EXPERT PANEL ON
SECURITIES REGULATION

DRAFT SECURITIES ACT: COMMENTARY

INTRODUCTION

The Expert Panel on Securities Regulation ("**Expert Panel**") has recommended in its Final Report that a comprehensive national securities act be adopted to govern Canadian capital markets. The Draft Securities Act ("**DSA**" or the "**Act**") has been developed to provide a starting point for such a national securities act, and illustrates how certain of the specific recommendations made by the Expert Panel in respect of such a national securities act might be implemented. This Commentary accompanies the DSA, and its purpose is to explain how the DSA was developed, the approaches taken in drafting various provisions and their underlying rationale. This Commentary also provides an overview of certain substantive provisions of the DSA. It is accompanied by a table that sets out the sources upon which certain provisions of the DSA are based (Appendix A).

(a) Background to the Development of the DSA

While the development of the DSA has included consideration of a number of strategic, organizational and substantive matters, there are a number of additional issues that require further consideration. These include determination of appropriate transition provisions as well as the institutional aspects of the securities regulator and the independent adjudicative tribunal, as have been recommended by the Expert Panel in its Final Report. The Expert Panel expects that these and other matters would be considered during a formal legislative drafting process, in consultation with participating provinces[1] and other stakeholders. As a result, the DSA does not include certain key provisions, and focuses primarily on substantive aspects of securities regulation.

Although the Expert Panel recommends a securities act that would apply throughout Canada, the DSA itself does not contain provisions governing how this is to be achieved in the absence of the unanimous agreement on the part of all of the provinces. This issue has been dealt with by the Expert Panel in the "Transition Path" section of its Final Report, which sets out a number of recommendations on how best to transition to a single, comprehensive national securities regime. These recommendations include a phased approach, pursuant to which application of a national securities act could be limited to participating jurisdictions only, pending a transition to a comprehensive national securities regime.

Key considerations of the Expert Panel in assessing the various possible approaches to drafting a securities act that would provide a basis for the development of a national securities act included the simplification of transitional issues and mitigation of any potential capital market disruption. The Expert Panel was also working within a very limited timeframe and without the benefit of public consultation on the DSA. As a result, the approach taken to drafting the DSA was

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[1] Unless otherwise indicated, references to "provinces" and "provincial" includes "territories" and "territorial".

primarily to seek to harmonize existing provincial securities regulation. In light of this, while certain substantive improvements have been made, the DSA largely reflects existing provincial securities regulation.

The above considerations led the Expert Panel to select an existing and in force provincial statute as the starting point for drafting the DSA. The provincial statutes considered as a starting point included those in force in provinces that are home to a significant number of market participants (i.e., Alberta, British Columbia, Ontario and Quebec). The Alberta *Securities Act* ("**ASA**") recommended itself from among these choices for a number of reasons: it has been revised to be harmonized with multilateral and national instruments promulgated by the members of the Canadian Securities Administrators ("**CSA**"); it is substantively similar in many respects to the legislative schemes of other "passport" jurisdictions (which includes all jurisdictions other than Ontario); and it has evolved over time to conform, in many meaningful and substantive respects, to the Ontario *Securities Act* ("**OSA**"). Relevant concepts from other provincial statutes were also considered and, to the extent practicable, incorporated**.**

While the drafting of the DSA has been influenced substantially by these statutes, the Expert Panel also considered, and its conclusions and recommendations were informed by, a number of other sources, including: the proposed *Uniform Securities Act* ("**USL**"), a legislative proposal developed by the Uniform Securities Legislation Project; the previously proposed (and principles-based) *Securities Act (2004)* (British Columbia); *Proposals for a Securities Market Law for Canada* (1979) of which Philip Anisman was the principal author; relevant federal legislation (such as the *Canada Pension Plan Investment Board Act*) and relevant provisions of international legislation (such as the *Financial Services and Markets Act 2000* from the United Kingdom and the *Securities Exchange Act of 1934* from the United States). The Expert Panel recommends that further consideration be given to these sources in the context of developing a national securities act.

