November 8, 2000

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Securities Commission
The Manitoba Securities Commission
Ontario Securities Commission
Office of the Administrator, New Brunswick
Registrar of Securities, Prince Edward Island
Nova Scotia Securities Commission
Department of Government Services and Lands,
Newfoundland and Labrador
Registrar of Securities, Northwest Territories
Registrar of Securities, Yukon Territory
Registrar of Securities, Nunavut

c/o John Stevenson, Secretary
Ontario Securities Commission
20 Queen Street West
Suite 800, Box 55
Toronto, Ontario
M5H 3S8

Dear Sirs/ Mesdames:

Re: NI 54-101 and Related Instruments – Communications with Beneficial Owners of Securities of a Reporting Issuer

We would like to take this opportunity to submit a number of comments on the drafting of revised National Instrument 54-101 and related forms, on the assumption that the Canadian Securities Administrators will be taking steps to implement NI 54-101 in the short term. Before addressing those drafting points, however, we would like to make a plea for harmonization of the shareholder communication regimes under National Policy 41/NI 54-101 and the Canada Business Corporations Act (CBCA).

As you are aware, in the spring of this year the federal government introduced Bill S-19, which contains a number of amendments to the CBCA. For the purposes of this submission, we are focussing on section 72 of the bill, which would amend CBCA section 132. It is apparent from the content of section 72 that the drafters did not fully understand the intricacies of the tiered holding of securities. We were particularly concerned by the proposed redrafting of CBCA section 153(2) which would preclude an

intermediary from appointing a proxyholder to vote securities without first obtaining voting instructions from the beneficial owner of the securities. Assuming that CDS is encompassed by the definition of intermediary (and that appears to have been Industry Canada's intent), that would preclude CDS from issuing an omnibus proxy to a reporting issuer as the first link in the chain of communication with beneficial owners about an upcoming shareholder meeting.

The effect of the CBCA amendments would have been to frustrate a fundamental aspect of the NP 41/NI 54-101 shareholder communication system in the context of CBCA securities – or at the very least, forces a choice between complying with federal legislation or with a rule made pursuant to provincial securities law. The provisions of Bill S-19 are moot since the bill will die on the order paper. Before the bill is ultimately reintroduced in Parliament it is vital that steps be taken to ensure that it contemplates a shareholder communication system that parallels that established under NP 41.

DRAFTING COMMENTS

1. Part 1 Definitions and Interpretation

(a) CDS

The definition of "CDS" does not set out the company's full legal name. It should make reference to "The Canadian Depository for Securities Limited" (emphasis added).

(b) Proximate Intermediary

The definition of "proximate intermediary", specifically clause (a), should be revised to make it clearer that the focus is on whether the participant, and not the depository, holds the specific security. As currently drafted, the definition could be interpreted as catching every participant of the depository because it is not clear that the phrase "holding the security" modifies "participant" rather than "depository". We recommend revising the drafting as follows:

> "a depository participant ~~in a depository~~ holding the security, or". *{proposed new text is underlined; proposed deleted text is ~~struck-out~~}*

(c) Proxy-related Materials

There is a minor typographical error in the definition of "proxy-related materials". The word "materials" occurs in the defined term but the body of the definition refers to "material" in the singular.

2. Part 2 Reporting Issuers

(a) Section 2.2(1) – Notification of Meeting and Record Dates - Timing

The fourth line should read: "notification of meeting date and record date for notice and for".

(b) Section 2.2(2) – Notification of Meeting and Record Dates – Contents

The addition of the word "date" should be picked up here also. Alternatively, it could say "notification of meeting and record dates". The latter approach would be consistent with the drafting in sections 2.3(1) and 2.15(a).

