

August 21, 2001

VIA E-MAIL & MAIL

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 the Government Services and Lands,
Newfoundland and Labrador
Registrar of Securities, Government of 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

Commission des valeurs mobilières du Québec
Stock Exchange Tower
800 Victoria Square
P.O. Box 246, 22nd Floor
Montreal, PQ H4Z 1G3
Attention: Denise Brosseau, Secretary

Dear Sirs/Mesdames:

**Re: Proposed National Policy 51-201 – Disclosure Standards and
Proposed Rescission of National Policy 40 - Timely Disclosure**

The Canadian Venture Exchange (“CDNX”) appreciates the opportunity to comment on Proposed National Policy 51-201 (the “Proposed Policy”) and the proposed rescission of National Policy Statement 40 – Timely Disclosure (“NPS 40”). CDNX is a stock exchange for emerging companies and shares with the Canadian Securities Administrators (the “CSA”) a responsibility for and an interest in ensuring that market participants have equal access to and the opportunity to act upon material information. CDNX supports the efforts of the CSA in this initiative and the overall goal of improving corporate disclosure and the integrity of the Canadian capital markets.

CDNX welcomes the opportunity to participate in this initiative in order to:

- (i) ensure the maintenance of a credible Canadian market based on equality of material information among shareholders;
- (ii) work toward greater harmonization of securities laws and regulation in Canada in order that Canadian market participants have a clear, uniform and workable framework of rules governing timely disclosure;
- (iii) structure effective regulatory guidelines in Canada in order to eliminate the selective disclosure of material information; and
- (iv) structure effective regulatory guidelines in Canada relating to web-based or electronic communications.

Our comments below are set out in three sections. First, we provide comment on the discussion of timely disclosure as restated in the Proposed Policy and the proposed rescission of NPS 40. Second, we provide brief comments relating to certain provisions of Parts V and VI of the Proposed Policy. Finally, we provide specific response to the particular questions posed in the Request for Comments, namely:

- (i) the approach to the “necessary course of business exception”;
- (ii) the approach for determining how a company may satisfy the “generally disclosed” requirement under the tipping provisions; and
- (iii) the practicalities of a company implementing the recommended “best disclosure” practices in Part VI of the Proposed Policy.

I. PROPOSED RESCISSION OF NATIONAL POLICY STATEMENT 40 – TIMELY DISCLOSURE

The CSA has proposed the rescission of NPS 40 on the basis that (i) the guidance provided in the Proposed Policy incorporates the guidance previously forming part of NPS 40, and (ii) the relevant exchanges have rules and policies in place concerning timely disclosure.

Generally speaking, CDNX believes that the Proposed Policy represents a departure from the current disclosure regime in Canada which, through NPS 40, is harmonized as between securities legislation and policy and stock exchange policy. We are concerned that this departure will result in a national disclosure regime which is more confusing and correspondingly less user-friendly to market participants, with negative impact on the quality of disclosure generally. Accordingly, CDNX is not in favour of the CSA’s approach to timely disclosure as outlined in the Proposed Policy or the rescission of NPS 40 at this time.

Our comments under this heading relate generally to Part I - Introduction, Part II – Timely Disclosure, Part III – Overview of the Statutory Prohibitions Against Selective Disclosure and Part IV – Materiality of the Proposed Policy.

Dual Disclosure Regime

The Proposed Policy will effectively create a dual disclosure regime in Canada given that the guidance it provides relates only to the statutory regime whereby issuers are required to disclose material changes but not material facts. In this regard, we are concerned that the Proposed Policy does not adequately emphasize that Canadian listed companies are held to a higher standard of public disclosure pursuant to exchange policies and rules, a standard which requires the disclosure of “material information”, whether such information consists of “material facts” or “material changes”.

The adoption of NPS 40 was an effort by the CSA to both create uniformity in the manner public companies disclose material information and address the inadequacies of the statutory regime relating to continuous disclosure. NPS 40, as supplementary guidance to the statutory disclosure requirements, provides that disclosure must be made not only for material changes, but also in relation to material facts. It is premised on the fact that public confidence in the integrity of securities markets requires that all investors be on an equal footing, which is accomplished by the timely disclosure of material information. The disclosure standard adopted in NPS 40 was established in order to ensure, subject to an extremely limited confidentiality exception, that a reasonable investor would receive all important information relevant to making an investment decision, thus enabling the market to set prices efficiently. Accordingly, NPS 40 requires that the public be immediately informed of material information by way of a news release to ensure broad and accurate dissemination of information and in order to reduce the risk that persons with access to that information will act upon undisclosed information. NPS 40 provides guidelines to assist in the process of determining what information is material, including a list of developments likely to require prompt disclosure. Most fundamentally, the alignment of NPS 40 with the TSE Timely Disclosure Rules provides issuers with a uniform and consistent disclosure message - the immediate release of material information.

