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Standing Committee on Finance and Economic Affairs  
Room 1405, Whitney Block  
Queen's Park,  
Toronto ON M7A 1A2

Dear Committee Members:

Re: Public Hearings on the Five Year Review Committee  
Final Report: Reviewing the Securities Act (Ontario)

Thank you for the opportunity to provide input into your review of the Final Report of the Five Year Review Committee (Final Report) that was issued March 21, 2003.

By way of background, I am the author of three reports on regulatory strategies relating to the provision of financial services.<sup>1</sup> I am a securities

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<sup>1</sup> *Regulatory Strategies for the Mid-90s - Recommendations for Regulating Investment Funds in Canada*, prepared for the Canadian Securities Administrators, January 1995. (Available in electronic form at <<http://www.osc.gov.on.ca>>)

*Regulation and Supervision of Investment Funds in the New Financial Landscape - A Canadian Perspective* presented by Glorianne Stromberg as part of the background material for the third session of the Expert Meeting on Institutional Investors organized by the OECD Committee on Financial Markets in July of 1997. (1998 OECD Publications, *Institutional Investors In The New Financial Landscape*, Page 449)

*Investment Funds in Canada and Consumer Protection - Strategies for the Millennium*, a Review by Glorianne Stromberg prepared for the Office of Consumer Affairs, Industry Canada, October 1998. (Available in printed form from Industry Canada's Information Distribution Centre and in electronic form at <<http://strategis.ic.gc.ca/epic/internet/inoca-bc.nsf/en/ca01120e.html>> )

lawyer, a former Commissioner of the Ontario Securities Commission and a frequent speaker and commentator on matters relating to the investment funds industry, the financial services sector, and the protection of investors.

My reports contain extensive recommendations on the issues dealt with in the Final Report. They provide an integrated, strategic framework for addressing the issues. Indeed, the Final Report adopts many of the recommendations I made. The submission<sup>2</sup> I made to the Five Year Committee on its Issues List contains an overview of the core elements that the Five Year Review Committee's remedial recommendations needed to address. You may find it helpful to review this.

The observations I made four years ago remain as relevant today as they were then. So do the recommendations I made in my Reports which are regarded by many as benchmarks. Copies of the 1995 Report, the 1998 Report and of my submission to the Five Year Review Committee accompany this letter.

**The Need for Change:** It is important for the Legislative Committee to recognize that despite all the efforts and resources that have been dedicated to securities regulation and all the assurances from regulators and self-regulators, securities regulation is simply not working effectively to protect investors and ensure confidence in and fairness of the capital markets. In fact, the very opposite is occurring. The need for meaningful change has never been greater.

**The Need for Better Accountability:** The last time the Legislature took a close look at the Ontario Securities Commission (OSC) was 1988 when the Standing Committee on Government Agencies tabled its report. Since that time – despite the concerns the Standing Committee expressed about the OSC's oversight of self-regulatory organizations, the effectiveness of these organizations, and the overall efficiency of the OSC – the OSC has been given free rein with little actual oversight by the Legislature. The tabling of Statements of Priorities and Annual Reports in the Legislature with little or no discussion of what is or, more importantly, what is not contained in them does not amount to oversight.

It is important to keep in mind that the Legislature has delegated a lot of responsibility to the OSC including the power to make rules which have the same force as if they were contained in a statute enacted by the

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<sup>2</sup> [http://www.osc.gov.on.ca/Regulation/FiveYearReview/fyr\\_20000609\\_list\\_com\\_stromberg.pdf](http://www.osc.gov.on.ca/Regulation/FiveYearReview/fyr_20000609_list_com_stromberg.pdf)

Legislature. Indeed, many of the OSC rules supercede express provisions of the Securities Act. The requirement for ministerial approval of these rules combined with the five year review process is proving not to be a sufficient oversight mechanism for delegated legislative authority. Here again, the test is not just what has been done but what has not been done.

The public interest requires that the Legislature exercise better oversight over the OSC and its other financial service regulators. It is important that the Legislative Committee recognizes this and recommends measures to enhance the Legislature's oversight of securities and other financial services regulation in the Province.

A dedicated standing committee to consider these matters would be a starting point. This committee would consist of members of the Legislature with significant knowledge and awareness about securities and financial services matters. The mandate of this committee would be to consider not only the Five Year Review Reports but also the effectiveness of the Securities Act and the OSC's administration of it along with other financial services matters.

This standing committee would also be charged with reviewing and assessing the adequacy of the Statements of Priorities and Annual Reports. It would also assess the effectiveness of the rules that are made by the OSC under its rule-making authority and the exemptions it grants with respect to the impact on the protection of investors and the fairness of capital market operations. The establishment of an independent government accountability agency similar to the US General Accounting Office would be another desirable measure to ensure accountability to the Legislature and the public of Ontario.

It is also important that sufficient time on the legislative agenda be allocated to enact needed legislation. The Legislative Committee has heard submissions urging the enactment without delay of legislation dealing with civil liability for misrepresentations made in continuous disclosure material and the implementation of the Uniform Securities Transfer Act. These are examples of needed legislation.

