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July 23, 2001

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, Government of the Northwest Territories
Registrar of Securities, Government of the Yukon Territory
Registrar of Securities, Nunavut

c/o John Stevenson, Secretary
Ontario Securities Commission
20 Queen Street West
Suite 1903, Box 55
Toronto, Ontario
M5H 3S8

Dear Sirs/Mesdames:

Re Proposed National Policy 51-201: Disclosure Standards
:

This letter is in response to the request for comments dated May 25, 2001 with respect to proposed National Policy 51-201 Disclosure Standards.

As a general matter, I believe that proposed NP 51-201 is both timely and helpful. It provides substantial and important guidance to issuers and their advisors alike. There are, however, two matters that I would like to raise for your consideration.

Definition of Materiality

NP 51-201 describes the definitions of "material fact", "material change" and "privileged information" that are found in provincial securities legislation. As noted in the discussion that accompanies NP 51-201, the U.S. standard for materiality is somewhat broader

than the scope of Canadian statutory definitions in that it is not based on a market impact test. Rather, the U.S. standard focuses on the importance of the information to a reasonable shareholder making an investment decision. In my view, Canadian securities administrators should re-visit the question of whether Canadian investors would be better served by a materiality standard (and a consequential change in disclosure obligations) that follows the U.S. model.

Although the Canadian and U.S. standards will, in the majority of situations, produce the same result on a question of materiality, it is far from the clear that the Canadian definition adequately addresses the interests of investors in all circumstances. The underlying assumption of the Canadian test for materiality is that the secondary trading market will, in all cases, react in a manner that will be dispositive of whether any particular release of information is material to the issuer or not. This is clearly a faulty assumption in numerous cases; there are many issuers whose securities are sufficiently illiquid, or trade in inefficient markets (eg, over the counter), with the result that the market price or value of the securities does not properly reflect the importance of the information that has been disclosed.

The U.S. standard for materiality may appear, on its face, to be less certain than the Canadian standard; however, the U.S. standard is focused on the correct question and does not allow issuers to delay or avoid disclosure and related obligations on the basis of an assessment of after-the-fact market reaction.

Persons Subject to Tipping Provisions

Part III of NP 51-201 contains guidance on a number of issues that arise with respect to tipping and insider trading. The draft policy statement does not provide guidance with respect to the application of tipping and insider trading prohibitions to third parties who become aware of potential material transactions from persons who are not in a "special relationship" with the reporting issuer. Consider the following example. A portfolio manager receives a telephone call from an investment dealer who is looking to lock-up a block of shares in a company that will be the target of an impending take-over bid. The investment dealer is acting on behalf of the offeror and the proposed bid has not been publicly disclosed. The portfolio manager declines to lock up to the offer. Is the portfolio manager prohibited from trading in securities of the target company? If so, for how long?

The existing requirements of the *Securities Act* (Ontario) do not contain a clear answer to these questions. Subsection 76(3) has some application, but does not prohibit either the offeror, or the investment dealer, from soliciting the support of the portfolio manager. In addition, it is not at all clear that the offeror's plans would constitute a "material fact" with respect to the target company or, even if it did, that either the offeror or the investment dealer would be persons in a special relationship with the target company. In these circumstances, it is likely that the portfolio manager would not be restricted by applicable securities laws from trading immediately in the shares of the target company. This is an outcome with which many market participants would not agree. Some consideration in NP 51-201 of this sort of circumstance would be helpful.

The views expressed in this letter are those of the author alone and do not necessarily reflect the opinions of any other partners at Torys or the firm as a whole.

Yours truly,

J.D. Scarlett

JDS/lc