Like the TSE Timely Disclosure Rules and NPS 40, CDNX Policy 3.3 – *Timely Disclosure* requires issuers to immediately disclose all material information. CDNX Policy 3.3 expressly states that the underlying principle of CDNX policy is that all investors must have equal access to material information about an issuer in order to make informed and reasoned investment decisions. CDNX Policy 3.3 provides that it is to be read in conjunction with NPS 40. In addition, CDNX Policy 3.3 provides additional recommendations and guidelines for junior issuers and cites certain events which are deemed by CDNX to be “material information”.

The current legislative requirements simply oblige the disclosure of “material changes”. The Canadian exchanges have implemented a higher standard in order to create greater integrity in the market and oblige the disclosure of material facts – facts which do or which could reasonably be expected to significantly affect the market price of a security. The Proposed Policy breaks from this standard, and in doing so jeopardizes previous gains made in the harmonization of CSA and stock exchange policy.

CDNX will continue to require and enforce the higher standard of disclosure as set out in CDNX Policy 3.3. While CDNX does not rely on the commissions to enforce its timely disclosure requirements, we encourage the adoption of uniform national disclosure standards. Such

uniformity provides greater certainty and guidance for issuers, and reduces opportunities for confusion and compromised disclosure. Ultimately, uniformity and harmonization provide the basis for stronger and more credible capital markets.

In summary, CDNX is of the view that the Proposed Policy will further fragment the regulation of continuous disclosure. Companies that are endeavoring to establish consistent practices for determining what information is material and the manner of disclosure of that information are best served by a consistent and seamless framework within which to operate. A regulatory regime which moves back to varying rules concerning timely disclosure will confuse issuers and other market participants and may ultimately lead to less disclosure than the current framework provides. The effect of the Proposed Policy will be to make already difficult disclosure decisions even more difficult.

References to Stock Exchange Timely Disclosure Policies

As stated above, we are concerned by the approach taken by the CSA in drafting the Proposed Policy and the departure from NPS 40 and exchange policies generally. Our comments under this heading highlight specific inconsistencies which we believe should be remedied.

The Proposed Policy does not adequately reference in its discussion that each issuer listed on a stock exchange in Canada must comply with the rules of the relevant exchange concerning timely disclosure. By way of example, Subsection 1.1(3) of the Proposed Policy cautions companies to carefully consult varying provincial legislation, yet does not make any reference to timely disclosure requirements under exchange policies. Section 2.1 of the Proposed Policy simply references the statutory regime and makes no mention of the disclosure obligations under exchange policies.

Part IV of the Proposed Policy, while citing exchange policies, does not effectively state the fact that exchange disclosure obligations are triggered by a different standard or upon “material information”. This represents a move away from a harmonized disclosure approach and we believe that the Proposed Policy will give rise to more frequent “negotiations” with listed company representatives concerning the disclosure of material information.

II. COMMENT RELATING TO CERTAIN PROVISIONS

References to “Material Non-Public Information” Misleading

Our comments under this heading relate to Part V – *Risks Associated with Certain Disclosures* of the Proposed Policy.

CDNX generally supports the interpretive guidance provided at Part V of the Proposed Policy. However, we are concerned that in an attempt to adopt principles from Regulation FD, the Proposed Policy does not adequately reflect the current Canadian disclosure regime. By way of example, we note that the Proposed Policy makes reference to “material undisclosed information” at Sections 5.3 and 5.4. Similarly, we note the use of the misleading phrases “non-public material information” at Section 5.4 (2) and “material nonpublic information” at Section 5.8 of the Proposed Policy. These phrases are misnomers, given that under the TSE Timely

Disclosure Policy/NPS 40 as well as under CDN Policy 3.3 – *Timely Disclosure*, all material information *must* be publicly disclosed. CDN is concerned that such misleading references will lead to greater uncertainty and confusion surrounding issuer disclosure obligations.

