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BY FACSIMILE AND E-MAIL August 11, 2003

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British Columbia Securities Commission
701 West Georgia Street
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Attention: Rosann Youck

Re: NI 51-102, OSC Rule 51-801, NI 71-102, NI 52-107 and OSC Rule 71-802

I am writing in my personal capacity (and not on behalf of the firm or any client) to comment on the above-mentioned proposed rules.

These comments are in no particular order.

First, I wish to commend the CSA for seeking to adopt a uniform national approach to continuous disclosure, and for proposing exemptions (albeit too narrow ones, in my view) for foreign issuers. Second, I wish to encourage the development of an IDS system that will work in harmony with MJDS and also enable non-MJDS dual country cross-border offerings.

I. Proposed NI 51-102

I wish to make the following comments in respect to proposed NI 51-102:

1. Responses to Questions Set out in the Request for Comments to Proposed NI 51-102

(a) Filing of Material Sent to Securityholders and Material Contracts Affecting Securityholder Rights

In the Request for Comments accompanying the proposed instrument, the CSA encourage comments relating to certain specific issues addressed by Parts 11 and 12 of the proposed instrument. Question 1a specifically addresses whether the rules requiring reporting issuers to file material sent to securityholders and the rules requiring reporting issuers to file copies of contracts that materially affect securityholder rights should be limited to certain circumstances.

The phrasing of this question suggests that a bank holding "security" would hold a "class of security". This seems to confuse collateral security with securities, and also fails to capture the case law distinction between negotiated commercial agreements (e.g. a loan agreement) and securities. In no event should copies of materials sent to banks be required to be filed. Nor in my view should documents sent to controlling shareholders, which may include much sensitive material. Only documents sent generally to securityholders should be required to be filed, and in any event I believe this is already addressed in provisions such as the Regulation to the *Securities Act* (Ontario), section 6(1)(a). Consequently, a new rule may not be required for this purpose. Alternatively, if it will remain, I support the 50%/50 securityholder approach here. Note that is unclear if the 50 securityholder test refers to registered or beneficial holders.

In response to question 1b in the Request for Comments, I do not agree that the filing requirement in Part 12 should be expanded to apply to all material contracts of the issuer. I prefer the existing Canadian approach. Expanding the requirement can create many competitively sensitive issues. In practice in the US, it seems to lead to a lot of work moving information to separately delivered schedules that are not filed.

(b) Business Acquisition Disclosure

In response to questions 2a and 2b contained in the Request for Comments, if BARs are to be required, there should be an express exemption for situations where financial statements are not available, and also where an unqualified audit report is not available, to avoid precluding public companies from making acquisitions in such circumstances (e.g. part of a business, receivership purchase, etc.) without the delay, cost and uncertainty of requiring exemptive relief to be obtained. Otherwise, especially in auction or competitive situations requiring speed, investors could be seriously prejudiced. If the current approach is to be maintained, it should be subjected to a rigorous cost–benefit analysis first. For example, paragraph 8.9(1) of the policy says that cost and time will not be a factor. This seems entirely inappropriate given the provisions of section 2.1 of the OSA.

2. Comments Relating to the Substantive Rules in Proposed NI 51-102

(a) Comments Relating to Proposed Definitions

(i) Definition of "Venture Issuer"

The proposed change to the definition of "venture issuer" in Part 1 of the proposed instrument should not exclude NASDAQ SmallCap companies or those listed on the UK AIM market, etc.

(ii) Definition of "Off-Balance Sheet Arrangements"

I believe that a definition of "off-balance sheet arrangements" should, if practicable, be included in the rule if it is to be required. It is important to specify what exactly an issuer is required to disclose (in this case, what the disclosure obligations of an issuer are in relation to off-balance sheet arrangements in an issuer's MD&A under part 6 of the proposed rule) especially if the requirement is uncertain. The need for a principled approach could then be discussed in the proposed companion policy.

(iii) Definitions Related to a Reverse Take-over Bid

The definitions related to a reverse take-over should be contained in the rule, rather than cross-referenced to the CICA Handbook. Many legal practitioners do not maintain a copy of the CICA Handbook either at all or in an updated fashion (requiring them to do so could be costly), and subsequent CICA Handbook changes would automatically amend the rule. Also, foreign companies likely will not use the CICA Handbook.