(b) Overview of DSA and Key Provisions

The general legislative drafting approach reflected in the DSA, consistent with many existing provincial statutes, is to include core, fundamental provisions in the statute while allowing for more detailed and technical requirements to be implemented through rules. This approach is believed to be more conducive to the development of more proportionate, principles-based regulation, which the Expert Panel has addressed in its Final Report. As noted in the study on principles-based securities regulation commissioned by the Expert Panel, in a principles-based system less detail is provided in the statute and more is left to be filled in through the regulator's rule-making powers.[2] This approach is also consistent with recent developments in provincial securities legislation, facilitates greater flexibility by

[2] Ford, Cristie: "Principles-based Securities Regulation". Expert Panel on Securities Regulation (2009).

allowing a comprehensive securities regime to be built upon the statute as complimented by the rules, and conforms to the approach taken in the USL.

As a result of this approach, the provisions of the DSA relating to, for example, registration and prospectus requirements, continuous disclosure and take-over bids have been drafted to include the fundamental provisions relating to these matters in the statute, while allowing for the related technical requirements to be implemented through rule-making. For this reason, the rule-making provisions in the Act are intended to provide the regulator with broad-based and comprehensive rule-making ability. It is the recommendation of the Expert Panel that the regulator also strive to take a more principles-based approach with respect to the development of the rules.

The DSA reflects a number of the recommendations that are made in the Final Report of the Expert Panel. Set out below is a description of some of the ways in which the DSA incorporates those recommendations:

1. Taking a more principles-based approach to securities regulation – DSA, Commission (Part 1) and general legislative drafting approach (see discussion above);

2. Inclusion of a core set of objectives of securities regulation – DSA, Section 11;

3. Inclusion of guiding principles to be observed in pursuing the objectives of securities regulation, including facilitating the reduction of systemic risk, implementing a cost-benefit approach to regulation, regulating with regard to the need to facilitate innovation and maintain the competitiveness of Canada's capital markets, promoting international cooperation and informed participation of investors, providing for appropriate avenues of redress for securities law violations and taking into account regional markets and sectors – DSA, Section 14;

4. Providing the regulator with appropriate interim powers in the legislation to deal with market events that might pose significant systemic risks – DSA, Section 30;

5. Timely reporting to the public on advancing statutory objectives – DSA, Section 32;

6. Establishment of an independent reporting issuer panel to represent the views and interests of small reporting issuers in the formulation of securities regulation – DSA, Section 25;

7. Establishment of an independent investor panel to represent the views of investors in the formulation of securities regulation – DSA, Section 25;

8. Establishment of the Canadian Securities Commission (the "**Commission**" or the "**CSC**") – DSA, Council of Ministers (Section 12), Nominating Committee (Section 13) and Commission (Part 1). (The DSA includes the establishment of

the CSC, the Council of Ministers and the Nominating Committee for purposes of the nomination of Commissioners, but does not otherwise address the institutional aspects of the CSC. See the commentary below for a further discussion of these issues.);

9. Establishment of an independent adjudicative tribunal – DSA, Canadian Securities Tribunal (Part 2). (Although the DSA contemplates the establishment of a Canadian Securities Tribunal (the "**Tribunal**"), it does not contain related operative provisions. The Expert Panel has recommended consideration of the Quebec Bureau de décision et de révision en valeurs mobilières for such purposes.);

10. Empowering the securities regulator with the ability to order compensation as a means of redress for investors incurring losses on account of a violation of securities law – DSA, Section 149;

11. Inclusion of the ability to designate a third-party dispute resolution body and to require registrants to participate in its dispute-resolution mechanisms– DSA, Section 58; and

12. Regulation of exchange-traded derivatives through securities legislation – DSA, Trading in Securities and Exchange Contracts (Part 5).

The following is a description and overview of the key elements of each Part of the DSA.

PURPOSES

The DSA expressly identifies the purposes of the Act and the principles that shall guide the Commission in pursuing those purposes. The DSA recognizes that the core objectives of securities regulation are to provide investor protection and to foster fair and efficient capital markets and confidence in such markets. The remaining provisions of the DSA are to be interpreted and applied with these purposes in mind.

The principles outline the primary means through which the Commission is to achieve the stated purposes. The function of these provisions is to provide the parameters within which the Commission is to exercise its regulatory powers and to give the Commission guiding standards with which it is to evaluate its options in administering the DSA. These principles are based in part on the OSA, modified as necessary to reflect the mandate of a national regulator, and with the additions recommended by the Expert Panel.

