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**Re: Proposed OSC Rule 11-502 Distribution of Amounts Paid to the OSC under Disgorgement Orders; Proposed Companion Policy 11-502 Distribution of Amounts Paid to the OSC under Disgorgement Orders; Proposed OSC Rule 11-503 (Commodity Futures Act) Distribution of Amounts Paid to the OSC under Disgorgement Orders; Proposed Companion Policy 11-503 (Commodity Futures Act) Distribution of Amounts Paid to the OSC under Disgorgement Orders – Modernize the Process to Distribute Disgorged Amounts to Harmed Investors**

The Osgoode Investor Protection Clinic (“IPC”) appreciates the opportunity to comment on the Ontario Securities Commission’s (“OSC”) proposal for a new regulatory framework that establishes a process to distribute money received by the OSC under disgorgement orders to harmed investors (“Proposed Rules”).

By way of background, the IPC, the first clinic of its kind in Canada, is dedicated to providing free legal advice and services to retail investors across the country. Since launching in 2016, we have worked with a wide range of clients who have suffered investment losses. From seniors whose adviser mismanaged their entire life savings on the cusp of their retirement to low-income investors whose advisers recommended leveraged loans, we have worked with vulnerable retail investors who need assistance in seeking redress but cannot afford a lawyer.

We are pleased to bring their voices to the OSC proposal.

We appreciate your consideration of our comments; in the spirit of brevity, we have focused on those questions and topics that we think we can best add value to the process.

Sincerely,

Brigitte Catellier, Associate Director  
Rita Yang, Student Caseworker  
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Yubo Wang, Student Caseworker

**The Osgoode Investor Protection Clinic**

## Overview

Upon reviewing the Proposed Rules, we believe that the proposed OSC Rules and related policies represent a positive advancement in investor protection within Ontario’s capital markets. By introducing a statutory framework for the distribution of funds obtained through disgorgement orders, the OSC is improving its ability to provide redress to investors harmed by securities law violations. However, the Clinic would like to address some concerns regarding the practical implementation of this framework, particularly in ensuring that all investors can navigate the process effectively.

### 1 Publication of Disgorgement Amounts and Accessibility

One key concern involves the publication of disgorgement amounts on the OSC website. According to the Proposed Rules, the amounts received by the OSC under disgorgement orders will be published on its website and updated to reflect additional funds received within 30 days after each calendar quarter.<sup>1</sup> However, the Proposed Rules lack clarity on how this information will be displayed.

We understand that the OSC reviewed and considered comparable legislative frameworks across jurisdictions, with the British Columbia Securities Commission (BCSC) serving as a key reference for the Proposed Rules.<sup>2</sup> The BCSC requires that whenever it receives funds from a disgorgement order, a notice must be published, and applications for payment are considered.<sup>3</sup>

However, upon examining the BCSC website, it seems that locating necessary information can be challenging, particularly for retail investors with limited digital literacy. Navigating to the appropriate section requires several steps —starting at “Enforcement,” moving through “Administrative Enforcement” and “Administrative Sanctions,” before reaching “Returning Funds to Investors” to begin the claim process. This complexity could be a barrier for those unfamiliar with digital platforms or legal procedures.

The IPC’s data from 2018 to 2024 shows that 67% of our clients have low or no financial literacy.<sup>4</sup> A common observation is that lower digital literacy often accompanies low financial literacy, which may hinder one’s ability to access the website and find relevant information. If the notice is only posted on the website without additional outreach, many potential claimants might not become aware of their opportunity to file a claim in time,

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<sup>1</sup> See *Proposed OSC Rule 11-502 Distribution of Amounts Paid to the OSC under Disgorgement Orders; Proposed Companion Policy 11-502 Distribution of Amounts Paid to the OSC under Disgorgement Orders; Proposed OSC Rule 11-503 (Commodity Futures Act) Distribution of Amounts Paid to the OSC under Disgorgement Orders; Proposed Companion Policy 11-503 (Commodity Futures Act) Distribution of Amounts Paid to the OSC under Disgorgement Orders – Modernize the Process to Distribute Disgorged Amounts to Harmed Investors*, OSC Request for Comments B.6, (2024) 47 OSCB 5655 at 5666 (Proposed OSC Rule 11-502, s 3) [OSC Proposal].

