and 24 national policies covering key areas such as prospectus requirements, mutual fund regulation, rights offerings, take-over bids, registration issues and marketplace operations;
- The mutual reliance review systems ("MRRS") for prospectus vetting and exemptive relief applications; and
- The System for Electronic Document Analysis and Retrieval ("SEDAR"), a centralized, on-line document depository for reporting issuers.

2. The Goals of the USL Project

Though many improvements have been made through the CSA process, the next fundamental step towards a more efficient, effective and competitive system of securities regulation is harmonized laws. The goal of the USL Project is to develop a uniform securities act (the "Uniform Act") and rules ("Uniform Rules") for adoption by each jurisdiction of Canada on a fast-tracked basis. The Uniform Act and Uniform Rules would be word-for-word uniform in each jurisdiction. Since the USL Project is a harmonization initiative, the resulting Uniform Act and Uniform Rules would contain few substantive differences from current securities laws.

The USL Project is the top priority of the CSA and is part of a larger framework of regulatory reform. We recognize that harmonized laws are an important first step, but there are numerous other reforms that we must consider to ensure the continued fairness and efficiency of our capital markets. Other potential reform initiatives will come from a variety of sources, including:

- The proposals developed and published under the BCSC Deregulation Project;
- The Draft Report of the Ontario Five Year Review Committee; and
- Stand-alone projects that are either underway and worthy of completion or new initiatives arising out of market events.

3. The Structure of Uniform Securities Laws

The USL[1] would provide a national framework for securities regulation. The Uniform Act would be "platform" legislation that would set out fundamental rights, powers and obligations. The Uniform Rules would contain detailed requirements. This regulatory framework would facilitate future reforms through the rule making process. Currently, it can take several years to amend all of the securities acts of Canada due to different legislative timetables.[2] The capital markets are on a much faster timetable. We are regularly faced with new products, market structures, enforcement priorities and policy issues that require us to respond in a timely manner if we are to regulate effectively. Our rule making process generally allows us to react more quickly to such changes.

Securities laws also contain administrative and procedural provisions that reflect the laws of a particular jurisdiction and cannot easily be harmonized. Examples include provisions relating to penalties and other remedies, rule making procedures and the constitution of securities regulatory authorities ("SRAs"). These provisions would be harmonized to the greatest extent possible and included in a Securities Administration Act (an "Administration Act") that each jurisdiction of Canada would enact.[3] Each Administration Act would be based on a model Administration Act that would be developed under the USL Project. As a result, there would be uniformity of organization and presentation of these provisions.

The CSA recognize that there are local markets within Canada with their own policy imperatives. Where a harmonized approach may not be appropriate, the majority position would be set out in the Uniform Act or Uniform Rules. Local differences would be set out by way of exceptions in a local provincial or territorial rule ("Local Rule") or the relevant Administration Act. We anticipate

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[1] A reference to the USL in this Concept Proposal is a reference to the body of law that would be implemented pursuant to the USL Project.

[2] For a recent example, consider the Zimmerman amendments to the take-over bid rules which, though non-controversial, took 4 years to be passed by each jurisdiction's legislature.

[3] Québec may not enact an Administration Act due to the enactment of Bill 107, ***An Act respecting the Agence nationale d'encadrement des services financiers***, that merges the Commission des valeurs mobilières du Québec with the Régie de l'assurance-dépots du Québec, the Bureau des services financiers and the Fonds d'indemnisation des services financiers. The merged entity would be called the Agence nationale d'encadrement du secteur financier and would administer all legislation governing the regulation of the financial sector.

that the use of Local Rules would be exceptional and infrequent. Local Rules would be reviewed regularly to ensure that they reflect obvious local needs rather than theoretical differences.

4. Methodology

During the past year, we have completed a detailed review of the securities laws of five jurisdictions of Canada: British Columbia, Alberta, Manitoba, Ontario and Québec. These jurisdictions were chosen because their securities laws are representative of the securities laws of the other jurisdictions of Canada. We have compared corresponding provisions and identified and analyzed differences. Where differences are not substantive, harmonization is merely a matter of redrafting the provision with uniform wording and harmonized definitions to ensure the clearest statement of the law. Therefore, these provisions are not discussed in detail in this Concept Proposal. Where differences between corresponding provisions are substantive, we have done one of two things:

1. Where the necessary policy debate has already been completed through other CSA initiatives, we have considered the advantages and disadvantages to the various jurisdictions' approaches and then made a decision as to which approach best reflects the goals of securities regulation and therefore should be included in the USL; or

2. Where the necessary policy debate has not been completed, we have recommended harmonizing existing provisions with a view to replacing them in the future with provisions that reflect the outcome of the ongoing policy development process.

The decisions in this Concept Proposal and the results of the public consultation process will form the basis for the Uniform Act, Uniform Rules and model Administration Act. All multilateral and national instruments would be reviewed and amended consequentially to achieve concordance with the Uniform Act.

We envision a Canadian securities law compendium that contains, in one easily referenced work, the Uniform Act, the Uniform Rules and each jurisdiction's Administration Act and Local Rules, with common section numbers and cross references.

5. Maintaining Uniformity

The CSA recognize that maintaining harmony is as important as achieving it. Currently, the CSA are making rules on a coordinated basis. We intend to strengthen the degree of cooperation and coordination between SRAs by

introducing a more formal method of implementing policy initiatives. Although legislative sovereignty dictates that each jurisdiction must exercise its own discretion, CSA members would commit to bringing any contemplated amendments, Local Rules or new initiatives to the CSA table to canvass whether they can or should be developed on a uniform basis.

6. Measuring Success

Canadian securities laws should be comprehensive, comprehensible, harmonized and administered in an efficient manner, with a minimum of duplication and expense. They should respect provincial and territorial sovereignty, accommodate local needs and respond to necessary changes in a timely manner. Success should be measured not only by the degree of uniformity we may achieve but also by the degree to which concerns relating to complexity, duplication, costs, delays and conflicting policies have been alleviated and the degree to which we produce a system that better achieves the goals of protecting investors and market integrity without unduly burdening the market.

II. ADMINISTRATIVE PROVISIONS

1. Introduction

Currently, securities acts have both substantive and procedural components. Substantive laws apply to issuers, investors and intermediaries and are our top harmonization priority. Procedural laws are the laws that SRAs must follow in order to administer substantive laws. These are of more concern to SRAs themselves than to the regulated community. Procedural laws can differ without detracting from substantive uniformity. In some cases, procedural laws necessarily differ because they must fit within the legal framework that applies to regulatory agencies in each province or territory. The USL would accommodate this need for local differences by dividing substantive and procedural provisions into separate enactments. We propose that each province and territory enact an Administration Act which would contain procedural provisions.

2. Content of Administration Acts

(a) Administration of SRAs

Each SRA has administrative provisions that must continue to fit within the procedural framework that applies to regulatory agencies in each province or territory. These provisions include:

- the formation and continuation of an SRA;

- an SRA's legal relationship to its provincial or territorial government;
- the appointment of members of an SRA;
- the powers and duties of officers and employees of an SRA;
- delegation from an SRA to its staff;
- the financial administration of an SRA;
- the powers of an SRA;
- the rulemaking process;
- quorum requirements for SRA meetings and hearings;
- powers and procedures respecting hearings; and
- appeals of SRA and SRO decisions.

(b) Investigations

Each SRA has its own powers and procedures respecting investigations, hearings and prosecutions. These powers are integral to an SRA's ability to fulfill its investor protection mandate. These provisions include:

- the power of an SRA or its staff to conduct an investigation;
- powers of an investigator under an investigation order;
- the appointment of experts;
- the ability of an SRA or its staff to order production of documents from industry participants;
- the ability of an SRA to execute a warrant issued in another jurisdiction;
- the appointment of receivers;
- the ability of an SRA to make a freeze order;
- the ability of an SRA to apply to a court of competent jurisdiction to obtain an order that a person comply with securities laws;
- the ability of an SRA to file an SRA decision with a court of competent jurisdiction so the decision is enforceable as an order of that court;
- reports of investigations;
- the confidentiality of investigations; and
- the recovery of costs.

We have studied these provisions and identified non-substantive modifications that would harmonize and simplify our laws and could be made without policy debate. We have also identified provisions that cannot be harmonized because existing differences reflect the fact that an SRA's investigative and prosecutorial powers cannot conflict with the laws of the province or territory from which the SRA derives its authority. These proposals are discussed in detail in **Appendix A**. This appendix also identifies provisions that we would not carry forward into the USL.

(c) Penalties Available to a Provincial Court

The penalties available to a Provincial Court on finding that an offence has been committed should be increased.

Effective and meaningful enforcement powers are essential to an SRA's ability to achieve the goals of securities regulation. Generally, more serious breaches of securities laws are prosecuted in Provincial Court. Although courts can impose substantially higher monetary penalties than an SRA and can also sentence an offender to a term of imprisonment, the current maximum penalties are not of sufficient consequence to punish offenders and deter potential offenders. The USL would adopt the provisions contained in recently passed but unproclaimed amendments to the Ontario Securities Act[4] which would result in the following changes to the penalties available on conviction of an offence:

- the maximum fine would be increased to $5,000,000;
- the maximum imprisonment term would be increased to five years less one day; and
- the maximum fine on conviction of an insider trading offence would be increased to not more than the greater of $5,000,000 and an amount equal to triple the profit made or loss avoided by the offender.[5]

(d) New Administrative Powers

To enable greater co-operation among SRAs and make our system of regulation easier to navigate, the Administration Act should modify existing provisions on information sharing, delegation and immunity as discussed below.

(i) Delegation Between SRAs

The USL should allow SRAs to delegate all regulatory functions among themselves, subject to restrictions that would preserve each SRA's autonomy and jurisdiction.

The CSA have significantly streamlined the regulatory approval process through MRRS for prospectuses and exemptive relief applications. Under MRRS, each SRA reviews and issues a decision on the prospectus or exemptive relief

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4 See *Keeping the Promise for a Strong Economy Act (Budget Measures, 2002)*, c. 22 S.O. 2002, formerly Bill 198, *An Act to implement Budget measures and other initiatives of the Government*, 3rd Sess., 37th Leg., Ontario, 2002, third reading given December 9, 2002 [hereinafter the "*Budget Measures Act*"].

5 See s. 194 of the *Budget Measures Act*.

application, but the principal regulator handles the review and comment process on behalf of all SRAs and acts as the issuer's or applicant's point of contact. It is optional for SRAs to participate in MRRS, but all have chosen to do so.

The USL would increase the potential for regulatory streamlining in two significant respects:

1. The USL would contemplate comprehensive inter-SRA delegated decision-making of all regulatory functions: prospectus and exemptive relief applications, registration, compliance and enforcement; and

2. The USL would allow an SRA to delegate a particular function, duty or power to another SRA. The delegate SRA would essentially stand in the place of the delegating SRA.

The delegated decision making system could create a virtually seamless system of securities regulation which would allow "one stop shopping" by industry participants. For example, an applicant for exemptive relief or a prospectus receipt would deliver a multi-jurisdictional application and fees to the principal regulator only and would receive one decision from that regulator. The decision would be the decision of all SRAs named in the multi-jurisdictional application. Therefore, a delegated decision model combined with harmonized securities laws across the country would simplify approval processes and reduce processing costs for both SRAs and industry.

We recognize that each SRA is a creature of, and is ultimately answerable to, its provincial or territorial legislature. Therefore, the following safeguards would be built into the delegation provisions to ensure the preservation of each SRA's autonomy and jurisdiction:

1. Delegation would be optional. Any agreement to do so would be capable of revocation at any time at the option of either the delegating or the delegate SRA;
2. SRAs would not be able to delegate their power to delegate;
3. SRAs would not be able to delegate their ability to make rules; and
4. SRAs would not be able to delegate their corporate governance powers.

(ii) Immunity

The immunity provisions in the USL should ensure that members, officers and employees of an SRA, whether acting for itself or for another SRA, are immune from any actions or other proceedings for damages.

Currently, securities legislation contains immunity provisions that prevent proceedings for damages being instituted against an SRA, its members and its staff for actions done in good faith and in the performance of any function or duty, exercise of any power or any related neglect, omission or default. However, a provincial or territorial legislature may only immunize against liability in its own jurisdiction.

The Administration Acts would therefore contain an immunity provision that would be uniform across jurisdictions. Each jurisdiction's provision would expressly confer immunity in that jurisdiction on every SRA, whether acting for itself or on behalf of one or more other SRAs and whether acting under the laws of that jurisdiction or under the laws of one or more other jurisdictions.

(iii) Information Sharing

The USL should facilitate inter-jurisdictional investigations by providing SRAs with the authority to collect and use personal information and to disclose that information to other securities and financial regulators, stock exchanges, self-regulatory organizations, law enforcement agencies and third party service providers.

Every jurisdiction has freedom of information and protection of privacy ("FOIPP") legislation that governs the collection, use and disclosure of personal information by public bodies. The securities legislation of some jurisdictions allows SRAs to share information with other regulators. Other SRAs have either no ability or a limited ability to share information. The ability to co-operate with other regulators is essential given that capital markets activities often cross provincial or national borders. SRAs must also have the ability to provide personal information filed with them to the third party service providers who administer electronic filing systems such as the National Registration Database ("NRD") and the proposed System for Electronic Disclosure by Insiders ("SEDI").

The USL would contain a provision allowing each SRA to exchange information with other SRAs, stock exchanges, self-regulatory organizations, law enforcement agencies and third party service providers.[6] The provision would also allow SRAs to share information with analogous entities outside Canada.

It is critical that the USL information sharing provision be paramount to provincial or territorial FOIPP legislation.[7] If FOIPP legislation were to apply to an SRA's

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[6] In Québec, the communication of personal information to third party service providers without consent is not permitted under legislation respecting the protection of personal information.

[7] Québec legislation respecting the protection of personal information has precedence over any contrary legislation. It is unlikely that the Québec legislature would consent to the USL provision having precedence.

decision to share information with one of the enumerated entities, the decision could be reviewed and reversed by the provincial or territorial privacy commissioner. This may discourage SRAs from sharing information with other regulators. It would also be possible that sensitive information obtained by an SRA could be ordered disclosed to the public by the privacy commissioner. This could frustrate the investigative purpose for which it was obtained. Finally, our fast paced markets require expedited procedures for determining whether sharing information is in the public interest in any particular circumstance. Such determinations are generally outside standard FOIPP tribunal procedures and therefore it is preferable for SRAs to make such determinations.

III. SELF-REGULATION

1. Introduction

Many participants in the Canadian securities industry are regulated by self-regulatory organizations ("SROs"). Self-regulation is appropriate since SROs have the skill, expertise and ties to industry to regulate effectively. The functions of Canada's current SROs are, in broad terms, to regulate the activities of their members and to provide market regulation services.

Generally, each jurisdiction that regulates SROs does so in substantially the same way. Securities acts generally permit or require an SRA to recognize an SRO that is carrying on business in the SRA's jurisdiction.[8] Where that SRO is a stock exchange, recognition by an SRA is mandatory. Generally, securities acts also permit SRAs to exempt these entities from recognition. Once an SRO is recognized by an SRA, it must regulate the operations, standards of practice and business conduct of its members but is subject to oversight by that SRA. In addition, an SRA has the authority to review any direction, decision, order or ruling made by a recognized entity. An SRA's oversight of a recognized entity generally varies from its oversight of an exempted entity.