In this regard, one important addition to the guiding principles is addressing the role of the securities regulator in facilitating the reduction of systemic risk in the larger financial system. This principle has been added in recognition that it is now critical that securities regulators consult and coordinate with other domestic and

international financial authorities to manage and contain systemic risks to capital markets.

Other guiding principles also include the need to ensure that regulatory costs are proportionate to the benefits being sought (a concept found in the OSA), providing for investor access to dispute resolution mechanisms and a means of compensation and redress (a concept found in the Quebec *Loi sur les valeurs mobilières* and *Loi sur l'Autorité des marchés financiers* ("**QSA**"), the desire to maintain a competitive position for, and facilitation of innovation in, Canadian capital markets, promotion of international cooperation and informed participation of investors in securities regulation, and the need to take into account regional markets and sectors**.** These additional principles have been based in part on recommendations made by previous commissions and panels that have studied various reform initiatives relating to Canadian capital markets as well as improvements made to comparable international legislation**.**[3]

COUNCIL OF MINISTERS, NOMINATING COMMITTEE, COMMISSION AND TRIBUNAL

The Expert Panel has recommended a single securities regulator for Canadian capital markets in the Final Report. The Final Report describes the desired structure of the Commission, which would include a Council of Ministers comprised of provincial and federal ministers; a Nominating Committee with representatives designated by the Council of Ministers; Commissioners appointed by the Minister of Finance based upon recommendations of the Nominating Committee; and an oversight Board.

The DSA is intended only to provide an illustration of how certain of the provisions relating to such a Commission might be addressed in legislation. It does not, for example, attempt to address many of the institutional aspects of a Commission. Those are best addressed through a formal legislative drafting process undertaken to implement such recommendations following consultation with the provinces. Such aspects include, among others, the legal status of the Commission[4], particulars related to its funding (the Expert Panel has recommended that the Commission be self-funding), staff compensation (the Expert Panel has recommended the ability to compensate at market rates), and the role of a Board in the Commission's governance structure (the Expert Panel has recommended appointment of an oversight Board). The DSA also does not include many standard provisions relating to such matters as delegation of powers, inter-jurisdictional co-

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[3] The Task Force to Modernize Securities Legislation in Canada (2006); Crawford Panel on a Single Canadian Securities Regulator (2006); Five-Year Review Committee (Ontario, 2003).

[4] Although the DSA provides for a corporation without share capital as does the OSA, this is only meant to provide an illustration of how the Commission might be structured.

operation, holding of hearings and appeals from decisions. These would also be included in any implementing legislation.

The DSA addresses the establishment and mandate of the Council of Ministers, Nominating Committee and Commission and the nomination of Commissioners. As was recommended in the Final Report, it also provides for the establishment of investor and small reporting issuer panels to represent the interests of investors and small reporting issuers, respectively. The DSA also contemplates that the location of the head office would be specified in the implementing legislation (the Expert Panel has indicated that the decision as to location will likely reflect negotiations with participating jurisdictions) and that the Commission would maintain regional offices and district offices across Canada (the Expert Panel has recommended the establishment of regional offices in major financial centres and smaller local offices.)

The DSA includes provisions requiring the Commission to regularly report on its activities and giving the Commission comprehensive and broad-based rule-making powers and the power to make certain types of interim orders when necessary to address circumstances posing risk to capital markets.

The Expert Panel has also recommended establishment of an independent adjudicative tribunal. It recommends a structure based upon the Quebec Bureau de décision et de révision en valeurs mobilières, and contemplates that the relevant provisions in the QSA be adapted as appropriate in the implementing legislation. As to jurisdiction, while the Expert Panel recommends that discretionary exemptions and contested take-over bids be considered by the Commission, the presumption is that other matters (including appeals from decisions of the Commission or recognized entities) would be heard by the Tribunal. Determination of the types of matters that would properly go before the Tribunal requires further consideration. The QSA provides a useful precedent for these purposes, however, such an exercise should ideally be undertaken in consultation with participating provinces.

RECOGNIZED ENTITIES

With respect to the regulation of recognized entities, the DSA prohibits a person from carrying on business as an exchange or a trade reporting system without being recognized by the Commission and permits the Commission, on application, to recognize a self-regulatory organization ("**SRO**") or clearing agency. While the DSA gives the Commission the power to recognize, govern, impose obligations on and restrict the conduct and operation of recognized entities, it also gives these entities certain powers necessary to carry out their operations, including the power to regulate the conduct of their members.