(c) Section 2.3(1) – Intermediary Search Request – Request to Depository – in connection with meeting

Section 2.3(1)(a) requires the depository to report on holdings of securities that carry notice and/or voting rights. The current drafting stipulates that the depository provide:

> "a report that specifies the number of securities of the reporting issuer of each class or series that entitle the holder to receive notice of the meeting or to vote at the meeting …"

The drafting could imply that the depository was providing an independent confirmation that the securities carry the right to receive notice/vote. Instead, the depository relies on the information provided to it, in this case by the reporting issuer in its notification of meeting and record dates. It would, therefore, be more appropriate if the description of the report referred back to the notification as the authority for determining which securities carry the right to receive notice or to vote. We recommend that the drafting be changed along the following lines:

> "a report that specifies the number of securities of the reporting issuer of each class or series specified in the notification of meeting and record dates as entitling ~~that entitle~~ the holder to receive notice of the meeting or to vote at the meeting …"

In addition, the drafting of section 2.3(1)(a) needs to be modified slightly in connection with the reference to a person or entity holding securities on behalf of the depository. Such a person/entity (eg. an upstream depository) will likely be holding securities on behalf of other entities in addition to the depository. The depository has no information about those other holdings by the upstream depository and so cannot report on "the number of those securities held by " the upstream depository. That would imply a report on the total holdings in that security by the upstream depository whereas the depository can only report the number of securities held for it. We therefore recommend that the drafting be revised as indicated below:

> "… to receive notice of the meeting or to vote at the meeting that are currently registered in the name of the depository, the identity of any other person or company that holds securities … and the number of ~~those~~ such securities held by that other person or company on behalf of the depository;" *{Note: we propose replacing "those" with "such" for consistency with the drafting of section 5.3(a).}*

The same comment regarding the responsibility for specifying which securities carry rights to receive notice/vote applies equally to the drafting of section 2.3(1)(c). In addition, the proposed drafting of this provision could be interpreted as requiring the depository to provide every telephone and fax number and email address that it has on record for each of its participants. To address these issues, we recommend redrafting the provision as follows:

> "… a list setting out the ~~names~~ name, ~~addresses~~ address, telephone ~~numbers~~ number, fax ~~numbers~~ number, ~~any~~ electronic mail ~~addresses~~ address (if any) and respective holdings of each of its participants ~~in the depository~~ of each class or series of securities specified in the notification of meeting and record dates as entitling ~~that entitle~~ the holder to receive notice of the meeting or to vote at the meeting; and"

(d) Section 2.5(1) – Request for Beneficial Ownership Information

The depository should not be described as "identifying" intermediaries "holding the securities that entitle the holder to receive notice of the meeting or to vote at the meeting". As discussed above, it is not the depository's role to determine which rights attach to which securities. We recommend changing the drafting as follows:

> "… send it to all proximate intermediaries identified by the depository as holding the securities specified in the notification of meeting and record dates as entitling ~~that entitle~~ the holder to receive notice of the meeting or to vote at the meeting."

As an aside, we question whether the cross-reference in the fifth line of section 2.5(1) should not be to section 2.3 rather than to section2.4.

(e) Section 2.20 - Abridging Time

Currently CDS produces (at the request of the Ontario Securities Commission) a weekly report of any issuer notifications that were received after the date prescribed by NP 41. Are there likely to be changes to that arrangement or should we continue to provide the same report? Also, as an observation, we note that late receipt of a notification from an issuer will make it more difficult for CDS to provide timely information to the market.

5. Part 5 Depositories

(a) Section 5.3 (and footnote 48) – Depository Response to Intermediary Search Request by Reporting Issuer

Section 5.3 describes the report produced by the depository as "containing information that is as current as possible". While that is a fair description of the intermediary master list (subject to inserting the word "reasonably" before "possible"), it is not an appropriate description of the information on securities holdings that is provided pursuant to sections 5.3(a) and (b).