Under the USL, the basic framework for the regulation of SROs would remain substantially the same. However, there would be a few modifications to the current regime that are discussed below. In addition, new SROs are likely to emerge as the securities industry evolves. A flexible approach to regulation is therefore imperative.

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[8] In Québec recognition of all SROs is mandatory.

2. Recognized Entities

The USL should recognize "marketplaces" rather than "stock exchanges" to reflect the diversity of ways in which securities are traded as well as to allow for flexibility.

Currently, securities acts require SRAs to recognize "stock exchanges" or "exchanges" that are carrying on business in the SRA's jurisdiction. However, these terms are dated and do not reflect current trading practices and products. "Marketplace" is a broader term which would include both securities and derivatives exchanges. This term would more accurately reflect current trading practices and provide flexibility for future trading systems.

The USL should specifically provide that entities recognized by an SRA are subject to that SRA's jurisdiction.

SRAs only have jurisdiction over entities that they recognize. The legislation in some jurisdictions provides that an SRA "may" recognize certain SROs. This language is unclear as it seems to give SROs the option of being subject to SRA oversight. The USL would specifically provide an SRA with the authority to require an SRO to be recognized if it is carrying on business in the jurisdiction.

The USL should define an SRO to mean a person or company whose objectives are related to, or consistent with, the purposes of securities legislation and that regulates the activities of its participants or participants of other recognized entities.

Currently, not all securities acts define the term "self-regulatory organization" and those that do have differing definitions. Under the USL, a "self-regulatory organization" would be defined to mean a person or company whose objectives are related to, or consistent with, the purposes of securities legislation and that regulates the activities of its participants or participants of other recognized entities. Reference to participants of other "recognized entities" would be necessary to enable an SRO to act as agent for another recognized entity.

The USL should include the concept of a "market participant". This concept should include, among other entities, a recognized entity.

In Ontario, "market participants" are required to comply with record-keeping and audit obligations contained in securities laws. This provides SRAs with jurisdiction to obtain information from entities that would otherwise not be subject

to these obligations. This information is sometimes necessary to regulate effectively. "Market participants" include, in addition to a recognized entity:

- Reporting issuers;
- Directors, officers and promoters of reporting issuers;
- Mutual fund managers and custodians;
- Transfer agents;
- Control persons; and
- Entities exempted from recognition.

The USL definition of "market participant" would include these entities but may not be as broad as the current definition in the Ontario *Securities Act*.

3. Powers of Recognized Entities

The USL should grant recognized entities the power to regulate former members and the power to compel witnesses to attend and produce documents at a disciplinary hearing.

Securities acts require a recognized entity to regulate its participants and their employees or agents in accordance with its rules and policies. Currently, not all jurisdictions provide that recognized entities have jurisdiction over former members. It is important to ensure that members of a recognized entity are not able to avoid responsibility for breaches of its rules or policies by surrendering their membership in that recognized entity. The USL would provide that the authority of a recognized entity to regulate its members extends to former members and those acting on the former member's behalf.

The USL would also give recognized entities the power to compel witnesses to attend and produce documents at disciplinary hearings. Recognized entities need these powers to be able to properly regulate their members.

4. Voluntary Surrender of Recognition

The USL should authorize SRAs to accept a recognized entity's voluntary surrender of recognition.

Currently, some securities acts allow a recognized entity to voluntarily surrender its status as a recognized entity with approval from the relevant SRA. SRA approval is an appropriate condition of voluntary surrender in order to ensure that there is no adverse impact to the public. Under the USL, an SRA would have the

ability to accept an application for voluntary surrender of recognized status provided that:

1. The SRA is satisfied that the surrender of recognition is not prejudicial to the public interest; and

2. The SRA's acceptance of the surrender of recognition is in writing and may be subject to such terms and conditions as the SRA may impose.

5. The Ability of SRAs to Enforce Rules of Recognized Entities

The USL should specifically authorize SRAs to enforce the rules and policies of recognized entities.

As part of their general oversight function, SRAs would continue to be able to enforce the rules, policies and other similar instruments of recognized entities. This would be accomplished by empowering SRAs to commence enforcement proceedings against the members of a recognized entity or issue compliance orders which require a person, company or the directors and senior officers of a company to comply with or cease contravening the requirements of a recognized entity.

IV. THE REGISTRATION REQUIREMENT

1. Introduction

Securities legislation generally requires both securities firms and the individuals working for them to be registered. There are a number of requirements that firms and individuals must meet to become and remain registered.

There are some inconsistencies among jurisdictions' registration systems. One of the most fundamental inconsistencies is the presence of the universal registration system in Ontario and Newfoundland & Labrador. The universal registration system requires a broader range of entities to register and is quite different from the registration systems in place in other Canadian jurisdictions. Upon implementation of the USL, Ontario and Newfoundland & Labrador would replace the universal registration system with the harmonized USL system. However, these jurisdictions may choose to enact Local Rules to continue some aspects of the universal registration system.

2. The Role of SRAs and SROs

The USL should incorporate the SRO model for the regulation of certain registrants.

The USL would continue the SRO model of regulation of registrants in those jurisdictions where it currently exists. Under the SRO model, dealers would meet requirements established and enforced by SRAs contained in the USL and additional requirements would be imposed at the SRO level based on the specific activities of SRO members. This model would enable SROs, subject to SRA oversight, to tailor their requirements to their members' activities. The CSA recognize that eliminating the overlap between SRA and SRO rules is an important objective and would continue to work with SROs to eliminate duplicative requirements.

Registrants such as advisers and restricted dealers who are not currently required to be members of an SRO would continue to be regulated by SRAs directly.

3. Triggering the Registration Requirement

The requirement to be registered should be triggered when a person or company trades in a security.

Under the USL, the requirement to be registered would arise when a person or company trades in a security (the "trade trigger"). This is the status quo in all jurisdictions except Québec. The Québec *Securities Act* requires registration when a person or company is carrying on business as a dealer or adviser (the "business trigger"), but the experience in Québec is that the business trigger is interpreted similarly to the trade trigger. Québec courts have held that the registration requirement applies to any activity that is part of a chain of events that could lead to a trade, whether or not the person or entity involved is running an ongoing trading business.

The trade trigger has been criticized as too broad, necessitating numerous registration exemptions for particular types of trades and particular individuals. However, to switch to a true business trigger, we would have to develop an appropriate definition of carrying on business that captures the appropriate range of activities and revise the existing exemptions regime. The Ontario Five-Year Review Committee recommends the business trigger, but only if it can be adopted across Canada. More policy work and feedback from industry participants is required before we can determine whether this change would be appropriate.[9]

[9] In Québec, a change to a trade trigger would also require that "trade" be defined. Such a definition would be introduced with the USL.

4. Categories of Registration

The USL should provide for one dealer category with three sub-categories (investment dealer, restricted dealer and mutual fund dealer) and one adviser category with two sub-categories (general adviser and restricted adviser).

The requirements that a registrant must satisfy depend on how its trading activities are categorized under securities laws. Currently, each jurisdiction has similar registration categories, but there are some differences. The USL would replace the categories in place in each jurisdiction with two general categories: dealer and adviser. **Appendix B** indicates how the proposed new categories of registration would affect the categories that currently exist in the comparator jurisdictions.

(a) The Dealer Category

The dealer category would be divided into three sub-categories: investment dealer, mutual fund dealer and restricted dealer. The individual registration requirement would continue to apply to trading representatives and trading partners and officers of dealers.

(i) Investment Dealer

Investment dealers are unrestricted in carrying out their trading activities and advising on the suitability of investments for their clients. The functions and characteristics of an investment dealer would be that it is:

- permitted to trade in all securities;
- permitted to provide advice concurrent with trading;
- permitted to act as an underwriter;
- permitted to exercise discretionary trading authority;
- required, where the requirement currently exists, to be a member of an SRO; and
- required to meet capital, supervisory, proficiency, sales conduct and other requirements established by SRAs and the applicable SRO.

(ii) Mutual Fund Dealer

The functions and characteristics of a mutual fund dealer would be that it is:

- permitted to trade only in mutual fund securities;
- permitted to provide advice concurrent with trading;

- not permitted to exercise discretionary trading authority;
- required, where the requirement currently exists, to be a member of an SRO; and
- required to be subject to capital, supervisory, proficiency, sales conduct and other requirements established by SRAs and the applicable SRO.

In some jurisdictions, mutual fund dealers are allowed to trade in certain exempt products. These exceptions are largely a function of local market conditions and would continue under Local Rules rather than being harmonized.

(iii) Restricted Dealer

The USL would provide that dealers that do not fit into either the investment dealer or mutual fund dealer categories would be required to register as restricted dealers (other than those listed in (iv) below). The activities of many of these registrants are local in nature and would be subject to Local Rules or locally imposed terms and conditions of registration. However, the activities of some restricted dealers are common to many jurisdictions. The USL would prescribe these registrants' obligations in specific sub-categories of the restricted dealer category. In general, however, the functions and characteristics of a restricted dealer would be that it is:

- permitted to trade only in certain products and/or to certain clients;
- required to meet capital, supervisory, proficiency and other requirements established by SRAs; and
- not required to be a member of an SRO.

(iv) Current Categories Which Would Not Be Included in the USL

The following registration categories would not be included in the USL:

- security issuer;
- financial intermediary dealer; and
- foreign dealer.

Currently, all jurisdictions have a registration category for security issuers. Under the USL, there would be a registration exemption for issuers distributing their own securities, subject to conditions. Therefore, the security issuer category would not be necessary under USL.

The financial intermediary and foreign dealer categories are not active categories in Ontario. It is not necessary to include them in the USL.

(b) Advisers

The current adviser categories are confusing and duplicative. There is a clear need for a simplified and harmonized system of adviser registration which is flexible enough to cover new activities in the market.

The USL would contain one adviser category that is divided into two sub-categories: a general adviser sub-category that merges the investment counsel and portfolio manager categories and a restricted adviser sub-category that would cover securities advisers and international advisers. The USL provisions respecting international advisers would be similar to current OSC Rule 35-502 *Non-Resident Advisers*. The USL would continue to require advising representatives and advising partners and officers to register.

The functions and characteristics of a registrant in the general adviser category would be that it is:

- permitted to advise specific clients on investing, buying or selling specific securities;
- permitted to give continuous advice on investments based on a client's particular objectives
- has discretionary authority to manage a client's investment portfolios; and
- required to meet qualification, proficiency and capital requirements.

Securities laws currently provide an exemption from the adviser registration requirement for certain persons or companies whose principal business is not the provision of advice. This exemption would be incorporated into the USL.

5. The Process for Registration, Renewal of Registration and De-registration

(a) Registration and De-registration

There are significant similarities between the procedures in place in most jurisdictions for the registration and de-registration of individuals and companies. The registration system in Québec is different but is based on substantially the same concepts as the registration systems in other jurisdictions. The goal under the USL is to harmonize the registration and de-registration regime.

(b) Streamlined National System for Registering Individuals

Currently, an individual that wishes to perform registerable activities must register in each province and territory where those activities would take place. This process can involve submitting up to 13 applications for registration to 13 SRAs. Harmonized registration categories and obligations as well as the ability of an SRA to delegate to another SRA proposed under the USL would allow us to implement a national registration system whereby a registrant in one jurisdiction would become registered in another jurisdiction. Under this streamlined system, a registrant would simply be required to notify the SRA in its home jurisdiction that it wishes to do business in other jurisdictions and pay the appropriate fees for the other jurisdictions. NRD would provide a streamlined method of submitting an application for registration in multiple jurisdictions, thereby facilitating this system.

(c) Renewal of Registration

Most jurisdictions other than Québec require a registrant to renew its registration on an annual basis. In Québec, registrants are registered permanently but must supply specified information annually. Québec may consider adopting an annual renewal system, but there are many considerations that must be evaluated before such a decision can be made.

(d) Residency Requirements

Currently, some jurisdictions require certain dealers that are not individuals to be formed or created under the laws of Canada or a Canadian jurisdiction. This requirement would not be carried forward in the USL. Instead, non-resident registrants would be regulated through Local Rules or individual terms and conditions to ensure adequate investor protection. Some jurisdictions may require registrants to be residents of Canada. This result would be achieved through Local Rules or the requirement of membership in an SRO that in turn requires its members to be residents of Canada.

6. Obligations of Registrants

Registrants must meet a number of requirements that generally fall into one of four broad areas:

- Solvency;
- Integrity;
- Proficiency; and

- Regulatory oversight and enforcement.

(a) Solvency

(i) Capital Requirements

Under the USL, investment dealers and mutual fund dealers would be subject to the capital requirements of their governing SRO. The capital requirements applicable to non-SRO members (i.e., advisers and restricted dealers) would be prescribed in the USL.

(ii) Other Solvency Requirements

Other solvency requirements such as bonding and insurance requirements and margin requirements are substantively similar across jurisdictions and would be harmonized under the USL.

(b) Integrity

Registrants' obligations in this area include:

- know your client and suitability rules;
- rules respecting conflicts of interest between a registrant and its clients;
- record keeping;
- compliance systems and prudent business practices;
- segregation of assets; and
- client communications.

There are few substantive differences in the various jurisdictions' provisions. For SRO members, where appropriate, the SRA and SRO rules would be conformed. Integrity requirements for non-SRO members would be prescribed in the USL.

(c) Proficiency

The goal of the USL is to introduce harmonized proficiency requirements for all registrants and to conform them to SRO requirements where possible.

(d) Regulatory Oversight and Enforcement

The USL would incorporate the SRO model for regulating registrants who are members of an SRO. These registrants would be subject to SRA and SRO rules. Non-SRO members would be regulated directly by SRAs.

V. THE PROSPECTUS REQUIREMENT

1. Introduction

A fundamental characteristic of the current system of securities regulation is that issuers must qualify a distribution of securities with a prospectus unless an exemption is available. Under the USL, the existing prospectus trigger in most jurisdictions would be retained and no one would be permitted to distribute securities unless they:

1. File and obtain a receipt for a prospectus;
2. Comply with alternate requirements of an SRA; or
3. Have an exemption available.

The basic premise is that a prospectus provides sufficient information about an issuer and any offering of securities that it is making to allow a potential purchaser to make an investment decision. Therefore, it must contain full, true and plain disclosure.

The vast majority of trades occur in the secondary market rather than the primary market. Although there is a continuous disclosure record that a potential secondary market purchaser may review prior to making an investment decision, securities laws do not mandate that this disclosure be provided to the potential secondary market purchaser. The CSA are pursuing policy initiatives that would harmonize and strengthen rules for secondary market disclosure. In January 2000, the CSA published for comment a proposed integrated disclosure system ("IDS") that would provide investors with more comprehensive and timely continuous disclosure. The USL would be drafted flexibly so that the move to an integrated disclosure system can be accommodated.[10]

2. Triggering the Prospectus Requirement

The requirement to file a prospectus should be drafted broadly enough to accommodate an integrated disclosure system for corporate issuers and alternative disclosure systems for investment funds.

The prospectus requirement contained in the USL would be drafted to accommodate a continuous disclosure-based system. Under such a system, a participating reporting issuer would be able to make a public offering without

[10] See CSA Notice and Request for Comment 44-401 and 51-401 "Concept Proposal for an Integrated Disclosure System" (January 28, 2000).

filing and clearing a prospectus so long as its continuous disclosure record is current. The issuer would file an alternative form of offering document that discloses the terms of the offering.

3. Form and Content of a Prospectus

Under the USL, rules relating to the form and content of prospectuses would be harmonized.