The DSA generally reflects the approach taken in most provincial statutes; however, it is worth noting that:

- As under the USL, the DSA provides for mandatory recognition of quotation and trade reporting systems ;
- The authority of exchanges and SROs extends to former members, thereby avoiding the problem encountered in *Taub v. Investment Dealers Association of Canada;*
- As under the USL, a recognized exchange or recognized SRO may delegate, with prior approval of the Commission, any of the powers, duties or functions that it is authorized to carry out;
- The Commission has the ability to provide for a process for the self-certification of rules, policies, bylaws and similar instruments of recognized entities;
- The Tribunal is designated as the appropriate body to hear appeals of SRO decisions;
- The Commission would have the power to enforce any decision, etc. of a recognized entity; and
- The Commission would have the power to suspend trading on a recognized exchange.

REGISTRATION

The approach taken to registration in the DSA is to require any person that engages in an activity that requires registration to be registered under the DSA in the appropriate registrant category (unless the person can carry out that activity in accordance with an appropriate registration exemption). Under current provincial legislation, the registration requirement is imposed upon any person who trades in a security or exchange contract or acts as an underwriter. However, pursuant to the harmonization and reform of the registration regime across Canada (in the form of proposed National Instrument 31-103 *Registration Requirements*), the requirement to be registered is proposed to be changed generally from a trade-based registration requirement to one based on being "in the business" of trading in securities and exchange contracts. This proposal has been reflected in the DSA, including the related proposal to require registration of investment fund managers.

The DSA imposes a duty of care on all registrants to deal fairly, honestly and in good faith with clients, in addition to the duty of care imposed on investment fund managers (i.e., the requirement to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances).

The DSA includes new provisions that empower the Minister to designate a federal dispute resolution body to deal with complaints respecting registrants. Under these provisions, every registrant could be required to participate in the dispute resolution mechanisms established by such a body and the Minister would

be empowered to appoint a majority of its directors. Further, the DSA empowers the Commission to order compensation as a form of redress for an investor who has incurred a loss on account of a violation of securities laws by a registrant.

TRADING IN SECURITIES AND EXCHANGE CONTRACTS

The DSA imposes rules on the conduct of registrants pertaining to certain activities that they may undertake in connection with trades in securities and exchange contracts. The purpose of these rules is to regulate the conduct of registrants with a view to providing protection to investors. With respect to regulation of exchange-traded derivatives, the DSA preserves the current regulatory regime in Alberta and British Columbia, by regulating conduct related to trading of exchange contracts. This also preserves the regulation of exchange-traded derivatives in Ontario to a substantial degree, as exchange-traded derivatives are regulated under the ASA and the British Columbia *Securities Act* ("**BCSA**") in a substantially similar manner to their regulation in Ontario under the *Commodity Futures Act*. In this respect, the DSA contains provisions specifically relating to trading in exchange contracts, including provisions that impose control over exchanges that facilitate trading of exchange contracts by requiring the exchange to be recognized by the Commission and that the form of exchange contract be accepted by it.

The prohibition against front running found in section 93.3 of the ASA has not been included, as prohibitions against front running are included in the market integrity rules of the Investment Industry Regulatory Organization of Canada (i.e., the Universal Market Integrity Rules).

Sections 94-96 of the ASA, which contain certain disclosure requirements for dealers as principal, advisers and registered dealers have been omitted, as they are proposed to be repealed pursuant to the Alberta *Securities Amendment Act, 2007*, and instead addressed in the rules. Section 63 of the DSA, which is modeled on section 97 of the ASA, has been streamlined and as a result, imposes the requirement to provide to customers, on request, information as required by the rules rather than specify the particular disclosure that is required in the legislation itself. These changes reflect an example of the approach taken in drafting the DSA of retaining core principles in the legislation while moving technical requirements to the rules.

The DSA does not include express requirements relating to the obligations of a registrant toward the beneficial owners of a security found in section 104 of the ASA, as the Commission has the ability to make rules in this respect, if required. Section 105 of the ASA, which deals with advertising and sales materials, has been omitted from the Act as this section is proposed to be repealed pursuant to the Alberta *Securities Amendment Act, 2007* and could be implemented through the rules.