**Regulatory Immunity:** With respect to the submissions regarding increasing regulatory immunity, I think this should be deferred until such time as there is enhanced accountability for what regulators do and for what they do not do. It is very troubling when years go by between reported abuses and regulatory action to deal with them. In the interim, many more investors are harmed.

I recommend that this subject receive more study before any changes are made. There needs to be a better balance between enabling regulators to do their work and protecting the public from regulatory negligence in the carrying out the regulatory mandate. Better internal assessment, oversight and controls may go a long way in justifying increased regulatory immunity.

**Self-Regulation:** There is an urgent need to review the operations of self-regulatory organizations such as the Investment Dealers Association of Canada. The continued reliance on such organizations to protect the public is problematic and the adequacy of the OSC's oversight of them is questionable. Now that the OSC is a self-funding agency, it is time to review whether there is a more efficient regulatory structure that would prove more effective in protecting the public. It is also time to review whether the time spent by the OSC on oversight functions could be better spent in direct operations.

In the meantime, the Investment Dealers Association of Canada should be required to separate its functions as a trade association from its regulatory obligations.

**Single Regulator:** I recommend that the Legislative Committee lend its voice to those calling for a single securities regulator that will operate throughout Canada. I also recommend that at the appropriate time, securities, insurance, pension and trust regulation be combined into a single integrated financial services agency that will operate throughout Canada. I also recommend that market regulation be combined with prudential regulation as has been done in the United Kingdom.

**Separate Administrative Tribunal:** There is a need to give serious consideration to separating the administrative tribunal function from the other functions of the OSC. Apart from the concerns giving rise to a reasonable apprehension of bias, the growth and complexity of the financial services industry combined with the increased severity of the sanctions and penalties have overtaken the purpose of transferring enforcement to a specialized administrative body. These factors combine to make it very problematical to attempt to continue to operate with untrained, part-time lay persons playing an adjudicative role.

There is also a need to consider what other changes might be needed to reconcile administrative proceedings, provincial summary conviction offences and Criminal Code offences. In addition, changes to the Evidence Acts may be necessary.

Ideally, the consideration of these matters would take place in conjunction with creating a single regulator that would operate throughout Canada.

**Closed System:** I recommend that the Legislative Committee require that the closed system of securities regulation be eliminated in favour of an integrated continuous market access system such as that adopted by British Columbia. This would simplify the securities regulatory system and reduce its costs and complexity.

**Disclosure:** I also recommend that the Legislative Committee and the Minister of Finance take steps to ensure that investors actually receive (in print or, at their option, electronic form) disclosure documents such as prospectuses, annual and interim reports unless the investor expressly requests that such documents not be sent to him.

Currently, investors have to request that these documents be sent to them. Most people never get around to making this request with the result that they never receive the information that they need to make a reasoned decision. By the time they start asking for information, it is usually too late.

The current regulatory approach (which is sometimes described as "access equals delivery") significantly undermines investor protection. The resulting informational asymmetry makes it impossible to adopt the regulatory strategy of allowing "free market forces to prevail".

**Mutual Fund Governance:** I recommend that the Legislative Committee and the Minister of Finance not permit the implementation of the proposals for mutual fund governance contained in National Instrument 81-107. My reasons are set out in my letter to the regulatory authorities dated April 9, 2004<sup>3</sup> commenting on these proposals. A copy of this letter accompanies this submission.

While I do not object to the recommendations contained in the Final Report on mutual fund governance, they do not go far enough. It is time to insist that mutual fund managers be registered with the OSC in order to sponsor mutual funds and to require that they meet prescribed conditions of registration as to competency, proficiency, capital, systems and controls and other like matters. There are extensive recommendations concerning these matters in my Reports.

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<sup>3</sup> Glorianne Stromberg in [PDF](#)

**Exemptions:** I recommend that the Legislative Committee require that the public receive notice of, and an opportunity to be heard on, any application for exemptive relief that involves a substantive policy issue or the implementation of proposals in rules that have not become final.

Examples of exemptive relief that involve such matters are contained in the orders exempting various mutual fund enterprises from the prohibitions against self-dealing and related party transactions and in orders exempting issuers and others from delivering disclosure documents unless they receive an express request for the same.

**Disciplinary Proceedings and Complaints:** I recommend that the Legislative Committee require the OSC, the IDA and other self-regulatory organizations to provide the public with access to a list showing particulars of all disciplinary proceedings and specified complaints against registrants (including their representatives). Ideally this information should be stored in a central on-line national facility.

Access to this information is part of an "early warning" system for suitability for registration and continued registration of firms and individuals. It is an essential element of consumer protection.

The lack of an adequate complaints mechanism combined with lack of public disclosure to the public of problem firms and/or representatives is another example of the knowledge gap that exists and that operates to the disadvantage of consumer/investors.

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The foregoing matters are examples of some of the things that need to be done to improve investor protection and ensure confidence in the fairness of the capital markets. There are many more as you will see if you look at the recommendations in my Reports.

I will be pleased to answer any questions you may have.

Yours very truly,

(Signed) Glorianne Stromberg

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