The intermediary master list (provided pursuant to section 5.3(c)) reflects the most recent information received by the depository from its participants. (CDS specifically requests semi-annual updates/confirmations from its participants to help maximize the currency of the master list.) However, information on CDS holdings and on holdings by its participants (that comprise the total CDS holding), has to be provided as of a particular date. In the case of an intermediary search request made under s. 2.3(1) (i.e. in connection with a meeting), the relevant date is determined by the date of receipt of the request (as a general rule, CDS processes each intermediary search request on the day on which it was received). In that case, then, securities holdings will be reported as of the date of receipt of the request while the intermediary information will be as current as reasonably possible.

Section 2.3(2) also contemplates a reporting issuer requesting intermediary information as of any stated date (and in connection with any class or series of securities). Where a depository receives a request of that type, the reported holdings will be current as of the specified date.

In light of these comments, we recommend revising section 5.3 in the following manner:

> "… a depository shall send to the reporting issuer a report, containing information that ~~is as current as possible, that~~".

Footnote 48 should be amended concurrently (by replacing "report" with "intermediary master list") and moved so that it applies just to section 5.3(c).

(b) Section 5.3(a) – Depository Response to Intermediary Search Request by Reporting Issuer – Holdings by or on Behalf of Depository

Consistent with the discussion of amendments to section 2.3(1), above, section 5.3(a) should be changed as follows:

> "… the identity of any other person or company that ~~holds~~ as of the relevant date held securities … and the number of such securities held by that other person or company on behalf of the depository as of that date;"

(c) Section 5.3(b) – Depository Response to Intermediary Search Request by Reporting Issuer – Holdings by Depository Participants

Similarly, section 5.3(b) should be amended to address points raised in the discussion (above) of section 2.3(1), so that it would read:

> "… specifies the ~~names~~ name, ~~addresses~~ address, telephone ~~numbers~~ number, fax ~~numbers~~ number, ~~any~~ electronic mail ~~addresses~~ address (if any) and respective holdings, as of the relevant date, of each of its participants ~~in the depository~~ of securities of the series or class specified in the request, ~~on whose behalf the depository holds securities~~; and"
> *{We propose deleting the last phrase because it is redundant, and also for consistency with the drafting in section 2.3(1)}*

6. Part 6 Other Persons or Companies

(a) Section 6.1(5) – Requests for NOBO Lists from a Reporting Issuer – FINS

Section 6.1(5) requires reporting issuers to delete, from NOBO lists provided under Part 6, any FINS numbers or other information that would identify the intermediary through which the NOBO holds securities. We suggest replacing the reference to a "FINS number" with a term such as "account designation". FINS numbers will lose their relevance when equities are migrated from CDS's existing SSS/BBS to the DCS (which is being done stages, beginning in the spring of 2001). To avoid having to amend the National Instrument at a later date to reflect this systems evolution, we would recommend replacing the reference to FINS with a more generic term. ("FINS" could then be deleted from the definition section.)

(b) Section 6.2(3) – Other Rights and Obligations of Persons and Companies other than Reporting Issuers

This provision makes it clear that a person or company other than the reporting issuer may request an intermediary search (or beneficial ownership information). The compilation and provision of information by the depository in response to an intermediary search request consumes time and resources, and the depository is entitled to recover a reasonable fee from such persons/companies for this service. Thus, we would like to see the provision amended slightly to expressly reflect this fact. This is consistent with drafting elsewhere in the National Instrument: section 6.1(3) expressly states that a person requesting a NOBO list from a reporting issuer shall pay the issuer a fee for preparing the list. Accordingly, we recommend adding text to section 6.2(5) to indicate that there are two preconditions to receiving an intermediary search report from the depository: (1) provision of an undertaking in the prescribed form, and (2) payment of a fee for preparing the report.

7. Part 7 Prohibited Use

(a) Section 7.1 - Use of NOBO List

Since section 7.1 governs the use of both NOBO lists and intermediary search results, we would ask that the title be changed from "Use of NOBO List" to "Use of Information". The results of intermediary searches also contain confidential information and are therefore entitled to comparable protection. The title used in the National Instrument (coupled with the omission of any reference to intermediary search results in the proposed Undertaking, Form 54-101F9) could be construed as implying that intermediary information merits less confidentiality protection, which is not the case. Also, we wonder what the qualifier "relating to the reporting issuer" is intended to mean (in the third line of section 7.1).