As discussed above, the DSA preserves regulation of exchange contracts by imposing a recognition requirement on an exchange where such contracts are traded and by regulating the form of an exchange contract.

PROSPECTUS REQUIREMENTS

The main function of the prospectus provisions of the DSA are to impose requirements upon persons undertaking a distribution to provide prescribed disclosure to investors in the form of a prospectus or to undertake the distribution in compliance with exemptions from the prospectus requirement (in circumstances that have been determined under the rules to warrant distribution without a prospectus).

While Parts 9, 10 and 11 of the ASA were used as a starting point in drafting the equivalent provisions of the DSA, the DSA differs in a number of ways. The DSA has been streamlined such that substantive prospectus related provisions are set out in the Act, while technical requirements that relate to those substantive provisions are contemplated to be set out in the rules. For example, the DSA does not carry forward the requirement to file a preliminary prospectus but provides that a preliminary prospectus shall be filed if required by the rules, to provide flexibility to the regulator to implement prospectus distribution reforms. Similarly, the DSA also provides the option for an issuer to file another form of prospectus; however, as opposed to enumerating such other acceptable forms in the Act, the DSA permits the filing of another form of prospectus as permitted by the rules. The DSA does not identify the circumstances under which the issuance of a receipt can be refused if it is not in the public interest to do so, but allows for such circumstances to be set out in the rules. The DSA also does not specifically identify what activities may or may not be permitted during the period between the issuance of a receipt for a preliminary prospectus and a final prospectus, but allows for permitted or proscribed activities to be set out in the rules. However, the requirement for a prospectus to contain full, true and plain disclosure has been retained in the DSA itself.

CONTINUOUS DISCLOSURE

The DSA imposes continuous disclosure requirements on reporting issuers and gives the regulator the ability to review such disclosure. The timely disclosure obligations foster fairness and confidence in markets by ensuring that disclosure of material changes is provided in a timely manner and in the required form.

The approach taken to the regulation of continuous disclosure in the DSA follows the approach taken under the ASA and the OSA, pursuant to which requirements relating to continuous disclosure have been largely supplanted by National Instrument 51-102 and National Instrument 81-106, the continuous

disclosure rules for reporting issuers (other than investment funds) and investment funds, respectively.

Part 13 of the ASA and Part 14 of the OSA both contain separate provisions relating to proxy solicitations. Under the DSA, the requirement to comply with timely disclosure requirements relating to proxy solicitation has been included along with the continuous disclosure provisions of the DSA, rather than in its own section or part. Currently, in addition to the requirements under the various corporate statutes, proxy solicitation is also dealt with under National Instrument 51-102 and National Instrument 81-106. As a result of the introduction of these national instruments, the substantive proxy solicitation requirements previously included under the ASA and the OSA are either no longer included (in the case of the ASA) or have been rendered inapplicable (in the case of the OSA). The approach taken in the DSA, as in the USL, is to move substantive proxy related requirements from the DSA to the rules and to give the Commission the rule-making authority to implement these requirements in such a manner. We note in this respect that the Concept Paper introduced by the CSA as a precursor to the draft USL specifically stated that substantive proxy solicitation provisions were not to be included in the uniform legislation as they could be dealt with in the rules.

TAKE-OVER BIDS AND ISSUER BIDS

The take-over bid provisions of the DSA have been modeled primarily on existing provincial legislation (other than, as noted below, the OSA), incorporating certain provisions from the USL.

The DSA contains rules with respect to take-over bids, including rules imposing obligations upon any person making a take-over bid and upon the directors and officers of an offeree subject to the bid. The DSA also contains provisions to allow for applications to the Commission in connection with a take-over bid. The purpose of the take-over bid provisions of the DSA is to ensure protection through equal treatment of securityholders under a take-over bid and to provide an avenue for redress in circumstances where the equal treatment rules imposed by the DSA have not been followed.

In every province other than Ontario, the substantive and procedural rules for take-over bids and issuer bids are now dealt with in Multilateral Instrument 62-104 *Take-over Bids and Issuer Bids*. The DSA follows this approach and contemplates that most of the requirements would be set out in the rules. In Ontario, the substantive and procedural rules for take-over bids and issuer bids are dealt with in Part XX of the OSA and Ontario Securities Commission Rule 62-504. National Policy 62-203 *Take-over Bids and Issuer Bids* and Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions* (in Ontario and Quebec only) also apply to this regime.