<sup>2</sup> *Ibid* at 5658.

<sup>3</sup> *Returning Funds to Investors*, BSSC BCP 15-603 (10 March 2020).

<sup>4</sup> See Osgoode Investor Protection Clinic, “Annual Report” (last visited 3 October 2024), online: <<https://www.yorku.ca/osgoode/ipc/annual-report/>>.

especially if they do not regularly visit the OSC's website. For these claimants, exploring alternative channels for sharing disgorgement information is crucial, as they may be unaware of their potential claims or may struggle to access necessary information online.

## 2 Submission Process

Another concern arises from the submission process for claiming disgorgement orders. In the BCSC Model, the claimants must complete a *Proof of Claim*, which may require legal assistance to ensure accuracy, potentially adding costs for harmed investors.<sup>5</sup> The BCSC's model underscores a critical concern for Ontario: the need to make the claims process accessible to all investors. Ontario should consider proactive measures to design a more user-friendly system with streamlined navigation, clear instructions, plain languages and support options that reduce the reliance on costly legal assistance.

Under the Proposed Rules, applicants may file claims either electronically or via paper forms provided by the OSC. To qualify for receiving disgorgement amounts from the OSC, claimants must describe their direct financial loss and the amount claimed, supported by documentary evidence.<sup>6</sup> We would like to emphasize that many claims may require extensive documentation and/or professional assistance to prepare, which can be challenging for investors with limited financial literacy. A formal submission process might also lead to a need for professional help, thus increasing costs for those seeking to recover their losses.

Additionally, clear guidance is needed on the eligibility criteria under the Proposed Rules. To qualify for a complaint, investors must have incurred direct financial losses as a result of the contravention that led to the disgorgement payment. The eligibility of investors depends on their ability to quantify these direct financial losses and provide sufficient evidence.<sup>7</sup> Without professional assistance, many investors contacting the IPC struggle to distinguish between lost opportunity damages and direct financial losses. Therefore, it is crucial to offer clear guidance on differentiating between these two types of losses.<sup>8</sup> Further clarification is also needed on how losses will be assessed to ensure claimants can effectively demonstrate their eligibility.

Thus, we recommend that the OSC consider adopting a more user-friendly approach to publicizing disgorgement amounts and streamlining the submission process. Our recommendation includes the following:

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<sup>5</sup> See BC Securities Commission, "Claims Process Order on behalf of MNP Ltd. in its capacity as Court Appointed Receiver - Proof of Claim" (last visited 3 October 2024), online: <<https://www.bcsc.bc.ca/-/media/PWS/New-Resources/Enforcement/Administrative-Enforcement/Returning-Funds-to-Investors/Proof-of-Claim-form---Siu-Mui-Debbie-Wong-et-al.pdf>>.

<sup>6</sup> See *OSC Proposal*, *supra* note 1 at 5666-67 (Proposed OSC Rule 11-502, s 8(1)).

<sup>7</sup> *Ibid* at 5667 (Proposed OSC Rule 11-502, s 10(3)).

<sup>8</sup> *Ibid* at 5665 (Proposed Companion Policy 11-502, Part 1).

## **(1) Simplifying Website Navigation**

First, we recommend streamlining the navigation panel on the OSC website to ensure that claimants can easily locate the disgorgement information. This may include creating a dedicated, clearly labelled section for disgorgement notices on the homepage to minimize the number of clicks required to access relevant details. Additionally, providing a search function that directly leads users to claim instructions or resources will enhance the overall user experience. Improving the website's user interface will significantly benefit claimants, particularly those who may not be familiar with navigating complex websites.

## **(2) Plain Language with Clear Instructions**

Second, in the publication of disgorgement notices and the instruction of submitting claims, we recommend adopting plain language to make the information more accessible to all investors, particularly those with lower financial literacy. The use of clear, step-by-step instructions for submitting claims is crucial to avoid confusion and ensure that claimants understand the process. Bullet points, visual aids (such as flowcharts), and FAQs can be added to further clarify the steps involved. This will help ensure that all potential claimants, regardless of their familiarity with financial terminology, can easily comprehend and act on the information.