Rules relating to form and content of short form and shelf prospectuses have already been harmonized and would be included in the USL.[11] In addition, there is a CSA initiative underway to harmonize long form prospectus rules. It is anticipated that these rules would be finalized in time for incorporation into the USL. In the meantime, the CSA have already achieved a substantial degree of harmonization of long form prospectus rules. All jurisdictions allow issuers to elect to make a long form offering under either local rules or in accordance with the Ontario long form rule.[12]

The USL should allow an SRA to accept a prospectus that is prepared in accordance with the laws of a foreign jurisdiction.

To allow for greater flexibility, the USL would authorize an SRA to accept a prospectus prepared in accordance with the laws of a foreign jurisdiction if the SRA determines that the foreign prospectus contains full, true and plain disclosure.

VI. TRADING IN DERIVATIVES

1. Introduction

There are differing approaches to how jurisdictions regulate trading in derivative contracts. In some jurisdictions, securities legislation defines the term “futures contract” to include over-the-counter derivatives and “exchange contract” for derivatives traded on an exchange. Other jurisdictions have separate commodity futures legislation. In Québec, the legislation specifically provides that certain requirements apply to specified derivative contracts.

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[11] See National Instrument 44-101 *Short Form Prospectus Distributions* and National Instrument 44-102 *Shelf Distributions*.

[12] See OSC Rule 41-501 *General Prospectus Requirements*.

2. The Regulation of Exchange Traded Derivatives

The USL should adopt the concept of "exchange contract" to regulate derivative securities that are traded on an exchange. The "exchange contract" concept should not apply in jurisdictions which regulate commodity futures contracts and commodity futures options under a separate enactment.

The USL would adopt the Alberta and BC concept of "exchange contract". Under the USL, exchange contracts would be excluded from the definition of "security" and would be subject to the following requirements:

1. The registration requirement; and

2. The requirement that a prospective purchaser be given a risk disclosure statement prior to opening an account for trading in exchange contracts or any other disclosure that an SRA may require.

However, the USL would contain a carve out for jurisdictions with separate commodity futures legislation thereby preserving the *status quo* in Ontario and Manitoba.

3. Registration Exemptions for Exchange Contracts

The USL should provide certain registration exemptions for trades in exchange contracts.

Alberta and BC have comparable exemptions from the registration requirement for the following trades in exchange contracts that would be incorporated into the USL:

1. A trade made through a registered dealer;
2. A trade resulting from an unsolicited order placed with an individual who is not resident in the jurisdiction and carries on business outside the jurisdiction; and
3. A trade designated by regulation.

4. The Regulation of OTC Derivatives

The USL should exempt trades in over-the-counter derivatives from the registration and prospectus requirements where the transaction occurs between qualified parties.

In Alberta and BC, over-the-counter derivatives ("OTC derivatives") fall within the definition of "security". Both jurisdictions have exemptions from the registration and prospectus requirements for trades in OTC derivatives between "qualified parties". "Qualified parties" are generally institutional investors that use derivatives for commercial hedging purposes. In Ontario, Manitoba and Québec, certain OTC derivatives are governed by securities legislation and there are specific exemptions for these products. The USL would follow the Alberta and BC approach[13] and exempt trades in OTC derivatives between qualified parties from the registration and prospectus requirements.

VII. REGISTRATION AND PROSPECTUS EXEMPTIONS

1. Introduction

Securities laws provide exemptions from the prospectus and registration requirements where the goals of securities regulation can be accomplished without compliance with these requirements. There are a number of exemptions that are substantively similar in most jurisdictions which would be included in the USL. They are listed in **Appendix C.** Some jurisdictions have exemptions which are local in nature and scope and would be adopted as Local Rules. There are also a number of exemptions that would not be retained in the USL exempt market regime because they have been replaced by other exemptions or no longer reflect the needs of the exempt market. Finally, we have made certain recommendations which would substantially change the exemptions regime in some jurisdictions. They are discussed below.

2. Capital Raising Exemptions

Within the USL Project, the harmonization of capital raising exemptions is a top priority. The USL would reconcile Alberta and BC's capital raising exemptions contained in Multilateral Instrument 45-103 *Capital Raising Exemptions* ("MI 45-103")[14] with OSC Rule 45-501 *Exempt Distributions* ("OSC Rule 45-501")[15] and the regime in Québec.[16]

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[13] See Alberta Blanket Order 91-502 *Over the Counter Derivatives* and BC Instrument 91-501 *Over-the-Counter Derivatives*.

[14] MI 45-103 was implemented in Alberta on March 30, 2002 and in BC in April 3, 2002. There is a multi-jurisdictional initiative underway to expand the application of MI 45-103 to Saskatchewan, Manitoba, Nova Scotia, New Brunswick, Prince Edward Island, Newfoundland, Nunavut, the Northwest Territories and the Yukon Territory. A revised MI 45-103 that includes these jurisdictions has been published for comment. The comment period closed on November 19, 2002.

[15] OSC Rule 45-501 was implemented on November 30, 2001.

[16] Québec has published a concept paper called "Le financement de la PME au Québec", which discusses small business financing in Québec, for public consultation. Québec will then determine which exemptions are to be implemented.

(a) The Prescribed Minimum Amount Exemption

Most jurisdictions exempt trades in securities where the purchase price of the security is not less than a prescribed minimum amount. Ontario removed this exemption with the adoption of OSC Rule 45-501. Alberta and BC have committed to maintain this exemption for one year from the implementation of MI 45-103 but to review it at that time to determine whether it remains necessary. Québec intends to maintain its prescribed minimum amount exemption pending a decision on whether it would adopt the accredited investor exemption.

The prescribed minimum amount exemption has drawbacks, some of which are:

1. The ability to make an investment of the prescribed minimum amount does not necessarily indicate that an investor is not in need of protection; and

2. Prescribing a minimum amount may cause an investor to invest more than he or she otherwise would in order to qualify for the offering.

In addition, the prescribed minimum amount exemption may prove to be unnecessary given the availability of the accredited investor exemption and the offering memorandum (“OM”) exemption, which are discussed below.

(b) The Accredited Investor Exemption

Ontario, Alberta and BC have an exemption for “accredited investors”. Generally, an “accredited investor” is an institutional investor or a high net worth individual. The inclusion of this exemption in the USL would represent a substantial change for jurisdictions where it is not currently available. However, most jurisdictions are likely to adopt the accredited investor exemption as part of an initiative to expand MI 45-103, and therefore the policy debate necessary to implement this change is well underway.

(c) The Private Issuer Exemption

Most jurisdictions exempt the securities of a “private issuer” from the registration and prospectus requirements. A “private issuer” is generally defined as an issuer that has no more than 50 beneficial security holders and does not allow its securities to be held by members of the public.

Uncertainty about who is and is not a member of “the public” has deterred issuers from relying on the statutory private issuer exemption. MI 45-103 modified the statutory private issuer exemption in Alberta and BC to provide additional

guidance with respect to who is not a member of the public. It provides that the following persons may hold the securities of a private company:

1. Directors, officers, employees or control persons of an issuer;
2. Spouses, parents, grandparents, siblings or children of directors, senior officers or control persons of an issuer;
3. Close personal friends of directors, senior officers or control persons of an issuer;
4. Close business associates of directors, senior officers or control persons of an issuer;
5. Spouses, parents, grandparents, siblings or children of selling security holders;
6. Current holders of non-debt securities of an issuer;
7. Accredited investors;
8. Entities wholly owned by any combination of the entities listed in 1 through 7 above; and
9. Persons who are not members of the public.

With the implementation of OSC Rule 45-501, Ontario replaced its private issuer exemption with the closely-held issuer exemption. It permits an issuer to raise up to $3,000,000 as long as it has no more than 35 beneficial security holders, excluding accredited investors and employees.

The USL would reconcile these two approaches to the registration and prospectus exemption for issuers that have not issued securities to the public.

(d) The Family, Close Friends and Business Associates Exemption

MI 45-103 exempts trades to family members, close personal friends and close business associates of an issuer's directors, senior officers and control persons. The "accredited investor" exemption in OSC Rule 45-501 is available to family members of an issuer's directors, officers or promoters. However, there is no exemption in Ontario securities laws for the close friends or close business associates of the principals of an issuer.

The rationale for the close friends and business associates exemption in MI 45-103 is common to many exemptions that would be included in the USL: the relationship between the principals of an issuer and the prospective purchasers of securities allows the presumption that the prospective purchasers would be provided with the information necessary to make an investment decision.

(e) The Offering Memorandum Exemption

The OM exemption in MI 45-103 allows an issuer to issue securities under an offering memorandum to an unlimited number of purchasers without involving a registrant. In Alberta, a registrant must be involved for investments of over $10,000 unless the investor meets certain criteria intended to gauge his or her ability to withstand loss.

The OM exemption is currently in force in Alberta and BC only, but all jurisdictions except Ontario and Québec are participating in an initiative to implement MI 45-103. The OM exemption is still under consideration in Ontario and Québec. If Ontario and Québec choose to adopt the OM exemption under the USL, it would be included in a Uniform Exemptions Rule. Otherwise, it would be adopted in all jurisdictions of Canada except Ontario and Québec.

3. Certain Common Exemptions

(a) The Exemption for Mortgages

The USL should exempt trades in mortgages. If the mortgage is syndicated or on property that is not real property, the purchaser should be an institutional investor.

Most jurisdictions have an exemption for trades in mortgages or other encumbrances on property traded by a person registered or exempt from registration under provincial or territorial mortgage brokers legislation. The exemption does not apply to trades in mortgages or encumbrances on property that are contained in or secured by a bond. In BC,[17] this exemption is only available to purchasers who are institutional investors where the mortgage is syndicated or on property that is not real property. This restriction was adopted to prevent use of this exemption to sell risky investments to unsophisticated investors. The USL provision would contain this restriction.

(b) The Exemption for Short-Term Debt

The USL should exempt trades to individuals in short-term debt subject to conditions.

Most jurisdictions exempt trades in short-term debt. Where the purchaser is an individual, the minimum investment must be $50,000. In BC, this exemption is

[17] See ss. 3 and 4 of BC Rule 45-501.

not available for trades to individuals. This restriction prevents an issuer from circumventing the prescribed minimum amount exemption or lowering the minimum by issuing short-term debt rather than long-term debt or equity. It would be preferable to remove the prescribed minimum amount from this exemption and replace it with two conditions:

1. The debt is not convertible or exchangeable into or accompanied by a right to purchase another security other than the short-term debt in question; and

2. The short-term debt receives an acceptable rating by a recognized rating service.

The rating requirement would not apply to an offering restricted to institutional investors.

(c) The Exemption for Trades in Securities of an Issuer to its Employees, Officers and Directors

The USL should incorporate the final rule being developed by the CSA for trades by an issuer to employees, consultants, senior officers and directors.

Most jurisdictions have exemptions for trades by an issuer to its employees, senior officers and directors. Some jurisdictions also exempt trades to consultants and investor relations persons. The CSA have proposed to harmonize these exemptions across Canada.[18] The harmonized rule should be in place in time for incorporation into the USL.

(d) The Exemption for Distributions Outside the Local Jurisdiction

The USL should exempt a distribution made to purchasers outside Canada so long as specified steps are taken to ensure that the securities do not come to rest in Canada.

A person who trades a security must determine if the securities laws of a particular Canadian jurisdiction apply to the trade. Even if none of the initial purchasers of securities are located in that jurisdiction, there may be a distribution and therefore the securities laws of that jurisdiction may apply to the distribution.

This is a complex area of securities law which gives rise to different issues depending upon the location of the issuer and the purchasers.

[18] See CSA Notice and Request Comment Proposed Multilateral Instrument 45-105 *Trades to Employees, Senior Officers, Directors, and Consultants* (November 2, 2002).

(i) Private Placements to Purchasers in Other Canadian Jurisdictions

With the implementation of harmonized exemptions and resale rules, no special rules are needed for distributions or resales of securities privately placed within Canada. Since the resale rules would be the same no matter where in Canada the issuer and purchasers are located, a purchaser under a private placement need only comply with the hold period and other resale rules of his or her home jurisdiction to be in compliance throughout Canada.

The only exception to the harmonized resale rules would be in Manitoba, which intends to maintain its rules allowing purchasers of exempt securities of a non-reporting issuer to resell them through a Manitoba registrant after a hold period. However, Manitoba would require that the securities be legended to indicate that they cannot be traded outside Manitoba.

(ii) Private Placements by Canadian Issuers to Purchasers Outside Canada

Canadian issuers should be able to distribute securities to purchasers outside Canada without having to comply with Canadian registration and prospectus requirements. However, these distributions raise two regulatory concerns:

1. The securities might flow back to purchasers in Canada resulting in an indirect distribution to Canadian purchasers; and

2. A Canadian issuer might sell the securities in contravention of the laws in the purchasers' jurisdiction, potentially bringing Canada's regulatory system into disrepute.

To address these concerns, the USL would exempt such trades if the following conditions were satisfied:

1. The purchasers of the securities are outside Canada;
2. If an underwriter is participating in the distribution, the agreement between the issuer and the underwriter prohibits the sale of the securities to any person in Canada;
3. There are no directed selling efforts in Canada (i.e., actions taken for the purpose of, or reasonably expected to have the effect of, preparing the market or creating a demand for the securities);
4. Compliance with a restricted period during which the securities could not be resold to a person in Canada. The restricted period for equity would be

four months which must be shown in a legend on the certificate. The restricted period for debt would be 40 days during which the debt securities must be represented by a temporary global certificate;

5. The offering complies with the laws of the jurisdiction in which it is made; and
6. Disclosure is made that the distribution is exempted from the laws of the relevant Canadian jurisdiction.

(iii) Private Placements by Foreign Issuers to Purchasers Outside Canada

A private placement by a foreign issuer to a purchaser outside Canada would not be directly subject to Canadian law, but if the securities were re-sold into Canada or through a Canadian market, the private placement could be considered an indirect distribution. If the issuer's securities were listed on a Canadian exchange or for some other reason the issuer could reasonably expect that its securities might be resold into Canada, Canadian regulators would generally hold the issuer responsible for any indirect distribution.

The USL would provide that a foreign issuer listed in Canada or having significant Canadian market interest could protect itself from being found responsible for an indirect distribution by taking the following precautions:

1. Imposing offering restrictions. Specifically, if an underwriter participates in the distribution, the agreement between the issuer and the underwriter must prohibit the sale of the securities to any person in Canada;
2. Stating in any offering document that the securities are not qualified for sale in Canada;
3. Imposing restricted periods equivalent to the hold periods under Canadian securities laws and legending the certificates; and
4. Ensuring no directed selling efforts occur in Canada (i.e., actions taken for the purpose of, or reasonably expected to have the effect of, preparing the market or creating a demand for the securities).

Alternatively, if an issuer's home jurisdiction imposed equivalent or longer restricted periods than those required under Canadian securities law, compliance with the home jurisdiction's requirements would likely be sufficient to address potential flow back of the securities into Canada.