Future Oriented Financial Information

Sections 5.5 and 5.6 of the Proposed Policy, as currently drafted, appear not to take into account the general restrictions on disseminating future oriented financial information (“FOFI”) during the course of a distribution of securities, as contemplated by section 4.4 of National Policy Statement 48 (“NPS 48”). We believe that this should be addressed (or the applicability of NPS 48 to press releases clarified) before the Proposed Policy is finalized.

NPS 48 generally specifies the manner in which FOFI in General Purpose Documents, as defined in that Policy, is to be prepared, disclosed, dated and updated, where applicable, as well as specifying the involvement of independent public accountants. Although NPS 48 deals with these General Purpose Documents, section 4.4 of NPS 48 provides a reminder to issuers and distributing firms “that during the course of a distribution of securities... FOFI disseminated must only be that which is set out in the prospectus or offering memorandum set out in Appendix A to that Policy. In those rare circumstances where an extract of FOFI is disseminated, the extract or summary must be reasonable and balanced and shall have a cautionary note in bold face stating that the FOFI presented is not complete and the complete FOFI is included in the General Disclosure Document”.

These provisions appear to place significant restrictions on issuers proposing to disseminate any FOFI during the course of a distribution of securities, where such FOFI is not included in a General Purpose Document. For example, these restrictions would appear to apply if the issuer intended to issue a press release containing FOFI, during the course of a distribution of its securities.

Section 5.5 of the Proposed Policy encourages companies “to be open about their future prospects provided they have a reasonable basis for making such statements.” The future prospects being discussed, such as expected revenues, net income and earnings per share are FOFI. Section 5.6 of the Proposed Policy states “We do not intend for NPS 48 to discourage voluntary disclosure of the kind” set out in section 5.5. Despite this intention, NPS 48 as drafted would appear to apply to these voluntary disclosures if made in the course of a distribution of the issuer’s securities. Although the Proposed Policy does make general reference to NPS 48, it does not make it clear that sections 5.5 and 5.6 of the Proposed Policy must be read in light of the restrictions contained in section 4.4 of NPS 48 or, alternatively, that the Proposed Policy is the relevant instrument and that NPS 48 is not applicable to these situations.

We support the spirit of sections 5.5 and 5.6 of the Proposed Policy and the CSA’s long-standing practice of not applying NPS 48 to such disclosures where not made in connection with a distribution of securities. However, we would urge the CSA to remedy this deficiency (or confusion) prior to finalizing the Proposed Policy. Perhaps a footnote in the Proposed Policy referencing section 4.4 of NPS 48 can be made. In future, we hope any successor instrument to NPS 48 will eliminate this problem.

III. RESPONSES TO QUESTIONS RAISED IN THE REQUEST FOR COMMENTS

“Necessary Course of Business” Exception

Section 3.4 of the Proposed Policy contemplates the disclosure of material information by a company to a lender or in contemplation of a private placement, merger or acquisition under the “necessary course of business” exception. Such disclosure would be permitted provided that those receiving the information understand that they may not pass it on or trade upon such information until it has been “generally disclosed”.

CDNX opposes the approach taken by the CSA concerning this exemption.

The disclosure of a material fact to a shareholder or potential shareholder, at any time prior to public release, would be offside CDNX Policy 3.3 - *Timely Disclosure*. In our view, providing a shareholder with an investment decision advantage over another shareholder should never be considered to be in the “necessary course of business”. This is of particular concern in the junior market, where the generally lower priced and more volatile nature of stock prices may present opportunities for placees to purchase relatively inexpensive stock which spikes significantly higher following general disclosure of the material information.

“Generally Disclosed” Requirement

The Proposed Policy as drafted currently provides that one or a combination of the following will be considered to meet the “generally disclosed” requirement:

- (i) news releases distributed through a widely circulated news or wire service; *or*
- (ii) announcements made through press conferences or conference calls that interested persons may attend in person by telephone or by other electronic transmission, including the Internet.

The “generally disclosed” requirements as outlined in the Proposed Policy, while consistent with Regulation FD, are inconsistent with current Canadian practices, including CDNX requirements. CDNX specifically requires that listed companies disseminate material information by means of an electronic news disseminator. This requirement is mandated, whether a press conference is held or not. This approach is taken in order to ensure a broad dissemination of the material information to the public, and has the added benefit of providing an accessible historical record of material information relating to an issuer.

We believe the Proposed Policy should affirmatively require dissemination of news releases by means of an electronic news disseminator in order to ensure immediate, broad and simultaneous dissemination. Announcements made through press conferences or other means may be encouraged, but should not be sufficient in themselves.