In drafting these provisions, the USL was not relied upon as the USL preceded the development of Multilateral Instrument 62-104 and the corresponding reforms in Ontario. However, the DSA does include the requirement found in section 7.4 of the USL relating to equal treatment of securityholders, as this provision is considered to be more appropriately retained in the statute as a fundamental principle that should guide the rule-making authority of the Commission.

INSIDER TRADING AND SELF-DEALING

The insider trading and self-dealing provisions of the DSA have been modeled primarily on existing provincial legislation, with some modifications made to reflect Division 1 of Part 6 of the USL and to reflect more of "platform" approach by moving technical reporting requirements to the rules.

In particular, certain of these provisions of the DSA have been streamlined to retain the substantive reporting or related requirements in the Act while moving technical requirements to the rules. For example, while preserving the general reporting requirement contained in section 182 of the ASA and section 107 of the OSA, the DSA requires insiders to comply with disclosure requirements as set out in the rules. As a result, the requirement for an insider to file further reports reflecting certain changes in a previously filed report as contained in the ASA and the OSA has not specifically been carried forward under the DSA; instead, it is captured by the primary filing obligation set out in the DSA and details relating to this requirement would be specified in the rules. Similarly, while preserving the filing requirement applicable to management companies in respect of mutual funds (as found in section 191 of the ASA and section 117 of the OSA), the DSA requires such management companies to file a report in accordance with the rules and containing the information required by the rules.

The aforementioned examples reflect the approach taken to drafting certain provisions in this Part of the DSA, such that additional rules are required to, among other things, address certain procedural aspects related to insider reporting (e.g., the requirement to file an insider report within 10 days as is similarly contained in the regulations or rules in certain jurisdictions). The DSA also specifically requires an insider to make disclosure in accordance with the rules of an interest in a related financial instrument, which requirement is not currently contained in the ASA but is based on section 6.2 of the USL, section 57.2 of the BCSA and a currently proposed amendment to section 107 of the OSA (proposed under the *Budget Measures Act, 2006 (No. 2)*, c. 33, Sched. Z.5).

In addition, while provisions of the DSA relating to reports of legal owners have been drafted based on section 109 of the OSA, certain other provisions of the DSA have been reorganized or redrafted to reflect a more consistent structure and flow than that in comparable provisions in existing provincial legislation.

INVESTIGATIONS

The DSA contains detailed rules relating to what the Commission and/or the Executive Director of the Commission can and cannot do with respect to carrying out its investigative functions, including relating to the conduct of investigations, for the purpose of facilitating the administration of Canadian securities laws. The DSA generally follows existing provincial statutes and contemplates, for example, that the Commission would have the authority to order certain market participants to produce information, records and other documents, to compel witness testimony, to freeze property and to appoint receivers, managers, trustees or liquidators in connection with its investigatory powers. The DSA follows the ASA and provides broad authority to the Commission to share information with other governmental authorities and law enforcement agencies. However, the Expert Panel recognizes that the investigative powers set out in the DSA may need to be adapted to federal drafting conventions and policies in this area.

ENFORCEMENT

The enforcement provisions of the DSA set out the general prohibitions and duties for which a breach will result in a punishable offence under the DSA and also contain details regarding the applicable penalties and the enforcement tools available to the Commission. This Part is, to some extent, based upon the ASA, with appropriate changes to reflect a national regulator and to incorporate recommendations of the Expert Panel to improve investor protection.

The DSA contemplates that the quasi-criminal sanctions currently found in provincial securities legislation would be maintained in the DSA while criminal sanctions would remain in the Criminal Code. However, the Expert Panel does recognize that quasi-criminal sanctions may need to be adjusted as appropriate for federal legislation, and therefore certain aspects remain open-ended. For example, the DSA includes a general due diligence defence as was recommended by the USL and is the norm under federal statutes (other than in the case of mens rea offences). The Expert Panel has recommended that there be a full examination of larger structural reforms, including an assessment of the merits of consolidating administrative and criminal enforcement, and that these be undertaken after the Commission has been established.