(iv) Distributions Qualified by a Prospectus

Where an issuer is distributing securities under a prospectus offering to purchasers outside the local jurisdiction, the USL would adopt the approach in proposed Multilateral Instrument 72-101 *Distributions Outside the Local Jurisdiction*. It provides for an exemption from the prospectus requirement where the following conditions are satisfied:

1. A public offering document is filed in a jurisdiction of Canada, the United States of America or the United Kingdom in connection with the distribution;
2. The purchasers of the securities are outside the local jurisdiction;
3. If an underwriter is participating in the distribution, the agreement between the issuer and the underwriter prohibits the sale of the securities to any person in the local jurisdiction; and
4. No actions are taken for the purpose of, or that could reasonably be expected to have the effect of, preparing the market in the local jurisdiction, or creating a demand in the local jurisdiction, for the securities being distributed.

(e) The Exemption for Dividend Reinvestment Programs

The USL should exempt trades by an issuer or an administrator in securities of the issuer under a dividend or interest reinvestment plan. The cash payment option should be restricted to listed issuers or reporting issuers not in default under securities laws.

Most jurisdictions have an exemption that allows existing security holders of an issuer who receive a distribution of earnings from the issuer to reinvest that amount into additional securities of the issuer. In most jurisdictions, a security holder may increase the amount of securities purchased by contributing cash ("cash payment option") provided that no more than 2% of the issuer's float is issued in this manner. In Ontario, use of the cash payment option is not permitted by issuers who are not non-defaulting reporting issuers and who are not listed issuers on certain exchanges. These restrictions prevent unlisted issuers or issuers who are not reporting issuers from indirectly distributing securities to the public. The USL provision would include these restrictions.

(f) The Exemption for Trades in Securities of an Investment Club

The USL should exempt trades in securities of investment clubs.

Most jurisdictions currently have an exemption for trades in securities of a

"private mutual fund". The definition of "private mutual fund" includes both investment clubs and loan and trust pools. Loan and trust pools are mutual funds that are administered by a trust company but have no promoter other than the trust company. However, the "private mutual fund" definition does not apply to pooled funds managed by a portfolio manager. The regulatory issues are the same regardless of whether the pooled fund is managed by a loan and trust company or a portfolio manager. The USL would therefore eliminate this discrepancy by replacing the exemption for a "private mutual fund" with an exemption for an "investment club", which would be defined as an issuer:

1. Whose securities are held by not more than 50 persons;
2. That has never sought to borrow money from the public;
3. That does not pay or give remuneration for investment, management or administration advice; and
4. All of whose members are required, for the purposes of financing its operations, to make contributions in proportion to the securities issued by it that each member holds.

(g) The Exemption for Trades in Securities of Mutual Funds and Non-Redeemable Investment Funds

The USL should exempt trades in securities of a mutual fund or non-redeemable investment fund if the purchaser would hold a prescribed minimum amount of securities at the completion of the trade. Existing holdings should be taken into account in determining whether the purchaser holds the prescribed minimum amount of securities.

Most jurisdictions have an exemption for trades in a security of a mutual fund or non-redeemable investment fund if:

1. The purchaser acquires the securities as principal; and

2. Either the net aggregate acquisition cost to the purchaser is at least a prescribed minimum amount or the purchaser would, upon completion of the transaction, hold securities with an aggregate acquisition cost or aggregate net asset value of not less than a prescribed minimum amount.

In Ontario, the exemption is only available to a fund that is not a reporting issuer. The Ontario exemption also requires the mutual fund to be managed by a portfolio manager or a trust corporation registered under applicable local legislation. Ontario may retain these additional requirements.[19]

[19] For further background on the Ontario restrictions, see s. 2.4 of the Companion Policy to OSC Rule 45-501.

4. Other Exemptions With National Scope

(a) The Exemption for Securities Issued to Satisfy a Debt

The USL should exempt trades by an issuer in its own securities to satisfy a genuine debt subject to conditions.

Currently, BC exempts trades in securities by persons to satisfy genuine debts. However, it is often possible to effect such an exempt trade in substance by using other available exemptions. Therefore, it seems preferable to develop an exemption that directly allows trades to satisfy debts provided appropriate requirements and limits are present to ensure adequate investor protection.

(b) The Exemption for Security Issuers

The USL should exempt issuances by an issuer of its own securities.

The security issuer registration category allows an issuer to act as a registrant for issuances of its own securities exclusively for its own account. Rather than requiring registration and all its attendant obligations, the USL would replace this registration category with an exemption for issuers distributing their own securities. The exemption would be subject to appropriate conditions.

VIII. CONTINUOUS DISCLOSURE REQUIREMENTS

1. Introduction

Securities laws require issuers that fall within the definition of "reporting issuer" to make two types of disclosure on a continuing basis:

1. Periodic disclosure of financial and business information; and
2. Timely disclosure of material changes in their affairs.

These requirements attempt to create an even playing field where all investors have access to the same information.

2. Becoming a Reporting Issuer

The USL should harmonize the triggers for reporting issuer status.

Current definitions of "reporting issuer" contained in securities legislation are similar. However, there are two specific differences that would be addressed in the context of the USL.

First, in some jurisdictions, an issuer who lists its securities on an exchange that carries on business in a particular jurisdiction becomes a reporting issuer in that jurisdiction. However, in other jurisdictions, the listing must be on a recognized exchange for an issuer to become a reporting issuer. The USL would harmonize this discrepancy by providing that an exchange must be carrying on business within a jurisdiction and must be recognized or designated for reporting issuer purposes in that jurisdiction before a listing on that exchange results in reporting issuer status. Each jurisdiction would have the ability to exempt issuers who have a *de minimus* number or percentage of security holders in that jurisdiction. The threshold would not be harmonized since what is considered *de minimus* would vary with the size of the jurisdiction.

Second, only the Ontario *Securities Act* contains a provision allowing staff to apply to the SRA to deem an issuer to be a reporting issuer. The USL would include such a provision.

Therefore, under the USL, an issuer would become a reporting issuer in a jurisdiction if it:

1. Filed and obtained a receipt for a prospectus in that jurisdiction;
2. Became listed on an exchange that carries on business in and is recognized or designated in that jurisdiction, subject to a *de minimus* test for the percentage of shareholders within the jurisdiction;
3. Completed a business combination where one of the parties to the transaction is a reporting issuer in that jurisdiction; and
4. Was deemed to be a reporting issuer in that jurisdiction whether by order (on application by an issuer or at the request of an SRA) or rule.[20]

When an SRA deems an issuer to be a reporting issuer in the jurisdiction, it would have the ability to recognize the issuer's reporting issuer history in another jurisdiction.

[20] In BC and Québec, an issuer can become a reporting issuer by filing a securities exchange take-over bid circular, provided, in BC that the take-over bid is completed. A similar provision was removed from the Alberta and Ontario Securities Acts in 1999 legislative amendments due to concerns over potential abuse. The jurisdictions that have retained this method of acquiring reporting issuer status may continue it by Local Rule or local order.

3. Ceasing to be a Reporting Issuer

The USL should allow a reporting issuer with very few security holders in a particular jurisdiction to voluntarily surrender its reporting issuer status in that jurisdiction without making application to the relevant SRA.

Currently, most jurisdictions provide that a reporting issuer may cease to be a reporting issuer in a particular jurisdiction in one of two ways:

1. An SRA may revoke its reporting issuer status; or

2. A reporting issuer may apply for an order from an SRA deeming it to cease to be a reporting issuer.

These methods of ceasing to be a reporting issuer would continue under the USL. In addition, the USL would allow a reporting issuer to voluntarily surrender its reporting issuer status without making application to an SRA. The USL provision would be modeled after BC Instrument 11-502 *Voluntary Surrender of Reporting Issuer Status* and Alberta Policy 12-601 *Applications to the ASC* and would allow voluntary surrender if the following conditions were satisfied:

1. The reporting issuer has no more than 25 security holders, including holders of debt securities, in the jurisdiction in which it wants to cease to be a reporting issuer and no more than 50 security holders, including holders of debt securities, in Canada;
2. The reporting issuer's securities are not traded on a marketplace;
3. The reporting issuer is not in default of any of its obligations as a reporting issuer; and
4. The reporting issuer notifies the market and regulators that it meets the above conditions and would cease to be a reporting issuer no earlier than 10 days from the date of the notice.

4. Continuous Disclosure Obligations

The USL should adopt the continuous disclosure rules being developed by the CSA for investment funds and other reporting issuers.

The CSA has published proposed national instruments that would harmonize and streamline continuous disclosure obligations and consolidate the various local requirements for both investment funds and other reporting issuers. We expect these instruments to be implemented prior to the completion of the USL Project.

Proposed National Instrument 51-102 *Continuous Disclosure Obligations* ("Proposed NI 51-102") would apply to reporting issuers that are not investment funds. In addition to harmonizing and streamlining continuous disclosure requirements, Proposed NI 51-102 would enhance the consistency of disclosure in the primary and secondary markets and facilitate future changes to the prospectus regime. Although it largely consolidates local laws, there are some significant enhancements of disclosure obligations.[21] For example, two significant changes are:

1. Reporting issuers would be under shorter filing deadlines for annual financial statements. Some reporting issuers would also be under shorter filing deadlines for interim financial statements; and

2. Financial statement information on significant business acquisitions would be required within 75 days after completion of the acquisition. Currently, this information need only be disclosed in a prospectus.

Proposed NI 51-102 also provides a harmonized regime for the regulation of proxies and proxy solicitation which would replace the proxy rules contained in securities laws.

Proposed National Instrument 81-106 *Investment Fund Disclosure* ("Proposed NI 81-106")[22] would apply to all types of investment funds including mutual funds, labour sponsored investment funds, exchange traded funds, split share corporations, closed end funds and scholarship plans.[23] Proposed NI 81-106 would require investment funds to make annual and quarterly management reports of fund performance, and would revise and update the requirements relating to annual and interim financial statements. In addition, fund holders would be able to consent to not receiving any or all of an investment fund's management reports of fund performance and financial statements.

The USL should authorize SRAs to conduct continuous disclosure reviews.

The *Budget Measures Act* would authorize the OSC or any of its members, employees or agents to conduct a review of the disclosures that have been made or that ought to have been made by a reporting issuer or mutual fund in Ontario. This provision is critical to an enhanced continuous disclosure regime because it

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[21] For further details, see CSA Notice and Request for Comment relating to Proposed NI 51-102 (June 21, 2002).

[22] For further details, see CSA Notice and Request for Comment relating to Proposed NI 81-106 (September 20, 2002).

[23] BC proposes not to impose some parts of Proposed NI 81-106 on labour sponsored funds and non-reporting mutual funds.

would give SRAs jurisdiction to require an issuer to respond to identified deficiencies. Therefore, it would be included in the USL.

Under the USL, a reporting issuer should be subject to statutory civil liability for its continuous disclosure record in any Canadian jurisdiction.

Under the USL, the statutory civil liability of a reporting issuer relating to continuous disclosure obligations would apply to any issuer that is a reporting issuer in any jurisdiction of Canada.

IX. INSIDER REPORTING OBLIGATIONS

1. Introduction

"Insiders" of a reporting issuer must report their trades in voting securities of that issuer. The purposes of insider reporting obligations are to:

1. Provide the market with information about trades by those who have the best access to information about a reporting issuer;
2. Instill greater investor confidence in the market; and
3. Deter insiders from trading on undisclosed material information.

This area is largely harmonized. All jurisdictions require insiders to file reports within 10 days of becoming an insider of a reporting issuer (assuming that the insider holds securities) and within 10 days after a change in their holdings. National Instrument 55-102 *System for Electronic Disclosure by Insiders* harmonized the requirements for the form of insider filings across Canada. Until SEDI is operational, insider reports are to be filed in paper format. Once SEDI is operational, insider reports would be filed on-line.

2. Definition of an Insider

A reporting issuer who holds its own securities should not be deemed to be an insider of itself for insider reporting purposes.

Although there are minor differences among jurisdictions, insiders of a reporting issuer generally include:

1. Directors and senior officers of the reporting issuer and its subsidiaries;
2. Directors and officers of a reporting issuer that itself is an insider of the reporting issuer;

3. Persons with an interest of more than 10% in the reporting issuer's voting securities;[24] and
4. A reporting issuer itself so long as it holds its own securities.

Except in Manitoba, a reporting issuer who holds its own securities is an insider of itself unless it intends to cancel them. However, generally, an issuer who acquires its own securities does so with the intention of canceling them rather than holding them. Therefore, the USL would not impose insider status on a reporting issuer that holds its own securities.

The USL should adopt a function-based approach for determining who the senior officers of a reporting issuer are for the purposes of insider reporting.

In most provinces, "senior officer" means a person holding one of a number of listed offices, a person performing the functions of those offices and an issuer's five highest paid employees. The Québec *Securities Act* defines insider solely on the basis of function.

The USL would take a function-based approach to determining who the insiders of a reporting issuer are. Under the current title-based approach, people who do not perform an executive function or have regular access to inside information may be required to file insider reports. The USL would contain a definition of "executive officer" which would include:

1. An individual performing the functions of the chief executive officer, chief financial officer or chief operating officer; or

2. An individual working for an issuer, or any of its affiliates, in an executive capacity whose usual responsibilities expose the individual to non-public material information about the issuer.

3. Disclosure Triggers

(a) Deemed Changes in Beneficial Ownership

The USL should require insiders to report the acquisition or disposition of any right or obligation to purchase or sell securities of the reporting issuer.

In most provinces, the acquisition or disposition of a put, call or other option by an insider of a reporting issuer is deemed to be a change in the beneficial ownership

[24] Québec determines insider status on a per class basis (an insider is someone who holds 10% of any class). Québec may continue to determine insider status in this way.

of the underlying security of the reporting issuer. The insider must report this deemed change in beneficial ownership. The *BC Securities Act* takes a more streamlined approach by requiring an insider to report an acquisition or disposition of any right or obligation to purchase or sell securities of a reporting issuer. The USL would adopt BC's approach because it is broad enough to capture many types of derivative securities and extracts the necessary information.

(b) Transfer of Registered Ownership by an Insider

The USL should not require a transferee of registered ownership of securities beneficially held by an insider to report the transfer.

The Alberta, Ontario and Québec statutes all include provisions that require the registered owner of securities beneficially held by an insider to report the transfer from the insider to the registered owner to the relevant SRA if the registered owner knows that the insider did not report the transfer. These reporting requirements do not apply if the transfer is to give collateral for a genuine debt.

This provision would not be included in the USL. It creates an obligation on a registered owner to find out whether the beneficial owner is an insider and whether the insider filed the required report. The obligation to report such a transfer properly belongs to the insider only.

(c) Equity Monetization Transactions

The USL should adopt the rules relating to equity monetization transactions being developed by the CSA.

Equity monetization transactions unlock the cash potential of (or realize the economic benefit of) securities[25] thereby allowing the owner of the securities to redirect the liquidity to other uses. These transactions remove the owner's exposure to risk associated with the securities by transferring it to others. Where the owner is an insider, his or her disclosure of securities holdings is misleading. The USL would incorporate the CSA initiatives underway to ensure that equity monetization transactions trigger insider reporting obligations.

X. THE EARLY WARNING SYSTEM

The USL should contain an exemption from the early warning requirements for offerors that are acquiring securities under a formal bid.

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[25] The securities may be illiquid, immobilized or otherwise inaccessible or the securities may be tradable but the owner may not want to dispose of them.

Securities laws require security holders to give notice of changes in their holdings that may affect control of an issuer. These disclosure requirements, known as the "early warning system", provide that:

1. "Offerors"[26] that reach a certain percentage of security holdings in a reporting issuer (10% or more) must disclose their holdings immediately by press release and again two days later by filing a report; and

2. Offerors must make the same disclosure upon acquiring an additional 2% or more of the same class of securities or if there is a change in another material fact in a previously filed report.