## **(3) Utilizing Multiple Communication Channels**

We recommend expanding beyond the website and leveraging multiple communication channels to ensure the widest possible reach. This could include publication in widely read newspapers, the use of billboards in public areas, and radio or television broadcasts. Additionally, physical mail, community outreach, and hotlines should be employed to ensure broader and more inclusive access to this important information. Collaborating with legal clinics and organizing community workshops can significantly improve accessibility to potential claimants. These collaborations can help ensure that more people are informed about their rights and the steps they can take to submit claims.

Furthermore, social media platforms like Twitter, Instagram, and TikTok can be leveraged to reach a wider audience, especially younger individuals who may not traditionally seek financial information through conventional means. Optimizing search engine algorithms will also ensure that when people search terms like "harmed investors," information regarding disgorgement orders is prominently displayed.

We believe that by addressing these concerns, the OSC can make the claims process more accessible and ensure that harmed investors have a fair opportunity to recover their losses.

### **3 Reasonableness of the Administrative Costs**

The third concern arises from the “reasonable costs” definition in the Proposed Rules. The Proposed Rules specify that eligible claimants will receive pro-rata shares of the disgorgement amount after deducting administrative costs. They suggest that these administrative costs include the reasonable expenses incurred by the administrator in executing the distribution or by the OSC in obtaining external advice related to the distribution of the disgorged funds.<sup>9</sup>

However, the ambiguity surrounding what qualifies as “reasonable costs” is concerning, particularly in terms of the OSC’s expenses for external advice. We recommend establishing clear guidelines that define “reasonable costs” and including specific criteria for assessing the appropriateness of such expenses. We believe the following considerations may address ambiguity concerns and promote greater accountability, fairness, and transparency in the distribution process:

#### **(1) Transparency Measures**

To ensure transparency, the OSC can consider disclosing a breakdown of administrative costs, including external advice expenses. This transparency allows for public scrutiny and ensures that costs remain reasonable.<sup>10</sup> For instance, a final accounting for administrative costs could be submitted and made publicly available for review.

#### **(2) Uniform Standards**

The OSC can implement monetary sanctions against the wrongdoers in the enforcement proceedings, which often include the payment of cost. The OSC should consider using the same or comparable standards for calculating the cost of law-enforcement and distribution activities. The OSC may also consider unifying the standards for calculating these costs or developing a set of precedents that could provide guidance for future cases. We believe that having a consistent standard or a sample cost framework would provide greater clarity and ensure that these expenses are predictable across different cases.

#### **(3) Periodic Report**

The OSC can consider publishing periodic reports on its use of disgorgement funds, including detailed information on administrative costs. The report may include itemized reporting on tasks such as processing claims, legal fees, etc.

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<sup>9</sup> *Ibid* at 5668-69 (Proposed OSC Rule 11-502, s 15(1)).

<sup>10</sup> According to a report prepared by the United States Government Accountability Office, the Fair Fund data were housed in several different databases that have not been reconciled, and aggregate information on Fair Fund administrative expenses was unavailable. We believe that the OSC should avoid this situation and provide better accountability to the public. See US, Government Accountability Office, *Securities and Exchange Commission: Information on Fair Fund Collections and Distributions*, GAO-10-448R, online: <<https://www.gao.gov/products/gao-10-448r>>.

## **Conclusion**

While the Proposed Rules represent a favourable proposal for investor protection in a broader context, the recent *Poonian v BCSC* decision has a significant impact on investor protection as the Court held that, while disgorgement orders survive bankruptcy, other monetary penalties do not. This decision narrows the options for harmed investors to recover their losses, making the Proposed Rules even more crucial for ensuring that retail investors can reclaim their funds through the distribution process. Implementing a more user-friendly, accessible system is essential to address the challenges highlighted in this letter. We believe that this system should feature simplified navigation, clear instructions, and extensive outreach about order notices through multiple communication channels beyond the website. These enhancements will ensure that all investors, regardless of their digital literacy skills or financial resources, can fairly access the compensation they deserve.