As well, should "control" be defined in the definitions related to reverse take-over bids as 50% plus 1 aggregate ownership? If the acquired enterprise has diverse securityholders, control may not be the right term, since if the securityholders do not act in concert then they may not have control. Thus, a pure numerical measure may be better.

(iv) Definition of an "Acquisition of Related Businesses"

The definition of an "acquisition of related businesses" includes acquisitions that are contingent upon a single common event. If two entirely unrelated acquisitions were both contingent upon a regulatory approval, or the completion of a financing, then the "common event" language would appear to make them related businesses under this proposed definition, which seems inappropriate. The first two branches of the definition contained in (a) and (b) would seem to suffice in the definition of "acquisition of related businesses."

(v) Definition of "Asset-Backed Security"

The definition of "asset-backed security" may be too broad. If the definition would capture a unit of an income trust which owns 10-year subordinated notes of the underlying company or a money market or bond fund, then this definition is too broad.

(vi) Definition of "Date of Acquisition"

Should the "date of acquisition" not be defined as the legal date of closing of the acquisition, rather than what the CICA Handbook may say? The legal date of closing is when control changes, and the buyer generally has the ability to do what it wishes with the acquired business. Also, the CICA Handbook will not be relevant for foreign issuers. See also item 2.2 of the BAR form.

(vii) Definition of "Equity Security"

The "residual right to participate in earnings" portion of the definition of "equity security" has always troubled me. Often, such residual rights come with no dividends at all, and none are declared, which gives them no real right to any earnings at all, and dividends may or may not relate to earnings. The latter portion of the definition may be better alone. This comment also applies to proposed NI 71-102.

(viii) Definition of "Exchange-traded Security"

The definition of "exchange-traded security" excludes all foreign-listed or quoted securities. Also, in provinces other than Ontario, it appears to exclude TSX-listed securities (the TSX being recognized in Ontario only), and in Ontario

it appears to exclude TSX Venture-listed issuers (the TSX Venture being exempt from recognition in Ontario). This comment also applies to proposed NI 71-102.

(ix) Definition of "Executive Officer"

Paragraphs (e) or (f) of the definition of "executive officer" may be over-broad. Large companies, for example, could have very large numbers of policy-making personnel (*e.g.* in respect of the privacy policy, or the environmental policy, or the trade-mark / branding policy) and such persons are not considered executive officers by the company, but could be seen to be caught under the definition of "executive officer" in the proposed rule. By contrast, "officer" or "senior officer" seem to be more restrained concepts, especially for Parts 10 and 13 of Form 51-102F1 (Annual Information Form) and in Form 51-102F5 (Information Circular). This comment also applies to proposed NI 71-102.

(x) Definition of "Step-by-Step Acquisition"

I would suggest that a definition of the term "step-by-step acquisition" (as used in section 8.10) be included in the proposed rule.

(xi) Definitions that Refer to the CICA Handbook Generally

Generally, definitions in this proposed rule that refer to the CICA Handbook are very difficult to apply to issuers that use non-Canadian GAAP. Thus, GAAP-neutral definitions or references should be used instead in the proposed rule as well as in the forms, wherever practicable.

(b) Confidential Material Change Reports

These provisions should probably be left to the statute, given the reference in Bill 198 to the "failure to make timely disclosure in the manner and at the time required under [the] Act". Also, they may be inconsistent with the material change requirements contained in certain provinces' statutes.

(c) Filing Requirements Related to Securityholder Votes

Section 11.3 of the proposed rule, which requires reporting issuers to file a report disclosing information related to securityholder votes, should not be included as a mandatory requirement. This provision should only be adopted as a mandatory requirement, in my view, if and when an equivalent requirement is adopted in the US. In addition, if it will persist, an exemption should be provided for foreign companies.

(d) Filing Requirements Related to Shareholder or Voting Trust Agreements

Shareholder or voting trust agreements to which the issuer is not a party should not be required to be filed under Section 12.1(1)(c) of the proposed rule, since the issuer has no control over the creation of such agreements. As well, shareholder agreements in respect of investees should not be required (*i.e.* only those affecting the reporting issuer and to which it is a party should be required to be filed).

Contracts that "materially affect the rights or obligations of securityholders" are required to be filed under Section 12.1(1)(e) of the proposed rule. Such contracts should only be required to be filed if the issuer is a party to them (*e.g.* not CDS broker participation agreements) and if they "materially and directly affect the rights or obligations of securityholders generally and in their capacity as securityholders". Otherwise, documents that might be argued to indirectly affect securityholders' rights could be required to be filed (which would be a very uncertain concept).