Securities acts also impose a trading moratorium on an offeror who holds less than 20% of an issuer's securities that begins on the day an event requiring a report occurs and lasts until one day after the report is filed.

National Instrument 62-103 *The Early Warning System and Related Take-Over Bid and Insider Reporting Issues* provides an alternative monthly reporting system for institutional investors that do not intend to make a formal take-over bid.

In all jurisdictions except Ontario, offerors acquiring securities under a formal bid are exempt from the early warning requirements. If there is a formal bid, the offeror would be required to disclose any acquisition of securities under the take-over bid rules and therefore it is redundant to require them to do so under the early warning system. The USL would include an exemption from the early warning requirements for offerors acquiring securities under a formal bid.

XI. CONTROL PERSONS

1. Introduction

Multilateral Instrument 45-102 *Resale of Securities* ("MI 45-102"), which applies in all jurisdictions but Québec, harmonized rules relating to "control distributions".[27] A control distribution is a trade in a previously issued security from the holdings of a control person.

Control persons are required to give advance notice of their intention to sell for two principal reasons:

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[26] An offeror is defined as anyone who acquires a security, whether or not in the course of a take-over bid.

[27] The CVMQ has issued a blanket order that permits a four-month hold for the resale of securities privately placed provided that the issuer is a reporting issuer in Québec.

1. To ensure the market receives advance warning of a trade potentially large enough to affect control of an issuer or to move the price of the issuer's securities; and

2. To help SRAs and SROs monitor the trading activity of major security holders.

Control persons must also file an insider report within three days of completing any trade under the prospectus exemption contained in MI 45-102, instead of the normal 10 days.

2. Definition of Control Person

The USL should contain a definition of "control person".

Currently, "control person" is specifically defined in Alberta and BC. In Ontario, Manitoba and Québec, the control person concept is buried in the definition of "distribution".[28] Generally, a "control person" is a person, company or group of persons or companies having sufficient control over voting rights of an issuer to materially affect control of that issuer. In Québec, the concept of control person is based on holdings of a class or series of securities rather than on outstanding voting securities of an issuer. Except in Manitoba, a holding of 20% of the voting securities of an issuer is deemed, in the absence of contrary evidence, to be sufficient to materially affect control of that issuer.[29]

The USL definition of "control person" would take the form of the current Alberta, BC and Ontario provisions and provide that the following are control persons:

1. Any person or company that holds or is one of a combination of persons or companies that holds a sufficient number of any of the securities of an issuer so as to affect materially the control of that issuer; and

2. Any person or company that holds or is one of a combination of persons or companies that holds more than 20% of the outstanding voting securities of an issuer except where there is evidence that the holding of those securities does not affect materially the control of that issuer.

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[28] In Manitoba, the control person concept is contained in the definition of "primary distribution to the public."

[29] Québec adopted the same concept of control distribution in the recently passed but unproclaimed amendments to the Québec *Securities Act.* The threshold will be determined by regulation.

3. Control Distributions

(a) Notice Requirements

The USL should require control persons to file a notice of intention to trade in securities held by them within the timelines currently mandated by MI 45-102.

As for any distribution, a person making a control distribution must either file a prospectus or rely on a prospectus exemption. MI 45-102 provides a prospectus exemption for a control distribution if the selling control person files a notice of its intention to sell securities at least seven and not more than 14 days before the first trade of securities contemplated by the notice. If the first trade is not made by the 14th day, the control person must file a new notice. Once the first trade is made, the control person can renew the notice indefinitely. The requirement to file the notice ceases once the control person has sold all of the securities or has filed a notice stating that the securities are no longer for sale.

In Québec, policy statements provide that a notice and press release are required by any person holding more than 10% of the securities subject to resale at least seven days before the distribution when the number of securities subject to resale represents at least 5% of the total number of securities.

Under the USL, a control person would be required to comply with the requirements contained in MI 45-102. If Québec adopts MI 45-102, the notice and timing requirements would be harmonized.

(b) Public vs. Private Transactions

The USL should require a control person of a reporting issuer who distributes securities from his or her control block under an exemption from the registration and prospectus requirements to comply with the control person notice and insider reporting requirements.

Most jurisdictions do not require a control person who trades in securities from his or her control block in reliance on an exemption from the prospectus and registration requirements to comply with the advance notice and insider reporting requirements. The *BC Securities Act* requires a control person who relies on an exemption to effect a control distribution to give advance notice of the trade and file an insider report within three days of the trade.[30] A potential change of control that occurs in an exempt market transaction is just as relevant to the market as one

[30] See ss. 136 and 137 of the BC Rules. Note that the notice requirement only applies to distributions made pursuant to the exemptions listed in s. 136.

that would be effected through the facilities of an exchange. The USL would therefore provide that a control person who makes an exempt distribution must comply with the notice and accelerated insider reporting requirements.

(c) Filing Requirements

The USL should require control persons to file notices electronically.

The USL would require control persons to file notices electronically on SEDAR rather than the current method of filing such notices in paper format with an SRA. This change would make the information much more accessible. Control persons would also be required to file notices with the relevant exchange.

XII. INVESTMENT FUNDS

1. Introduction

The regulation of mutual funds is already substantially harmonized. The CSA have created harmony through a number of national instruments which have been adopted by each Canadian jurisdiction:

1. National Instrument 81-102 *Mutual Funds*;
2. National Instrument 81-101 *Mutual Fund Prospectus Disclosure*;
3. National Instrument 81-104 *Commodity Pools*; and
4. National Instrument 81-105 *Mutual Fund Sales Practices*.

Further, CSA policy initiatives are currently underway that would impact the USL Project. They include:

1. Mutual fund governance and a proposed framework for regulating mutual funds and their managers;[31]
2. Updating continuous disclosure for all investment funds;[32]
3. A Joint Forum of Financial Market Regulators review of point of sale disclosure documents for mutual funds and segregated funds;
4. Developing a regulatory response for alternative investment fund products, including hedge funds; and
5. A revised regulatory regime for fund of funds investments.[33]

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[31] See CSA Concept Proposal 81-402 "Striking a New Balance: A Framework for Regulating Mutual Funds and Their Managers" (March 1, 2002).

[32] See Proposed NI 81-106.

[33] See proposed amendments to NI 81-102 *Mutual Funds* relating to clone funds.

2. Basic Definitions

The USL should contain definitions of "non-redeemable investment fund" and "investment fund".

Most securities acts contain a substantially similar definition of the term "mutual fund".[34] However, only Ontario defines "non-redeemable investment fund".[35] The USL would contain a harmonized definition of "mutual fund", a definition of "non-redeemable investment fund" and a definition of the term "investment fund"[36] which would be a blanket term for all types of regulated funds.

3. Loan and Trust Pools

The USL should treat loan and trust pools in the same manner as pooled funds of portfolio managers.

Currently, loan and trust pools are considered private mutual funds and exempted from the registration and prospectus requirements.[37] As noted above, the USL would limit the definition of "private mutual fund" to investment clubs only. This would ensure equal treatment of loan and trust pools and pooled funds offered by portfolio managers since they are equivalent products.

4. Continuous Disclosure Obligations

The USL should include the continuous disclosure obligations contained in Proposed NI 81-106.

As noted above, Proposed NI 81-106 would harmonize continuous disclosure requirements for investment funds and would be included in the USL.[38]

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[34] Québec legislation differentiates between unincorporated mutual funds and incorporated funds and mandates the redemption of units on request rather than within a specified period after demand as do the laws of other jurisdictions.

[35] See OSC Rule 14-501 *Definitions*.

[36] The *Budget Measures Act* defines an investment fund to mean a mutual fund or a non-redeemable investment fund.

[37] A definition of "private mutual fund" does not exist in Québec.

[38] BC proposes not to impose some parts of proposed NI 81-106 on labour sponsored funds and non-reporting mutual funds.

5. Self-Dealing and Conflict of Interest Provisions

The USL should include current securities laws related to mutual fund self-dealing and conflicts of interest.

Most jurisdictions have largely similar provisions governing the conduct of mutual funds and their managers aimed at reinforcing the responsibilities and duties that mutual fund managers have at law to act in the best interests of their mutual funds.[39] Additional safeguards are included to preserve mutual fund investors' interests against self-dealing transactions affecting the fund's portfolio. The regime relies on a number of restrictions and prohibitions against trades with, through or in the securities of defined related parties. The CSA may replace this legislative scheme as part of their work to develop a governance regime for mutual funds. In the interim, it is necessary to retain the scheme. These provisions would be harmonized among jurisdictions and amended, where appropriate, to resolve the technical interpretive issues noted in a 1995 report of staff of the OSC.[40]

XIII. TAKE-OVER AND ISSUER BIDS

1. Introduction

Take-over and issuer bid rules ensure that all offeree security holders have access to adequate information about an offer and benefit equally from it. Currently, eight jurisdictions regulate take-over and issuer bids.[41] The relevant provisions are essentially harmonized except in Québec where harmonized legislation has been adopted but is not yet in force. The USL would introduce take-over and issuer bid laws in the jurisdictions that do not currently regulate these transactions and would eliminate the differences that currently exist between Québec's provisions and those of the other jurisdictions. Since the CVMQ routinely issues exemption orders on a case-by-case basis that result in *de facto* uniformity, the proposed changes to Québec's take-over bid regime do not require policy debate.

As noted above, the USL approach of introducing a "platform act" with detailed requirements contained in rules would accommodate future changes to take-over and issuer bid provisions. In general terms, the provisions defining a take-over bid and providing for its regulatory framework would be contained in the Uniform Act but the provisions relating to bid mechanics would be moved to a Uniform Rule.

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[39] In Québec, standard of care and conflicts of interest provisions apply to registrants only. Managers are not registrants in Québec although newly enacted s. 333.1(16) of the Québec *Securities Act* gives the CVMQ rulemaking power to regulate managers.

[40] See "Regulating Conflicts of Interest in the Management of Mutual Funds: The Current Regime" (1995), 18 OSCB 1167.

[41] New Brunswick, Prince Edward Island, the Northwest Territories, the Yukon Territory and Nunavut do not.

2. Direct and Indirect Offers

The USL take-over and issuer bid provisions should apply to both direct and indirect offers.

The USL would provide that the take-over and issuer bid requirements apply to both direct and indirect offers so as to prevent an offeror from avoiding regulation by acquiring control of an entity that controls the ultimate target.

3. Exempt Bids

The USL should modify the take-over and issuer bid exemptions for de minimus bids and add a new exemption for modified Dutch auction issuer bids.

The USL would maintain existing take-over and issuer bid exemptions subject to the following modifications:

1. An exemption would be added for take-over bids for foreign offeree issuers provided that:

    - Less than 10% of shares of the issuer are held by registered holders resident in Canada;
    - The principal market for the offeree's securities is outside Canada;
    - Canadian holders are permitted to participate on terms that are at least as favourable as those offered to any other security holder and receive the same disclosure;
    - Documents would not have to be translated into French or English.

2. Existing *de minimus* exemptions for bids made for Canadian targets would be consolidated into one exemption that provides that a take-over bid made in compliance with the applicable rules of the principal jurisdiction is exempt in those jurisdictions in which fewer than 50 offeree security holders reside and where the offeree security holders resident in the jurisdiction beneficially hold less than 2% of the securities subject to the bid. There are two important elements of the *de minimus* exemption:

    - It clearly provides that the percentage threshold is based on beneficial rather than registered ownership;
    - French translation would not be required if a bid is *de minimus* in Québec.

3. An exemption would be added for modified Dutch auction issuer bids, which are issuer bids where each security holder specifies a minimum price that he is willing to receive for his securities, but all security holders whose securities are taken up receive the same price.

4. Acting Jointly or In Concert

The USL should list the situations in which persons or companies are deemed to be acting jointly or in concert with the offeror, but the list would not be exhaustive. For circumstances not covered by the list, the USL would provide that it is a question of fact whether a person or company is acting jointly or in concert.

Under the USL, it would be a question of fact as to whether persons or companies are acting jointly or in concert with the offeror. In addition, the USL would prescribe circumstances in which persons or companies would be deemed to be acting jointly or in concert.

XIV. CIVIL LIABILITY

1. Introduction

Purchasers of securities have statutory rights of action against an issuer for fraud or misrepresentation. These statutory rights of action are much more powerful than their common law counterparts[42] because the plaintiff in a statutory action does not have to prove reliance on the misrepresentation,[43] and the right of action clearly applies where a misrepresentation results from an omission to state a material fact.

These provisions recognize the importance of information to the securities regulatory system. The documents to which primary market liability attaches are generally the basis for a purchaser's investment decision, and in the context of an initial public offering, they are also often the only publicly available information about the issuer. Statutory rights of action apply to misrepresentations contained in a prospectus, an offering memorandum and a take-over bid circular and related documents.

A right of action is also available to a purchaser against the dealer or offeror who fails to comply with the requirement to send a prospectus, an offering

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[42] In Québec, the counterpart provisions are contained in the Civil Code.

[43] The Québec *Securities Act* does not deem reliance, but a plaintiff in Québec is nonetheless not required to prove reliance.

memorandum (in BC only), or a take-over or issuer bid circular. Finally, there is a right of action available to a purchaser or seller of securities for damages as a result of a trade with a person or company who is, at the time of the trade, in a special relationship with a reporting issuer and in possession of material undisclosed information about that issuer.

2. Secondary Market Liability

The USL should provide a right of action for secondary market trades that applies regardless of whether the issuer is a reporting issuer in the jurisdiction in which the security holder resides if the issuer is a reporting issuer in any jurisdiction of Canada.

Primary issuances of securities account for only about 6% of capital market trading. There are currently no rights of action available to secondary market purchasers even though their trading activities comprise approximately 94% of all market activity. Investors in the secondary market base their decisions on the issuer's continuous disclosure record but have no statutory right of action if the continuous disclosure record contains a misrepresentation.

There have been numerous calls for a statutory civil liability regime for continuous disclosure over the past three decades.[44] The strongest came from the final report of The Toronto Stock Exchange Committee on Corporate Disclosure (the "Allen Committee"), which was released in 1997. The Allen Committee recommended that investors have limited statutory rights of action against those responsible for misleading continuous disclosure.

The CSA have long supported the Allen Committee's recommendation and continue to do so. The CSA published and received comments on draft legislation that would implement the Allen Committee's recommendation for the first time in 1998 (the "1998 Proposal") and again in revised form in November 2000 (the "CSA Civil Remedies Proposal").[45] Most commenters to the 1998 Proposal were concerned that issuers and industry professionals would be exposed to frivolous, coercive and costly lawsuits. The CSA carefully considered these concerns and believe that the revised Civil Remedies Proposal would provide appropriate protections against unmeritorious litigation. By way of brief summary, the CSA Civil Remedies Proposal would:

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[44] The various proposals for a secondary market civil liability regime are discussed in the Draft Report of the Five Year Review Committee at page 75.

[45] See CSA Notice 53-302 "Report of the Canadian Securities Administrators – Proposal for a Statutory Civil Remedy for Investors in the Secondary Market and Response to the Proposed Change to the Definitions of 'Material Fact' and 'Material Change'" (November 3, 2000).