8. Form 54-101F3: Omnibus Proxy (Depositories)

(a) ISINs and CUSIPs

The form of proxy stipulates that the security should be referred to by its ISIN. Both ISINs and CUSIPs are used in the industry. We recommend that the form explicitly countenance the use of either numbering system. Thus, "ISIN Number" should be changed to "ISIN/CUSIP Number". (The same comment would apply to Form 54-101F8 - Legal Proxy.)

(b) Corresponding Security

The third line of text refers to "the corresponding securities referred to below". Since there will be a separate proxy for each security (or class or series of security), it would be more appropriate to refer to "security" in the singular. Accordingly, we recommend modifying that phrase slightly to "the corresponding security …".

(c) Prohibition Against Voting without Instructions

The omnibus proxy contains a prohibition against the appointees voting the securities other than in accordance with voting instructions from the beneficial owner. We reiterate our comment from a previous submission that while we do not mean to disparage the importance of this issue, we do object to including such a statement as a directive given by the depository. The depository is not a regulator of its participants and it does not instruct them on how to conduct their business. In our view, Including that sort of text in the omnibus proxy would take it outside the scope of a depository's role. If the CSA insists on including substantially similar text then we would be prepared to include the subject sentence if it were prefaced by the text along the following lines: "We have been directed by securities regulatory authorities to remind you that [the] …"

We would also point out that, since the proxy is delivered to the reporting issuer and not to the appointed proxyholders, it is questionable whether including such a reminder would be of much practical consequence.

9. Schedule to Omnibus Proxy (Schedule to Form 54-101F3)

(a) Format of Report

CDS does not print its Holders of Record Reports (which are attached to its omnibus proxies) on letterhead, and we would request that the reference to letterhead be deleted from the proposed format for the Schedule. In addition, a CDS Holders of Record Report contains the information required by the proposed format, but not all the fields are named as they are in the proposed Schedule. Also the document produced by CDS is titled a "Holders of Record Report", not a "SCHEDULE TO OMNIBUS PROXY – Participant Security Positions". We are aware that section 1.4(1) of the National Instrument stipulates that a person/company may substitute another form or document for a required form as long as the substitute includes the same information contemplated by the required form. That obviates the need for CDS to make any changes to the format of its existing Holders of Record Report, but it is arguable that we would still need relief from the implicit requirement to print the report on letterhead.

10. Form 54-101F9 Undertaking

(a) Application to Intermediary Search Results

It is apparent that the form was designed for use in connection with a request for NOBO information – there are numerous references to the NOBO list but none to information regarding intermediaries. That is puzzling given that the National Instrument stipulates that the same form is to be used by a person or company (other than an issuer) requesting an intermediary search from the depository. The depository and its participants are entitled to the same assurance that where intermediary information is sought, it will only be used for authorized purposes. Holders of record information is confidential information and that confidentiality needs to be protected by the terms of the undertaking.

As drafted, the form only contemplates requests being made for NOBO Information and hence only provides protection against unauthorized use of NOBO Information. Rather than revise the form to try to make it suit both types of information request, perhaps two separate forms should be developed: one for intermediary search requests and one for NOBO information requests.

11. Appendix A: Proxy Solicitation under NI 54-101

(a) Distinction between Depositary and Depository

The Legend box refers, in the definition of “Dep”, to “Depositary”. That should instead be the word “Depository” because depositary has a specialized meaning in the securities industry, where it is used to refer to the entity to which market participants tender securities in a reorganization event such as a takeover bid.

We appreciate having had this opportunity for input on the drafting of the National Instrument and related forms. If you would like to discuss any aspect of our submission further, please contact the undersigned (at 416-365-8545) or Susan Cantlie (at 416-365-8395).

Yours very truly,

Toomas Marley
Vice-President, Legal
and Corporate Secretary