(e) Financial Statements and Partial Years

In section 4.1(1)(a)(ii) of the proposed rule, if there is less than a full prior financial year, should the partial period be included (*e.g.* for a newly created entity)? If the first year is a partial year, should it be clarified that only the partial financial year's statements must be filed?

(f) Request Form for Shareholders to Obtain Financial Information about the Company

Should the request form referred to in section 4.6 be sent only to equity securityholders or to holders of all of its publicly traded securities? Debtholders will have negotiated for any desired financial statements. It should also be clarified that only current year's financial statements (and MD&A) are required to be sent to securityholders, not all prior years' financials. It should be indicated that reporting issuers and intermediaries will need to prepare their own form of request form, as none is prescribed.

Should there be a distinction between OBOs and NOBOs (see NI 54-101), since reporting issuers should not be required to pay for delivery to OBOs.

(g) Personnel of a Reporting Issuer Responsible for Finalizing Financial Statements

Are the "personnel of a reporting issuer responsible for finalizing" the financial statements in section 4.11 the directors, who must approve them, which is the final step? Is this intended?

(h) Material Change as a Proposed Transaction

In section 7.1(4), since a material change may itself be a proposed transaction, this section does not seem to work properly. Also, if the transaction is ultimately abandoned, it could be damaging to disclose it, so the last sentence should be modified so as not to require disclosure of matters that will not proceed. Similarly, s. 7.1(5) should permit non-disclosure of an abandoned matter.

(i) Republication of Financial Statements

Why would a material change in non-financial statement related terms require republication of financial statements of an acquired company, and the associated audit and other costs?

(j) Reporting Periods Related to the Filing of Financial Statements

In section 8.4 of the proposed rule, which sets out reporting periods for the filing of financial statements, should the 45-day period be 90 days in the case of financial years, since an audit is required?

(k) Formal Notice of a Proposed Securityholder Meeting

Section 9.1(1) of the proposed rule should make clear that the notice of a proposed meeting requirement refers only to the formal notice requirements of a proposed meeting. Such notice is often published or press-released well in advance of the sending of a proxy circular.

(l) Debt Securities and Proxies

Debt securities may not contemplate proxies, which could cause problems under section 9.1(2).

(m) Exemptions From Certain Corporate Law Requirements

Today, an issuer would be exempt from proxy solicitation requirements where it has complied with similar corporate law requirements under its corporate statute (see for example OSA, section 88). This concept should be continued if the CSA wish to legislate in the area of proxy solicitation (an area of corporate law). Also CBCA-type solicitation exclusions should be incorporated in Part 9, and such exclusions should not apply to foreign companies, especially those whose laws are inconsistent. However, more fundamentally, I believe that the CSA should probably not legislate in this corporate law area.

The additional filing requirements relating to financial information of the issuer set out in section 11.4 of the proposed rule should only apply to statements for the period in question.

(n) Existing Exemptions

Section 13.2, which refers to reliance by reporting issuers on existing exemptions, should expressly apply to all new statutory requests, including Parts 8, 11 and 12 and sections 4.8, 4.10 and 4.11, which are new or were previously only a policy, not law.

As well, section 13.2 should not apply to foreign issuers, who may have no knowledge of such changes.

(o) Exemption for Certain Exchangeable Security Issuers

Since Quebec, unlike other provinces, has traditionally required the parent companies of exchangeable shares issuers to become reporting issuers, and then granted them full continuous disclosure relief, they should be exempted from the rule (expressly including all new requirements) pursuant to section 13.3 without any need to inform the CVMQ / QSC.

As well, exchangeable security issuers may have incentive options outstanding, so that sections 13.3(2)(c) and 13.3(3)(e) should allow options to exist.

"Prompt," rather than "concurrent" filings should be required under section 13.3(2)(d), since formatting changes and so forth may be required.

Sections 13.3(3)(a) and (b) should be deleted, since an insider may be a director of the issuer issuing exchangeable securities as well as an officer of the parent company or anther of its subsidiaries. Also, "insider" is not a definition that applies to a parent issuer that is not also a reporting issuer.

Section 13.3(3)(c) will involve U.S. disclosure, which would appear to suffice for the purposes of this proposed rule.