In addition, we are concerned that the comment at section 3.5(5) of the Proposed Policy (which concludes that companies may not meet the “generally disclosed” requirement by posting news

to a company website) does not identify or discuss the most critical point concerning information dissemination. In our view, the issue is not simply that Internet access is not sufficiently widespread, but rather that the Internet – whether a posting of news to a company website or some other internet news site – cannot be a sufficient dissemination solution because it does not push out the information but rather requires the user to go and look for it. Accordingly, the Internet by nature (pending, at least, the utilization of “push” technology to all relevant recipients) cannot meet the simultaneous requirement as a means of dissemination and, therefore, information cannot be properly “generally disclosed” via the Internet.

In addition, we note that the Proposed Policy in its current form contains some inconsistency. While the Proposed Policy states at Subsection 3.5(5) that a web site posting will generally *not* satisfy the “generally disclosed” requirement due to the fact that *Internet access is not sufficiently widespread*, it provides in contrast that announcements made by electronic transmission, *including the Internet*, would satisfy the “generally disclosed” requirement at Subsection 3.5(4) of the Proposed Policy. If the CSA intends to provide guidance relating to web-based communications, we urge that it be as clear and comprehensive as possible. We would refer the CSA to the TSE publication entitled *Electronic Communications* in developing guidance relating to electronic communication disclosure.

Practicalities of “Best Disclosure” Practices

The Proposed Policy sets out at Part VI practical steps companies can take to improve access to company information by all investors. While some of the guidelines would have little relevance to CDNX issuers, the Proposed Policy does effectively present flexible yet non-prescriptive disclosure practices aimed at assisting issuers in meeting their continuous disclosure obligations. CDNX commends this initiative by the CSA and the recognition at Part VI of the Proposed Policy that junior companies require the flexibility to adopt practices and procedures which are relevant to their situation.

CDNX Policy 3.3 – *Timely Disclosure* encourages directors and senior officers to implement practices and procedures relating to the disclosure of material information. It encourages the education of directors, management, employees and consultants as to the tipping and insider trading provisions and the restrictions on insiders and other special relationship persons having access to undisclosed information. In this regard, Issuers interested in achieving good corporate disclosure practices will be well served by the further guidance set out at Part VI of the Proposed Policy.

SUMMARY

In summary, CDNX makes the following submissions.

1. Harmonization

The CSA should work towards the development of uniform and harmonized national disclosure standards. In particular, in order to promote more credible capital markets, the same standard should be applied to trigger disclosure at all levels of regulation. CDNX

proposes the adoption of a standard which requires the immediate disclosure of “material facts” in order that all “material information” is obliged to be disclosed to the market. If the rule making authority does not confer upon the commissions the power to enact a timely disclosure rule, we would favour the amendment of the relevant statutes to achieve clarity and uniformity for Canadian market participants.

Alternatively, CDNX proposes that the CSA maintain the current approach to timely disclosure as stated in NPS 40, given that this is the framework within which Canadian market participants currently operate, and that it offers a more uniform system than that contemplated by the Proposed Policy. In this scenario, the CSA could build in the best disclosure practices and selective disclosure discussions as a supplement to NPS 40.

2. ***Eliminating Selective Disclosure***

CDNX commends the efforts by the CSA to develop guidelines to eliminate unfairness in the marketplace caused by selective disclosure. However, in order for these guidelines to be effective, we believe that these guidelines would best be framed on the current Canadian timely disclosure rules, including reference to the higher standard of disclosure imposed by exchange policies and rules. We understand that the guidance note entitled “*Better disclosure for Investors*” released by the Australian Securities and Investment Commission was a joint initiative with the Australian Stock Exchange. CDNX would welcome any opportunity to work with the CSA in a similar initiative designed to ensure that the selective disclosure discussion does not stand in isolation from current exchange policies and rules.

3. ***Best Disclosure Practices***

We support Part VI of the Proposed Policy on the basis of continued flexibility of approach for junior market participants.

4. ***Proposed Clarification***

The Proposed Policy could be improved through additional clarification in respect of future oriented financial information and web based communications, as outlined above.

Should you wish to discuss our comments, please do not hesitate to contact Janet Becker at (416) 860-4118 or myself at (403) 974-7407.

Yours very truly,



Gerry Romanzin
Executive Vice President
Canadian Venture Exchange