- provide a limited right of action against an issuer, its directors, responsible senior officers, "influential persons", auditors and other responsible experts for damages suffered due to the issuer making and not correcting public disclosure (either written or oral) that contains an untrue statement of a material fact or for failure to make required material disclosure;
- deem an investor to have relied on the misrepresentation or failure to make timely disclosure;
- provide defendants with varying defences based on their responsibility for the disclosure;
- impose caps on defendants' exposure so as to create a deterrence regime rather than a compensation mechanism;
- discourage unmeritorious litigation by requiring plaintiffs to obtain leave of the court to bring an action and requiring the court to approve any proposed settlement of an action; and
- impose a measure of equity among defendants by apportioning liability in proportion to each defendant's share of responsibility for the misrepresentation or failure to make timely disclosure rather than on a joint and several basis. However, defendants would be jointly and severally liable if they knowingly made the misrepresentation or failed to make timely disclosure.

The Ontario government recently passed proposed amendments to the Ontario *Securities Act* that would add rights of action for secondary market purchasers that are substantially the same as those contained in the CSA Civil Remedies Proposal.[46] For other jurisdictions, the USL presents an ideal opportunity to add these rights of action.

3. Primary Market Liability

Subject to the modifications discussed below, the USL should substantially maintain the existing civil liability regime for primary market investors.

(a) Misrepresentation in a Prospectus

The USL would maintain the right of action for either damages or rescission that is available to an investor purchasing under a prospectus[47] in substantially the same form, with the following modifications:

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[46] See the *Budget Measure Act*. As of the date of this Concept Proposal, these amendments have not been proclaimed.

[47] If the plaintiff is granted rescission, he has no right to damages. The Québec *Securities Act* also provides for the right to have the price revised, in addition to damages and rescission. The right of rescission or revision of price can be exercised without prejudice to the action for damages.

1. The potential defendants in a rescission action would be the issuer or selling security holder and any underwriters involved in the offering, whether or not they signed the certificate. In an action for damages, the potential defendants would be the issuer or selling security holder, every underwriter required to sign the certificate, every director of the issuer at the time the prospectus was filed, every person whose consent was filed (generally experts), and every person who signed the certificate (generally officers and promoters). This broadens the current potential defendants in Manitoba and Québec but is not a change in other jurisdictions;[48]

2. The defences currently available in Alberta, BC and Ontario would be contained in the USL and would apply to both actions for damages and rescission.[49] Two additional defences would be added:

   (a) A defence would be available for forward-looking information. A person or company would not be liable for a misrepresentation in forward-looking information if it can prove that it had a reasonable basis for the information and included appropriate cautionary language in the offering document;

   (b) A defence would be available for derivative information.

(b) Liability for Misrepresentations in an Offering Memorandum

The USL would maintain the right of action for either damages or rescission that is available to an investor purchasing under an OM[50] with the following modifications:

1. The USL would provide investors who purchase under an OM with a two-day right of withdrawal. This right is currently available in BC, Alberta and Manitoba.[51] It would be a change in Ontario and Québec where there are currently no withdrawal rights for exempt distributions. This right is

[48] In Manitoba, the defendants in a damages action are the directors of the issuer and those who sign the certificate. The CEO, CFO and promoter must sign the certificate. There is no statutory liability against the issuer itself, the underwriter, or experts. In Québec, the defendants include persons exercising the functions of certain named officers (regardless of whether they signed the certificate), and the liability of experts depends on whether the expert consented, not on whether a consent was filed.

[49] In BC, the listed defences are only available for actions for damages.

[50] If a plaintiff is granted rescission, he or she has no right to damages. The Québec *Securities Act* also provides for the right to have the price revised, in addition to damages and rescission. The right of rescission or revision of price can be exercised without prejudice to the action for damages in Québec.

[51] In BC and Alberta, the right of withdrawal is provided in MI 45-103 whereas the Manitoba *Securities Act* requires issuers to provide a contractual right of action.

appropriate since there is no requirement that a registrant be involved in assessing suitability for a potential purchaser, unlike prospectus offerings;

2. The potential defendants in a damages action would be the issuer, every director of the issuer at the date of the OM, every person who signed the OM[52] and, if the issuer is a reporting issuer, any expert who consented to the inclusion of its report. The inclusion of experts acting for reporting issuers is a change in all jurisdictions except Québec.[53] This change would be of minimal impact because experts acting for reporting issuers would be liable to secondary market purchasers under the proposed secondary market liability system;
3. The USL would continue to provide a defence to both a damages and a rescission action if the purchaser had knowledge of the misrepresentation.[54] The defences to damages and rescission actions available for forward looking and derivative information would also be available in the OM context;
4. Four new defences would be added for defendants other than the issuer:[55]
    (a) Delivery of an OM without the knowledge or consent of the defendant and the defendant, on becoming aware of its delivery, giving written notice to the issuer that it was delivered without the defendant's knowledge and consent;
    (b) Withdrawal of consent and giving notice of withdrawal upon becoming aware of any misrepresentation;
    (c) The misrepresentation is contained in an expertised part of an OM; and
    (d) The defendant conducted due diligence.

(c) Take-over Bid and Issuer Bid Circulars and Notices of Change and Variation

The USL would maintain the existing right of action for damages or rescission that is available to an offeree security holder that receives a take-over bid circular, issuer bid circular, notice of change or notice of variation if the document contains

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[52] This approach reflects the OM liability regime in MI 45-103 which most jurisdictions have agreed to adopt. It would be a change for Ontario, where the current rights of action for damages are against the issuer only. In Québec, the defendants in a damages action are the same as in the prospectus context: the issuer or selling security holder, senior executives who are functioning as directors or certain officers, experts and the underwriter.

[53] In Québec, expert liability in the OM context already exists, but applies regardless of whether the expert is acting for a reporting or a non-reporting issuer.

[54] In Ontario, there is an additional defence for the issuer if a selling security holder is offering the securities as long as the misrepresentation is not based on information from the issuer. The Québec OM defences parallel its prospectus defences (purchaser knowledge and acting with prudence and due diligence). In Manitoba, there is no defence for the purchaser having knowledge.

[55] These defences are currently available in Manitoba and will be available in BC and Alberta once statutory amendments are passed and proclaimed.

a misrepresentation.[56] The USL would also maintain the existing right of action for damages available to an offeree security holder who receives a directors' circular that contains a misrepresentation. Both rights would be in relation to any issuer, not just a reporting issuer, and would exist regardless of whether securities were transferred in reliance on the document.

The class of defendants would remain unchanged with one exception: all directors would be liable in an action for damages relating to a misrepresentation in a directors' circular if the entire board approved the circular. Currently, only those persons who signed the circular or notice are liable.

The USL would impose liability on experts who consent to the inclusion of their reports or opinions in both take-over bid circulars and directors' circulars and all related documents. Currently, only Alberta imposes liability on experts and only with respect to reports contained in a directors' (or officers') circular.

The available defences would be the same as the proposed defences in the prospectus and OM contexts and would apply to both actions for damages and rescission.

(d) Liability for Failure to Deliver Documents Required to be Delivered

The USL would maintain the rights of action for non-delivery of required documents that are available to a purchaser of securities under a prospectus or OM and to a security holder of an offeree issuer. However, the USL provision would differ from current provisions in two respects.

First, the right would extend beyond a failure to deliver and include a failure to file required documents. This approach has two advantages. It recognizes that delivery obligations are no longer as important and it provides a right of action against a person who made an illegal distribution.

Second, the USL provision would also specify that the potential defendants in such an action would be the issuer (or selling security holder) and the dealer (or the offeror).

(e) Liability for Trading on Information Relating to Investment Programs

Most securities legislation provides investor remedies for what is colloquially known as "front-running", or trading with knowledge of the investment program of a mutual fund or a client of a portfolio manager. A person who trades with this

[56] Québec plaintiffs also have the right to sue to have the price revised.

knowledge must account to the mutual fund or client for any benefit or advantage received. The legislation of most jurisdictions provides that an SRA or a security holder can apply to court for an order requiring a mutual fund to seek an accounting from a person who has traded with knowledge of the fund's investment strategy. This right of action would be included in the USL but expanded to apply to exchange contracts and other derivative securities.

(f) Action to Enforce Issuer and Mutual Fund Rights

Each of the jurisdictions has similar remedies that allow either the SRA or a security holder of an issuer to apply to a court of competent jurisdiction to commence an action on behalf of an issuer to seek an accounting from the issuer's insiders, affiliates or associates for trading on inside information.[57] There are inconsistencies among the various provisions, and certain aspects of the remedy do not apply to mutual funds. The USL would adopt the BC provision[58] with modifications that would extend the remedy to security holders of mutual funds.

(g) Rights of Action Excluded from the USL

Most jurisdictions have the following additional rights that would not be included in the USL:

1. The right of a holder of relatively small amounts of securities of a mutual fund to rescind the purchase without wrongdoing on the part of others. This right is open to abuse since it entitles a purchaser to recover the net asset value at the time of rescission as opposed to the time of purchase. This right is also inappropriate since it provides mutual fund purchasers with rescission rights in addition to a two-day prospectus withdrawal right;
2. The right of a customer of a dealer to void a contract with that dealer if the dealer fails to ensure that it maintains adequate holdings of securities to satisfy margin contracts it has entered into with its customers; and
3. The right of rescission of any person or company on the other side of a trade with a registered dealer against that registered dealer for a failure to disclose the registered dealer's intention to act as principal.

(h) Limitation and other Time Periods for Investor Rights

The rights of action in the USL would be subject to the following harmonized limitation periods:

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[57] In Manitoba, only a security holder of a corporation may bring such an application.

[58] See s. 137 of the BC *Securities Act*.

1. There would be a 180-day limitation period for all rights of action for rescission which would run from the date of the transaction that gave rise to the cause of action; and

2. The limitation period for rights of action for damages would be three years from the date on which the document containing the misrepresentation was sent or filed, unless a news release had been issued announcing that a class action had been commenced in a jurisdiction of Canada in respect of the misrepresentation. Where such a news release had been issued, the plaintiff would have six months from the date of its issuance to commence an action.

Because each jurisdiction has its own Limitations Act,[59] the USL would provide that its limitation periods override those in other enactments.

XV. ENFORCEMENT

1. Introduction

Under the USL, a contravention of any provision of the act or rules would be an offence. This is a departure from the *status quo* in some jurisdictions whose legislation specifically lists those provisions that may, if contravened, be prosecuted as an offence. This change would give SRAs more flexibility in determining how to frame an enforcement action. It would also remove the need to amend legislation each time an SRA adds to the list of provisions that may be treated as an offence.

The penalties on conviction for an offence would not necessarily be harmonized. Local differences in amounts of penalties are appropriate and reflect the fact that jurisdictions with larger markets and issuers may need a higher penalty in order for their enforcement powers to be meaningful. Penalties would be contained in the Administration Act.

2. Prohibited Acts

The USL should prohibit fraud, market manipulation and engaging in unfair practices.

There are a number of prohibitions contained in securities legislation. Some relate to specific subject areas (e.g., insider trading and tipping, trading without being registered, distribution without a prospectus) while others are of a more general

[59] In Québec, limitation periods are contained in the Civil Code.

nature. Currently, general prohibitions are contained in various places in the legislation. The USL would consolidate them.

The following prohibitions would be carried forward into the USL:

1. The prohibition on representations as to resale and future value;
2. The prohibition on listing representations with a modification to provide an exception where conditional approval of an exchange has been obtained or the subject securities are currently listed or quoted;
3. The prohibition on holding out registration; and
4. The prohibition on representing that an SRA has approved, expressed an opinion or passed judgment on certain matters such as the financial standing of an issuer. Some jurisdictions also prohibit representing an Executive Director has granted approval. Given that the Executive Director is the decision maker in a number of circumstances (most notably on whether to issue a receipt for a prospectus), the USL provision would be broadened accordingly.

The following prohibited acts exist in some jurisdictions and would be added to the USL:

1. A prohibition on fraud and market manipulation. Market manipulation and fraudulent trading can create misleading price and trading activity which are detrimental to investors and the integrity of the market. Some jurisdictions currently have a statutory prohibition.[60] The existing statutory prohibitions have a transaction-based focus which tends to limit the reach of the prohibition to a specific trade. The anti-fraud and market manipulation provision contained in the *Budget Measures Act* is preferable. It prohibits any person or company from directly or indirectly engaging or participating in any act, practice or course of conduct that the person knows or ought to know would create a misleading appearance of trading activity or an artificial price. This provision is based on an existing section in National Instrument 23-101 *Trading Rules*, which has been in force since August 2001; and

2. A prohibition on engaging in "unfair practices". Currently, the BC *Securities Act* contains this prohibition which was introduced in May 2002. An unfair practice includes putting unreasonable pressure on a person to

[60] British Columbia, Alberta and Saskatchewan have an express statutory prohibition while Manitoba and Ontario do not. Québec has an indirect prohibition. Section 276(2) of the Québec *Securities Act* gives the CVMQ a broad jurisdiction to "protect investors against unfair, improper or fraudulent practices". Québec recently passed an amendment to its *Securities Act* which added a new offence of "influencing or trying to influence the market price or value of securities by means of unfair, improper or fraudulent practices".

purchase, hold or sell a security, taking advantage of the person's inability or incapacity to reasonably protect his or her own interests because of physical or mental infirmity, ignorance, illiteracy, age or inability to understand the character, nature or language of any matter relating to a decision to purchase, hold or sell a security.

3. Misrepresentations and False or Misleading Statements

The USL should contain a harmonized definition of "misrepresentation".

The USL would contain a harmonized definition of "misrepresentation" that would include an omission to state a material fact that is necessary to be stated in order for a statement not to be misleading.

Currently, securities legislation distinguishes between a misrepresentation made to anyone with the intention of effecting a trade in a security, and a misrepresentation to an SRA or in a document required to be filed or furnished under securities legislation. The latter is considered more serious.

The USL would retain the distinction between general misrepresentations made to anyone and misrepresentations made to an SRA or in a required document. However, the general misrepresentation prohibition would no longer be qualified by the words "with the intention of effecting a trade".

The second type of misrepresentation, making a misrepresentation to an SRA, its staff or in a document required to be filed or furnished under securities legislation, would be retained in the USL.

4. Limitation Periods

The USL should harmonize the period within which an enforcement proceeding must be commenced.

The period within which enforcement proceedings must be commenced varies among jurisdictions. The Uniform Act would adopt the limitation period that applies in most jurisdictions, which is six years from the date of the occurrence of the event that gives rise to the enforcement proceedings.

5. Administrative Penalties

SRAs should have the power to impose an administrative penalty upon finding a contravention of the USL. It is not essential that the amount be identical in all jurisdictions.

Most jurisdictions have the power to order a monetary administrative penalty after a hearing where an SRA has found a contravention of, or failure to comply with, the act, rules, regulations, a decision, or, in some jurisdictions, a written undertaking under the act.[61] The maximum amount of the administrative penalty an SRA may impose varies between jurisdictions.[62]

An administrative penalty is a regulatory sanction. To be an effective deterrent, an administrative penalty should fit the circumstances of the case, including the nature of the respondent. Jurisdictions with larger markets and issuers may need a higher maximum in order for the authority to impose an administrative penalty to be a meaningful enforcement power. Therefore, local variations are justifiable and acceptable.

Each jurisdiction's legislation stipulates, subject to wording variations, that the funds collected by an SRA pursuant to an administrative penalty are to be used to further the objectives of that SRA. Generally, these funds are used to educate investors or promote their interests as a group. Such a provision would be included in each Administration Act.

6. Public Interest Powers

The USL should harmonize the types of enforcement orders an SRA may issue after an enforcement hearing.