Other compliance measures also include the power of the Commission to order financial compensation as an alternative to the conventional court process. These provisions are based upon the Manitoba *Securities Act* and New Brunswick *Securities Act*. The Expert Panel has also recommended the establishment of a compensation fund; however, this recommendation is not reflected in the DSA**.**

The DSA retains the public interest order powers of the provincial commissioners, as modeled on the applicable provisions in the ASA and the OSA. The DSA also contemplates the power to order compliance with rules and decisions

of recognized entities, reflective of the *Model Administration Act* developed by the Uniform Securities Law Project.

The DSA does not address administrative penalties as customary provisions under federal legislation differ from provincial legislation in this area. Any implementing legislation would, however, include provisions relating to administrative penalties.

CIVIL LIABILITY

The civil liability provisions of the DSA have been primarily modeled on existing provincial legislation and attempt to harmonize some of the material differences among the provincial statutes.

The DSA imposes civil liability for various offences, including with respect to misrepresentations contained in prospectuses, offering memoranda and circulars, for failure to send offering documents as required under the DSA and for trading in contravention of insider trading restrictions. It also sets out the relevant statutory defences to such offences, gives the Commission certain powers to make orders in this respect and sets out circumstances in which purchasers can rescind their contracts to purchase securities.

The purpose of this Part of the DSA is to give investors statutory rights of redress in the event that, among other things, a prescribed document contains a misrepresentation. The rights afforded to investors would be available in addition to any rights available to them at law and are meant to provide a more direct access for redress than that available under common law alone. In setting out defences to these obligations, the DSA also provides certainty to capital market participants engaging in activity that could expose them to liability by setting out standards with respect to their conduct that must be satisfied in order to avoid liability.

While retaining investor rights available under the ASA, the DSA also incorporates certain provisions found in the OSA. In respect of an action for damages relating to a misrepresentation in an offering memorandum, the DSA uses the OSA definition of "offering memorandum", includes a right of action against the selling security holder on whose behalf the distribution is made (OSA section 130.1) and contemplates that the rules will prescribe the circumstances in which such statutory rights would apply to offering memoranda. In addition, the DSA includes the requirement, as found in section 135(8) of the OSA, that a reporting issuer must cooperate fully with the efforts of the Commission in respect of every order made by the court regarding commencement or continuance of an action (relating to persons in a special relationship with a reporting issuer and persons with access to information concerning an investment program or portfolio).

CIVIL LIABILITY FOR SECONDARY MARKET DISCLOSURE

This Part of the DSA has been modeled primarily on existing provincial legislation. It sets out a number of offences for which issuers and others can be liable to secondary market investors (in contrast to the civil liability provisions discussed above, which set out liability in the primary market), as well as the relevant defences to such offences and the procedure for making claims in respect of secondary market offences.

The purpose of this Part is to give secondary market investors statutory rights of redress in the event that an issuer or other party has failed or has been complicit in a failure to comply with timely disclosure obligations relating to material changes or where a misrepresentation is contained in a public document or public oral statement.

GENERAL PROVISIONS

The general provisions that would customarily be included in implementing legislation, such as provisions relating to regulations and immunities, have not been addressed in the DSA. In this respect, it should be noted that in its Final Report, the Expert Panel has made a recommendation regarding the amending formula for the implementing legislation. The Expert Panel has recommended that amendments to a national securities act be subject to the veto of provincial Ministers representing at least a majority of the participating provinces having, in aggregate, not less than a majority of the population of all provinces that agree to participate in the national regime. The general provisions might also include other matters of relevance to a national regulator, such as provisions for international cooperation with law enforcement agencies.

As noted in the introduction, the DSA does not include transition provisions. The Expert Panel has made a number of recommendations in that regard in the Final Report. These include providing for the voluntary participation of provinces and limiting the application of legislation to such participating jurisdictions.