Also, a similar "early warning" (*e.g.* OSA, section 101) exemption should be available under this proposed rule.

3. Comments Relating to the Forms Accompanying NI 51-102

(a) Form 51-102F1 - Annual Information Form

I wish to make the following comments relating to the requirements under Form 51-102F1 Annual Information Form:

(i) Part 1(f) of the form, which provides instructions relating to the date of information included in the AIF, is inconsistent. The first paragraph requires that the information should be dated as at year-end, while the second paragraph requires that the information provided in the AIF be current.

(ii) Section 4.1 of the form should contemplate an issuer without a 3 year history.

(iii) In section 5.1(1)(c) of the form, when reporting about leases or mortgages of the business, it should be taken into account that a mortgage may have a face amount well in excess of the current obligation secured. Presumably though, it is the amount of debt that matters.

(iv) Given the involvement of third parties, the requirements relating to the disclosure of changes to contracts contained in section 5.1(1)(k) of the form would be very difficult to comply with in the case of an expected renegotiation of a contract. As well, disclosure of such a change could prejudice one's negotiating position to the detriment of investors.

(v) Under section 7.3 of the form dealing with ratings, do "quiet" or "shadow" ratings, or unsolicited ratings, need to be disclosed, or only ratings that have been solicited and publicly disclosed by the rating agency?

(vi) Disclosure of promoters required under item 11 of the form, can be very difficult since this is a very ambiguous and poorly drafted term. The implications to a securityholder designated as a promoter (the securityholder may not agree with such designation), could also be very serious due to the unfortunate recent addition in MI 45-102 of promoter's resales to the "always a prospectus distribution" category previously applicable only to control block holders. Also, a reporting issuer may have no ability to obtain information from a promoter.

(vii) The requirement to disclose material contracts in item 15.1, if it is to proceed, should be limited to one year rather than two in order to avoid repetition.

(viii) Item 12.1 of the proposed rule would require disclosure of known "contemplated" legal proceedings. This could preclude the sensitive negotiation of settlements, to the detriment of investors - only legal proceedings that have been instituted should be required to be disclosed except (if applicable) under material change material change requirements (where confidentiality is available during sensitive periods) or, as currently, in a prospectus (which is voluntary).

(ix) Disclosure of experts' holdings as required under section 16.2 of the form, is a time-consuming and complex process in the case of large law firms. I would suggest that this requirement be eliminated rather than expanded. It is not a US requirement. As well, it is very difficult and invasive to try to determine what amount of securities the partners and associates of a large law firm hold of a particular issuer and to ensure that such information is reasonably up-to-date. The proposed provisions would be virtually impossible to comply with.

(x) The term "social policy" under section 5.1(4) of the form is not defined and the meaning of this term is not at all clear. I would suggest including a definition of this term.

(xi) The disclosure by officers and directors relating to cease trade orders, bankruptcies, penalties or sanctions in section. 10.2 should be limited to knowledge. Presumably the reference to December 31, 2000 in section 10.2(3) should be updated.

(xii) The requirement to disclose "all" environmental liabilities under section 5.4(1)(d) would often not be possible to comply with as "all" environmental liabilities may well be unknown. I suggest using the words "known" and "material" environmental liabilities in place of "all."

(xiii) Section 5.2 of the form, which requires a description of the risk factors of the business, should <u>not</u> say that "risks should be disclosed in the <u>order</u> of their seriousness." It is not possible for one to predict which of many risks may come to pass, and thus suddenly become "the most serious." This requirement could create litigation or regulatory risks

unfairly, and should at a minimum be softened to reflect the associated uncertainty.

(xiv) In section 12.1, which requires disclosure of legal proceedings that a company is involved in, the 10% shelter should perhaps be based on equity or market capitalization, as liabilities should perhaps be taken into account as well.

(b) Form 51-102F2 - Management's Discussion & Analysis

I wish to make the following comments relating to the requirements under Form 51-102F2 Management's Discussion & Analysis:

(i) Interim MD&A requirements are now, in effect, as exhaustive as annual MD&A requirements, by virtue of the "updating" obligation in section 2.2 of this form. Given the time constraints relating to interim MD&A and the absence of an audit, is this appropriate?

(ii) While it may not relate to this rule, as MD&A-type information is required to be disclosed in an IPO situation, a safe harbour for forward-looking information should expressly apply in IPO situations as well. This is not contained in the CSA statutory civil remedy proposal, Ontario Bill 198 or in Ontario Bill 41, and should be implemented as soon as possible.