Each SRA has the power to issue an enforcement order after a hearing, whether or not there has been a specific contravention of legislation if it considers such an order to be in the public interest. While there are many similarities in the orders that can be made, there are also several very useful orders that only one or two jurisdictions can currently make. The USL would compile some of the less common but useful powers. SRAs would have the power to make the following orders:

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[61] Currently, the OSC does not have the ability to impose an administrative penalty. The *Budget Measures Act* would authorize the OSC to order the payment of an administrative penalty of up to $1,000,000 and to order the disgorgement of amounts obtained as a result of non-compliance with Ontario securities law.

[62] For example, the maximum in Québec is $1,000,000 for all contraventions (s. 273.1 of the *Québec Securities Act*). The maximum penalty in Alberta is $100,000 for individuals and $500,000 for corporations, which can be imposed for each contravention (s. 199 of the Alberta *Securities Act*).

1. An order that trading in or purchasing a security or securities by a person or company cease;
2. An order denying the use of exemptions;
3. An order that a person resign as a director or officer of an issuer, as a registrant or as manager of a mutual fund and prohibiting such person from acting as a director, officer or manager of an issuer, registrant or mutual fund or as a promoter;
4. An order that the registration or recognition granted to a person or company be suspended, cancelled, or subject to conditions;
5. An order against any person prohibiting or requiring dissemination of information or requiring amendments to disseminated information;
6. An order that a person or company (including a person or company registered or recognized under the relevant legislation) be reprimanded;
7. An order that a person or company comply with the act, rules or orders;
8. An order that a market participant submit to a review of his, her or its practices;
9. An order prohibiting a person from engaging in investor relations activities; and
10. A disgorgement power.

7. Temporary Orders

The USL should allow SRAs to make temporary orders without holding a hearing.

Most jurisdictions have the power to issue an order without holding a hearing on a temporary basis if it would be prejudicial to the public interest to allow the time required to hold a hearing to pass. The USL would contain a provision that allows the SRA to make any of the orders available following a hearing on a temporary basis if the amount of time required to hold a hearing and render a decision would be prejudicial to the public interest. The temporary order would take effect on a date determined by the SRA and would be in effect for a maximum of 15 days from the date it is made.

8. Orders for Failure to Comply with Filing Requirements

The USL should authorize SRAs to issue cease trade orders without a hearing where filing requirements have not been satisfied.

Under BC legislation, an SRA and the Executive Director may issue a cease trade order without a hearing where a person has not complied with the filing requirements in the legislation by not filing a record or not completing a record

filed properly. The order remains in place until the record completed in accordance with the legislation is filed. This is an important enforcement tool and would be included in the USL.

XVI. JOINT HEARINGS

The USL should contain provisions relating to the hearing rules should apply to a joint hearing.

There is an initiative currently underway to develop rules for joint hearings. These rules would be included in the USL if they are finalized prior to the implementation of the USL. Otherwise, the delegation provision contained in the Administration Acts would be drafted to permit the panel conducting the joint hearing to determine that one particular jurisdiction's laws apply to the proceedings.

XVII. GENERAL PROVISIONS

1. Rule Making Authority

The USL should harmonize rule making heads of authority.

The increasingly dynamic landscape of the modern capital markets requires that SRAs respond quickly and effectively to emerging issues. However, the legislative process is lengthy and therefore amendments to legislation can take several years to implement. This problem is further compounded by the fact that securities laws are complex and generally require a degree of expertise and industry knowledge.

SRAs are regularly faced with new products, market structures, enforcement priorities and policy issues that require a timely response. Rule making authority allows SRAs to respond more quickly to changing market circumstances. Most SRAs already have the power to make rules that have the same force and effect as a regulation made by the Lieutenant Governor in Council of the province or territory. However, some do not. To achieve and maintain harmonization, it is imperative that the SRAs of all jurisdictions of Canada have rule making authority.[63]

It is nonetheless crucial to preserve political responsibility for the system of securities regulation. Rules created by SRAs must be subject to government

[63] There should also be authority to make rules on an emergency basis. See, for example, ss. 3 and 4 of the Alberta General Rules.

oversight and should be developed through a transparent process. However, the government oversight process and the need for transparency should not obviate the fundamental benefits of a rule making power, namely, efficient and effective regulation. In its draft report, the Ontario Five Year Review Committee noted that it takes approximately 18 months to implement a national or multilateral rule. There should be clear and reasonable time periods associated with the processes for obtaining public comment and Ministerial approval.

The rule making provisions in the USL would assign the majority of rule making authorities to the SRA but would accordingly retain the Lieutenant Governor in Council's authority to make regulations in relation to the same rule making heads. The current provision that the regulations prevail in the event of conflict and authority for the Lieutenant Governor in Council to amend or repeal a rule would be maintained. There are also matters over which governments of certain jurisdictions have chosen to retain sole authority to make regulations. Under the USL, rule making authority relating to these matters would not be harmonized as they are matters of provincial or territorial sovereignty.

The matters on which SRAs have authority to make rules are specifically enumerated in legislation. In general, the heads of authority are similar. Most matters fit into one of the existing heads, but some do not, mainly for technical reasons. This approach sometimes results in undue attention being paid to the category of authority rather than the substance of the rule. A general head of authority that would allow SRAs to make those rules necessary for the administration of securities laws would be more congruous with the objectives of rulemaking.

2. Exemptive Relief

The USL should permit SRAs to exempt any person, company, trade or distribution from any or all provisions of securities laws.

Currently, all jurisdictions allow an SRA to exempt persons and companies from any requirement of securities laws by issuing an order of specific application. Currently, exempting powers vary in form between jurisdictions. The USL would consolidate all exempting provisions into one generally worded authority.

Some jurisdictions also have authority to issue a blanket order which applies generally to classes of trades, securities, companies, transactions and other matters. These jurisdictions have found that the authority to make blanket orders eliminates costs, delays and uncertainty caused by individual applications for discretionary relief and are a useful tool to address changes in the marketplace in a timely manner. The USL would therefore authorize SRAs to make blanket orders.

3. Filings

The USL should contain a provision allowing for the filing of documents that comply with the laws of a foreign jurisdiction whose laws are substantially the same as those under the USL.

Most securities laws allow the filing of documents that comply with the laws of another jurisdiction whose requirements are substantially similar. Under the USL, such a provision would not be necessary for jurisdictions within Canada but would be necessary for filings in compliance with the requirements of foreign jurisdictions.

The USL should contain a general execution and certification provision that applies to all filings.

Most jurisdictions prescribe the manner in which filings must be executed or certified. These provisions vary across jurisdictions. The USL would contain a harmonized provision that would also allow for flexibility in determining the appropriate means of executing and certifying documents.

4. Referral of Questions to an SRA

The USL should permit referral of a material question to an SRA.

Currently, some securities acts allow an applicant to refer a material question to an SRA. Some jurisdictions only permit the referral of questions relating to certain matters, for example, prospectuses. The USL would contain a general right of referral permitting the referral of a material or novel question to an SRA arising out of any application, filing or decision of an Executive Director.

APPENDIX A

INVESTIGATIONS

1. Provisions that Would be Modified Non-Substantively

(a) Production Orders

Before commencing an investigation, an SRA has the ability to order production of documents from various industry participants for certain specified purposes. This provision can be harmonized without detracting from local powers. The current BC provision makes the most effective statement of the scope of this power. The BC provision provides that production can be compelled from the following persons or entities:

(a) a clearing agency;
(b) a registrant;
(c) a person exempt (by order) from registration;
(d) a reporting issuer;
(e) a manager or custodian of assets, shares or units of a mutual fund;
(f) a general partner of a person referred to in (b)(c)(d)(g)(j) or (k);
(g) a person purporting to distribute securities in reliance on a prospectus exemption or an order exempting the distribution from the prospectus requirement;
(h) a transfer agent or registrar for securities of a reporting issuer;
(i) a director or officer of a reporting issuer;
(j) a promoter or control person of a reporting issuer;
(k) a person engaged in investor relations activities on behalf of a reporting issuer or security holder of a reporting issuer;
(l) the Canadian Investor Protection Fund;
(m) a person providing record keeping services to a registrant.

The list of industry participants from whom production can be ordered would be broadened from the current BC provision to include anyone who has issued securities (not just reporting issuers) and any person or entity who was, at the relevant time (but is no longer), a person or entity identified in (a) through (m).

There are four purposes for which production can be ordered in the current BC provision: (a) for the administration of the *Securities Act*, (b) to assist in the administration of the securities or exchange contracts laws of another jurisdiction, (c) in respect of matters relating to intra-provincial trading in securities or exchange contracts, and (d) in respect of matters relating to inter-provincial

trading in securities or exchange contracts. Each of these purposes should be incorporated into the uniform provision.

(b) Powers of Investigators under Investigation Order

Most jurisdictions' legislation places similar limits on the powers of an investigator acting under an investigation order. These limits can be harmonized by adopting a uniform provision based on the current BC provision.[64] That provision provides that an investigator may, with respect to the person or entity who is the subject of the investigation, investigate, inquire into, inspect and examine the affairs, records, property and assets of the person or entity.

(c) Power to Search and Seize

The Administration Acts would contain a harmonized provision that allows the person conducting an investigation pursuant to an investigation order to apply to the court of superior jurisdiction to obtain an order allowing the investigator to search premises and seize items of relevance. As the current BC provision does, the Administration Acts would provide that an investigator may enter the business premises of a registrant, SRO or exchange named in the investigation order and inspect records, property, assets or things used in the business that relate to the investigation order.[65] Investigators in Ontario and Manitoba have the power to search without an order of the court or the SRA in certain circumstances. These are useful provisions that additional jurisdictions may choose to adopt.

(d) Powers of an Investigator to Summon and Compel Attendance and Testimony

In all jurisdictions, investigators under an investigation order have the same power as the court of superior jurisdiction to summon and enforce the attendance of witnesses and to compel witnesses to give evidence and produce records and other items of relevance. The Administration Acts would include this power. The Administration Acts would also stipulate that a witness cannot refuse to answer a question on the grounds of self-incrimination or exposure to a penalty or civil proceedings.

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[64] However, the current Québec provision places very few limitations on an investigator's powers. Section 240 of the Québec *Securities Act* provides that the CVMQ acting under an investigation has all the powers of a judge of the Superior Court, except to order imprisonment. It is expected that Québec will retain this provision in its Administration Act.

[65] The CVMQ is not likely to include this provision in its Administration Act because its power to search and seize comes from the *Code of Penal Procedure.*

The law is clear that solicitor-client privilege applies to all requests for evidence and testimony. This would be explicitly stated in the Administration Acts. However, current detailed provisions on the procedures for claiming privilege[66] would not be retained.

(e) Obstruction of Justice

The Administration Acts would contain a provision modeled on the current BC provision[67] which makes it an offence to withhold, destroy, conceal or refuse to produce any record, in the face of an investigation order or a search and seize order. The offence would be expanded to include actions by persons who have knowledge of the investigation order but have not been served, and witnesses compelled under an investigation order or appearing at a hearing.

(f) Appointment of Experts

The Administration Acts would contain a provision modeled after the current Alberta provision[68] which allows an expert to be appointed both before and after an investigation order has been issued. Most jurisdictions do not currently have the power to appoint an expert before an investigation order has been issued. This is a useful power because there is often a benefit to obtaining the opinion of an expert on certain facts to assist in the decision of whether to take enforcement action.

(g) Reports to SRAs

All jurisdictions have a provision dealing with reports of investigators and experts appointed under an investigation order. Some jurisdictions require that all investigators and experts provide a report to the SRA as a matter of course[69] while others only require a report to the SRA on request.[70] To ensure that SRA resources are being used appropriately, a report should be produced only where an SRA thinks it is necessary. In the Administration Acts, investigators and experts would be required to provide a report to the SRA if the SRA requests one. The report would be privileged.

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66 For example, see ss. 57(2) to 57(8) of the Alberta *Securities Act*.

67 See s. 143(7) of the BC *Securities Act*.

68 See sections 28 and 43 of the Alberta *Securities Act*.

69 Under the Manitoba *Securities Act* (s. 22(10)) both investigators and experts must provide a report). In Alberta (s. 44 of the Alberta *Securities Act*) and Québec (s. 248 of the Québec *Securities Act*), only an investigator must provide a report.

70 See s. 15 of the Ontario *Securities Act* and s. 146 of the BC *Securities Act.*

(h) Confidentiality of Investigations

The Administration Acts would contain a harmonized provision that prohibits disclosure of the existence and details of any investigation (regardless of whether an investigation order has been issued). The prohibition would apply to SRA staff as well as to members of the public who are interviewed, requested to provide documents, or otherwise involved in the investigation. This prohibition would be subject to two exceptions: 1) a person or company can make disclosure to their counsel, and 2) the SRA[71] can order that the prohibition does not apply or that the information be released to other regulatory and law enforcement agencies.[72]

(i) Recovery of Costs

The Administration Acts would contain a harmonized provision allowing an SRA to recover both the costs of an investigation and the costs of a hearing from a person or company who has been found by the SRA to have not complied with securities laws or to have acted contrary to the public interest. The provision would be modeled after the current Ontario provision[73] which provides that the SRA may, after conducting a hearing, order that a person or entity who was the subject of an investigation or a hearing to pay the related costs if the SRA is satisfied that the person or entity has not complied with securities laws or has not acted in the public interest. The Ontario provision also provides that the SRA can, after conducting a hearing, order a person or entity who is guilty of an offence to pay the costs of the related investigation. The Ontario provision also includes a non-exhaustive list of examples of the types of costs that a person or entity may be ordered to pay.

(j) Appointment of Receivers

The Administration Acts would contain a harmonized provision granting SRAs[74] the power to apply to the court to appoint a receiver to oversee the affairs of a person or entity who fails to comply with financial conditions applicable under securities laws (e.g., minimum capital or bonding requirements for a registrant) or who is proposed to be the subject of an investigation order, an SRA hearing or a prosecution for contravening the legislation.

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[71] Some Commissions may choose to delegate the authority to waive confidentiality to staff.

[72] Ontario has a number of limits to the SRA's ability to order disclosure (for example, the person who gave the testimony must consent to the giving of the disclosure to police) that it may retain in its Administration Act.

[73] See s. 127.1(1) of the Ontario *Securities Act*.

[74] In the Alberta *Securities Act*, the power to make application to court for an order appointing a receiver is currently delegated to staff (the Executive Director).

(k) Freeze Orders

The Administration Acts would contain a harmonized provision allowing the SRA[75] to order that persons in possession of funds or securities that are the subject of an investigation order refrain from disposing of or withdrawing them, if such order is made for the purpose of administering securities laws. This is the same test that must be met for the issuance of an investigation order. The provision would also include a power to order certain persons or entities to hold funds or securities in trust for receivers, custodians or trustees. The provision would require that once a freeze order is made, notice must be served on all persons named in the order. The provision would not require the SRA to seek court approval of a freeze order. This is an unnecessary requirement because as a matter of administrative law, the persons affected by the order can seek review of it by the SRA at any time. If they are dissatisfied with that review, they can then seek judicial review.