APPENDIX A

This table identifies the primary sources of the various provisions included in the Draft Securities Act. For many of the provisions, only the primary source from the Alberta *Securities Act* is identified, although the provisions may be substantially similar to comparable provisions in other provincial and territorial securities law statutes. As well, while the substantive elements of the various provisions of the Draft Securities Act are based on the identified sources, those provisions may also have been redrafted to comply with federal statutory drafting conventions and norms and civil law harmonization.[5]

Abbreviations used in this Table	
AMF	*An Act Respecting the Autorité des marchés financiers* (Quebec) R.S.Q., c. A-33.2
ASA	*Securities Act* (Alberta), R.S.A. 2000, c. S-4, as amended
ASAA	*Securities Amendment Act (amending the Securities Act (Alberta)), 2007*, c. 10
BCSA	*Securities Act* (British Columbia), R.S.B.C. 1996, c. 418, as amended
FSA	(UK) *Financial Services and Markets Act 2000*
IOSCO	Report of the International Organization of Securities Commissions entitled "Objectives and Principles of Securities Regulation" (May 2003)
MSA	*The Securities Act* (Manitoba), C.C.S.M., c. S50, as amended
OSA	*Securities Act* (Ontario), R.S.O. 1990, c.5, as amended
USL	*Uniform Securities Act* (Consultation Draft December 16, 2003 of the Uniform Securities Legislation Project)
1934 Act	(US) *Securities Exchange Act of 1934*

Draft Securities Act	Source
Definitions and Interpretation	ASA, s. 1-10; ASAA, s. 2; OSA, s. 1(1); BCSA, s. 1(1)
Purposes and Part 1 – Commission	IOSCO, s. 4.2.1; AMF, s. 4 and 8; OSA, s. 2.1(1)-(6), 143(1)-6, 143.2 – 143.7; FSA, s. 2, s. 9-11 and Schedule 1; 1934 Act, s. 12(k)(2); ASA, s. 223; recommendations made in the "Five Year Review Committee Final Report Reviewing the *Securities Act* (Ontario)" dated March 21, 2003; the Final Report of the Crawford Panel on a Single Securities Regulator entitled " Blueprint for a Canadian Securities Commission" dated June 7, 2006
Part 2 – Canadian Securities Tribunal	See Commentary
Part 3 – Recognized Entities	ASA, s. 59, 60.1, 61 – 72, 73(1) and (3); OSA, s. 21(2), 21.1(1),

[5] A detailed table of concordance indicating the sources for each section of the DSA will also be made available at www.expertpanel.ca.

Draft Securities Act	Source
	21.2(1), 21.2.1 and 21.6; USL, s. 2.6(3) and 2.7(2)
Part 4 – Registration	ASA, s. 60, and 82; OSA, s. 27; ASAA, s. 5-9; *Bank Act*, s. 455.1
Part 5 – Trading in Securities and Exchange Contracts	ASA, s. 90-92(1)-(4) and (5), 97(1), 98-103, 106 and 107: BCSA, s. 58
Part 6 – Prospectus Requirements	ASA, s. 110, 112, 113, 119, 120, 122, 123, 126-130, 144, 145 and 153; USL, s. 4.4 and 4.6(1)
Part 7 – Continuous Disclosure	ASA, s. 146 and 147; USL, s. 5.1(1)
Part 8 – Take-over Bids and Issuer Bids	ASA, s. 158(a), 159–160, 179–180; OSA, s. 89; USL, s. 7.4
Part 9 – Insider Trading and Self-Dealing	ASA, s. 181(1), 181(2)(a)-(c), 182(1) and (3), 182.1, 184–186, 188–189, 191, 192–193.2; OSA, s. 109
Part 10 - Investigations	ASA, s. 40–41, 42(1)–(3) and (5)–(11), 43–46.1, 47(1)–(4)(a) and (5)–(8), 48(1)–(6), 49–52, 53(b)–(c), 54-57; OSA, 129(7)
Part 11 - Enforcement	ASA, s. 92(4.1), 93–93.2, 93.4, 141, 194(2) and (4)–(6), 195(2), 197–198, 200(1), 201–202; OSA, s. 72(8), 122(2), 126.1–126.2, 128(3) and (4); MSA, s. 148.2; 1934 Act, s. 12(k)(1)
Part 12 – Civil Liability	ASA, s. 203(1)–(10) and (11)-(15), 204(1)–(10), 205(1)–(12), 205.1, 206, 207(1)–(5), (8) and (9)–(11), 208(1)–(9), 209, 209.1, 211; OSA, s. 135(8)
Part 13 – Civil Liability for Secondary Market Disclosure	ASA, s. 211.01–211.03, 211.04(1)–(10) and (13)–(17), 211.05–211.095