2. Provisions that Would Not be Harmonized

(a) Investigation Orders

Each SRA would continue to have the power to make an order appointing a person to make an investigation for the administration of its own securities laws or for the administration of the securities laws or the regulation of the capital markets in another jurisdiction. There are procedural differences among the provisions relating to who has the jurisdiction to make the order[76] and its required contents.[77]

(b) Report to a Minister

In some jurisdictions[78], the responsible Minister can request a report from an SRA where there is an investigation order. Other SRAs[79] are required to report to the Minister if the investigation was ordered by the Minister. These provisions would be contained in the Administration Acts of these jurisdictions. We do not propose to harmonize them.

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[75] In Alberta, the power to issue a freeze order has been delegated to staff (the Executive Director).

[76] The decision maker is an SRA in all jurisdictions except Alberta. In Alberta, the order can be issued at a staff level (by the Executive Director).

[77] The current Québec provision does not specify the content of the investigation order. This is unlikely to change in Québec's Administration Act.

[78] See s. 149 of the BC *Securities Act* and s. 303 of the Québec *Securities Act.*

[79] See s. 25 of the Manitoba *Securities Act*.

(c) A Minister's Power to Order an Investigation

In some jurisdictions,[80] the Minister responsible for an SRA has the power to order an investigation. In other jurisdictions, the Minister does not have this power, presumably because local general inquiry legislation serves the same purpose. This provision would not be harmonized. Jurisdictions that require such a provision would include it in their Administration Acts.

3. Provisions that Would Not be Carried Forward into the USL

Most jurisdictions currently have a separate provision allowing an SRA[81] to order that a person's financial affairs be formally examined. Given that the threshold to obtain such an order is the same as that for obtaining an investigation order, a separate provision is unnecessary and such a provision would not be included in the Administration Acts.

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[80] See s. 147 of the BC *Securities Act*, s. 11(5) of the Ontario *Securities Act* and s. 23 of the Manitoba *Securities Act*.

[81] In the Alberta *Securities Act*, this power is delegated to staff (the Executive Director).

APPENDIX B

REGISTRATION CATEGORIES

I. Existing Categories Which Would be Replaced by Proposed Categories

1. The Dealer Category

(a) Investment Dealer

The proposed investment dealer category would replace the following categories in each jurisdiction surveyed:

BC: investment dealer

Alberta: investment dealer, broker

Manitoba: investment dealer

Ontario: investment dealer, broker

Québec: unrestricted dealer, discount broker

(b) Mutual Fund Dealer

The introduction of the mutual fund dealer category would represent a change in Manitoba[82] and Québec.[83] It exists in all other jurisdictions surveyed and would not be modified under the USL.

(c) Restricted Dealer

(i) Existing Categories Common to More Than One Jurisdiction

The proposed restricted dealer category is a general category which would replace the following specific categories for limited or restricted dealers:

- Exchange contracts dealer
- Scholarship plan dealer

[82] In Manitoba, mutual fund dealers are currently registered in the broker-dealer category and are restricted to dealing in mutual fund securities only.

[83] In Québec, mutual fund dealers are not under the jurisdiction of the CVMQ or the Québec *Securities Act*.

(ii) Existing Categories Unique to a Jurisdiction

The proposed restricted dealer category is a general category would replace the following specific categories for limited or restricted dealers:

BC: real estate securities dealer, special limited dealer, underwriter

Ontario: securities dealer, international dealer, limited market dealer

Québec: restricted dealer distributing QBIC shares or debt securities, independent trader

2. The Adviser Category

(a) Adviser

The proposed adviser category would replace the following categories in each jurisdiction surveyed:

BC: portfolio manager, investment counsel

Alberta: portfolio manager, investment counsel

Manitoba: investment counsel

Ontario: portfolio manager, investment counsel,

Québec: unrestricted adviser

(b) Restricted Adviser

The proposed restricted adviser category would replace the following categories in each jurisdiction surveyed:

BC: securities adviser

Alberta: securities adviser

Manitoba: investment adviser

Ontario: securities adviser and international adviser

Québec: restricted adviser

II. Current Categories Which Would Not Be Included in the USL

The following registration categories would not be included in the USL:

- security issuer (all jurisdictions);
- financial intermediary dealer (Ontario); and
- foreign dealer (Ontario).

APPENDIX C

EXEMPTIONS INCLUDED IN A UNIFORM EXEMPTIONS RULE

The following exemptions exist in most jurisdictions in substantially the same form and would be included in the USL in a Uniform Exemptions Rule.

1. Registration and Prospectus Exemptions

The following registration and prospectus exemptions would be included in the Uniform Exemptions Rule:

1. An exemption for trades by executors, trustees, receivers, liquidators, sheriffs or at a judicial sale.
2. An exemption for trades by a pledgee for the purpose of liquidating a genuine debt;[84]
3. An exemption for isolated trades;[85]
4. An exemption for trades by an issuer in securities of a reporting issuer as a dividend in kind.[86] This exemption would be modified to allow the dividend in kind to consist of securities of an issuer that is a reporting issuer in any jurisdiction, not just the exempting jurisdiction;
5. The exemption for trades by an issuer to existing security holders in rights to purchase additional securities of the issuer and the issue of securities pursuant to the exercise of the right.[87] This exemption would be modified to allow rights offerings for securities of an issuer that is a reporting issuer in any jurisdiction, not just the exempting jurisdiction and would specifically provide that the notice that is required to be filed covers both the issuance of the rights and the issuance of the securities underlyi ng the rights upon their exercise;
6. An exemption for trades in connection with the purchase of assets with a prescribed minimum fair market value of $100,000;[88]

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[84] See s. 45(2)(19) of the BC *Securities Act*; ss. 86(1)(f), 86(1)(g) and 131(1)(e) of the Alberta *Securtities Act*; s. 19(1)(d) of the Manitoba *Securtities Act*; ss. 35(1)(6), 35(1)(7) and 72(1)(e) of the Ontario *Securtities Act*; and s. 2.8 of MI 45-102.

[85] See ss. 45(2)(3) and 74(2)(2) of the BC *Securities Act*, ss. 86(1)(b) and 131(1)(b) of the Alberta *Securities Act*; ss. 19(1)(b), 58(1)(b) and 58(3)(c) of the Manitoba *Securtities Act*, and ss. 35(1)(2) and 71(1)(b) of the Ontario *Securities Act*.

[86] See ss. 45(2)(14) and 74(2)(13) of the BC *Securities Act*; ss. 86(1)(n) and 131(1)(g) of the Alberta *Securtities Act*; ss. 35(1)(13) and 72(1)(g) of the Ontario *Securities Act*; and ss. 52(2) of the Québec *Securities Act*.

[87] See ss. 45(2)(8), 45(2)(12), 74(2)(7) and 74(2)(11) of the BC *Securities Act*; ss. 86(1)(m), 86(1)(o), 131(1)(f) and 86(1)(g) of the Alberta *Securities Act*; ss. 19(1)(h.2), 19(1)(h.3), 19(1)(i) and s. 58(1)(b) of the Manitoba *Securtities Act*; ss. 35(1)(12), 35(1)(14), 72(1)(f) and 72(1)(h) of the Ontario *Securities Act*; ss. 52(1) and 155.1(2) of the Québec *Securities Act.*

[88] See ss. 45(2)(6) and 74(2)(5) of the BC *Securities Act*; and ss. 86(1)(s) and 131(1)(l) of the Alberta *Securities Act*.

7. An exemption for charitable, religious and fraternal organizations;[89]
8. An exemption for trades in securities of an issuer as consideration for mining claims or oil and gas rights.[90] The exemption would not require that the vendor enter into an escrow agreement;
9. An exemption for trades in variable insurance contracts;[91]
10. An exemption for government strip bonds;[92]
11. An exemption for trades in bonds secured by financial institutions or governments;[93]
12. An exemption for trades in certificates or receipts issued by trust companies or credit unions;[94]
13. An exemption for trades in securities that evidence indebtedness due under a conditional sales contract;[95]
14. An exemption for a de minimus rights offering;[96]
15. The exemption for securities issued as stock dividend;[97]
16. An exemption for trades in connection with an amalgamation, merger, reorganization or arrangement.[98] This exemption would be drafted broadly enough to cover all statutory procedures including trades in connection with reorganizations and windings up as well as procedures where the appropriate disclosure document is delivered to each security holder whose

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[89] See ss. 46(g) and 75(a) of the BC *Securities Act* ss. 87(g) and 143(a) of the Alberta *Securities Act*; ss. 19(2)(f) and 58(3)(a) of the Manitoba *Securtities Act*; ss. 35(2)(7) and 73(1)(a) of the Ontario *Securities Act*; and s. 3(3) of the Québec *Securities Act*.

[90] See ss. 45(2)(21) and 74(2)(18) of the BC *Securities Act*; ss. 87(k) and 131(1)(m) of the Alberta *Securities Act*; ss. 19(1)(l)(iii), 19(2)(j) and 58(3)(a) of the Manitoba *Securtities Act*; and ss. 35(2)(14) and 72(1)(m) of the Ontario *Securities Act*.

[91] See ss. 46(l) and 75(a) of the BC *Securities Act*; ss. 87(l) and 143(a) of the Alberta *Securities Act*; s. 2.2(1) of OSC Rule 45-501; and s. 3(13) of the Québec *Securities Act*.

[92] See s. 3 of BC Instrument 91-504; s. 4 of Alberta Blanket Order 85/03/15; Manitoba Policy 3.17; s. 2.2 of OSC Rule 91-501; and decision of CVMQ dated May 1, 1998.

[93] See ss. 46(a) and 75(a) of the BC *Securities Act*; ss. 87(a) and 143(a) of the Alberta *Securities Act*; ss. 19(2)(a) and 58(3)(a) of the Manitoba *Securtities Act*; ss. 35(2)(1) and 73(1)(a) of the Ontario *Securities Act*; and ss. 3(1), 3(15), 41 and 155.1(2) of the Québec *Securities Act*.

[94] See ss. 46(b) and 75(a) of the BC *Securities Act*; ss. 87(b) and 143(a) of the Alberta *Securities Act*; ss. 19(2)(b) and 58(3)(a) of the Manitoba *Securtities Act*; and ss. 35(2)(2) and 73(1)(a) of the Ontario *Securities Act*.

[95] See ss. 46(f) and 75(a) of the BC *Securities Act*; ss. 87(f) and 143(a) of the Alberta *Securities Act*; ss. 19(2)(e) and 58(3)(a) of the Manitoba *Securtities Act*; ss. 35(2)(6) and 73(1)(a) of the Ontario *Securities Act*; and s. 3(7) of the Québec *Securities Act*.

[96] See s. 10.2 of NI 45-101.

[97] See ss. 45(2)(12) and 74(2)(11) of the BC *Securities Act*; ss. 86(1)(m) and 131(1)(f) of the Alberta *Securities Act*; ss. 19(1)(h.1), 19(1)(h.2) and 19(1)(h.3) and 58(1)(b) of the Manitoba *Securtities Act*; ss. 35(1)(12) and 72(1)(f) of the Ontario *Securities Act*; and ss. 155.1(2) and 52(2) of the Québec *Securities Act*.

[98] See ss. 45(2)(9) and 74(2)(8) of the BC *Securities Act*; ss. 86(1)(p) and 131(1)(i) of the Alberta *Securities Act*; ss. 19(1)(j) and 58(1)(b) of the Manitoba *Securtities Act*; ss. 35(1)(15) and 72(1)(i) of the Ontario *Securities Act*; and ss. 155.1(2) and 50 of the Québec *Securities Act*. Also, see ss. 45(2)(12) and 74(2)(11) of the BC *Securities Act*; ss. 86(1)(m) and 131(1)(f) of the Alberta *Securities Act*; ss. 19(1)(h.1), 19(1)(h.2) and 19(1)(h.3) and 58(1)(b) of the Manitoba *Securtities Act*; ss. 35(1)(12) and 72(1)(f) of the Ontario *Securities Act*; and ss. 155.1(2) and 52 of the Québec *Securities Act*.

approval of the procedure is required and the procedure is approved by such security holders;

17. The exemption for all trades necessary to effect a take-over or issuer bid.[99] This exemption would be drafted broadly enough to include circumstances where there is technically no take-over or issuer bid because the seller resides outside the relevant jurisdiction;
18. Exemptions for trades regarding RESPS, RRSPs and RRIFs;[100]
19. An exemption for trades relating to mutual fund reinvestment programs;[101]
20. An exemption for US broker-dealers and agents;[102]

2. Registration Exemptions

The following are the registration exemptions that would be included in the USL in a Uniform Exemptions Rule:

1. An exemption for occasional trades by non-trading employees of a registered dealer;[103]
2. An exemption for trades through registered dealers;[104]
3. An exemption for small security holder selling and purchase arrangements;[105]
4. An exemption from the dealer registration requirement for a trade made by a US issuer of a right to purchase additional securities of its own issue to existing security holders and of the securities issued upon the exercise of the right;[106]
5. Advising exemptions for entities that provide advice solely incidentally to their main business and for non-specific advice contained in published materials.[107]

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[99] See ss. 45(2)(24), 45(2)(28), 74(2)(21), 74(2)(24), 74(2)(25) and 74(2)(26) of the BC *Securities Act*; ss. 86(1)(q), 86(1)(r), 86(1)(ee), 131(1)(j), 131(1)(k) and 131(1)(aa) of the Alberta *Securities Act*; ss. 19(1)(k)(i), 19(1)(k)(ii) and 58(1)(b) of the Manitoba *Securities Act*; ss. 35(1)(16), 35(1)(17), 72(1)(j) and 72(1)(k) of the Ontario *Securities Act*; and ss. 63 and 155.1(2.1) of the Québec *Securities Act*.

[100] See s. 3 of BC Instrument 45-510; s. 2.2 of ASC Rule 45-502 and s. 3 of Alberta Blanket Order 91/10/10; s. 2.11 of OSC Rule 45-501, s. 2.1 and 2.2 of OSC Rule 46-501; and Part XI of Manitoba Policy 3.01.

[101] See ss. 45(2)(25) and 74(2)(22) of the BC *Securities Act*; ss. 66(b) and 122(c) of the Alberta *Securities Act*; Part XIV of Manitoba Policy 3.01; s. 2.1 of OSC Rule 81-501; and s. 52(2) of the Québec *Securities Act*.

[102] See NI 35-101.

[103] See s. 86(1)(h) of the Alberta *Securities Act*; s. 19(1)(e) of the Manitoba *Securities Act*; and s. 35(1)(8) of the Ontario *Securities Act*.

[104] See s. 45(2)(7) of the BC *Securities Act*; s. 86(1)(j) of the Alberta *Securities Act*; s. 19(1)(g) of the Manitoba *Securities Act*; s. 35(1)(10) of the Ontario *Securities Act*; and s. 155.1(1) of the Québec *Securities Act*.

[105] See s. 2.1 of NI 32-101.

[106] See s. 9.1 of NI 71-101.

[107] See s. 44(2) of the BC *Securities Act*, s. 85 of the Alberta *Securities Act*, s. 18 of the Manitoba *Securities Act*, s. 34 of the Ontario *Securities Act*; and ss. 156 and 156.1 of the Québec *Securities Act.*

3. Prospectus Exemptions

The following prospectus exemptions would be included in the USL in a Uniform Exemptions Rule:

1. An exemption for trades between registered dealers;[108]
2. An exemption for control block distribution of securities issued by a reporting issuer made by an eligible institutional investor.[109]

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[108] See s. 74(2)(6) of the BC *Securities Act*; s. 131(1)(u) of the Alberta *Securities Act*; and s. 72(1)(q) of the Ontario *Securities Act*.

[109] See s. 2.1 of NI 62-101.