(iii) Does section 1.5(h) of the form require disclosure of defaults that have been waived either prior to (in the case of anticipated defaults) or after their occurrence?

(iv) Under section 1.13 of the form, it should be made clear that ordinary business arrangements (*e.g.* purchase orders) are not "financial or <u>other</u> instruments."

(c) Form 51-102F3 - Material Change Report

I wish to make the following comments relating to the requirements under Form 51-102F3 Material Change Report:

(i) The form should state that material change reports may be filed with cautionary language (*i.e.* this "may be" a material change) in circumstances where the issue is unclear. OSC staff has on at least one occasion indicated hostility to this approach, but it may be important, especially in situations

involving cross-border issuers, since there is no equivalent provision in the US.

(ii) As well, the CSA should make clear (and the TSX and TSX Venture Exchange should be asked to conform their approaches) in some way (e.g. the companion policy or a notice) that confidential negotiations between parties, absent a binding definitive agreement, do not constitute a material change. Following the British Columbia Securities Commission decision in *Bennett* (which found that such discussions were a material fact and, unfortunately and apparently unnecessarily, a material change as well), a strict approach could result in a situation in which it would be very difficult or impossible to negotiate a merger, financing or strategic relationship, as many potential purchasers, financiers or strategic partners will not be willing to negotiate in such circumstances.

(iii) It is not clear how the instructions under Item 7 are to be legally accomplished. It is equally unclear what statutory "discretion" Item 7 is making reference to.

(iv) I would also suggest that in Part 2, Item 1 of the form, no principal office in Canada should be required.

(d) Form 51-102F4 - Business Acquisition Report

I wish to make the following comments relating to the requirements under Form 51-102F4 Business Acquisition Report:

(i) I would suggest that in Part 2, Item 1.1 of the form, no principal office in Canada should be required.

(ii) What happens if a valuator will not consent to the disclosure of a prior valuation of an acquired business as is required in section 2.5 of this form?

(e) Form 51-102F5 - Information Circular

I wish to make the following comments relating to the requirements under Form 51-102F5 (Information Circular):

(i) The disclosure requirement relating to directors and officers contained in section 7.2 of this form should be limited to the issuer's knowledge.

(ii) The disclosure requirements relating to securities authorized for issuance under equity compensation plans contained in Item 9 of this form should not extend to non-compensation arrangements, as the instructions in this section imply.

(iii) Section 10.1(2) of the form seems to require all employee debt to be disclosed. This could be practically impossible, especially for a large company.

(iv) Information circular disclosure should in my view remain as "sufficient detail to enable securityholders to form a reasoned judgement", rather than prospectus-form disclosure, where foreign issuers are involved, since it is often hard for them to comply on a cost-effective basis with the minutiae of Canadian requirements.

(v) For significant acquisitions where securities are being issued and a circular is required, prospectus-level disclosure should not be required if a prospectus exemption is available. Frequently there will only be a circular because the TSX requires shareholder approval for dilution protection purposes, and requiring prospectus-level disclosure seems unnecessary.

(vi) Foreign issuers should, as in the US, be expressly exempted from the Canadian executive compensation requirements set out in Item 8 of this form.

II. Proposed OSC Rule 51-801 Implementing National Instrument 51-102 Continuous Disclosure Obligations

Section 3.6 of this proposed rule should be added as a note to Form 51-102F3 Material Change Report, in order to assist users.

III. Proposed National Instrument 71-102 Continuous Disclosure and Other Exemptions Relating to Foreign Issuers

I wish to make the following comments relating to the requirements under Proposed NI 71-102:

(a) In the definition of "eligible foreign reporting issuer", what are the "assets" or "business" of a holding entity that has subsidiaries or investors? How does one determine the "location" of securities? Is the 50% of asset tests to be based on book or estimated market

value? The term "senior officer," rather than "executive officer," should be used in this definition as the latter is over-broad.

(b) It is not desirable to require foreign issuers that previously obtained discretionary relief to re-examine that relief. There should instead be full grandfathering and all new provisions should not apply to them. This is especially the case for exchangeable share situations where the CVMQ/QSC, unlike other CSA members, compelled the parent companies to become reporting issuers and then granted continuous disclosure relief.

(c) Insider reporting relief obtained pursuant to sections 4.9 and 5.10 should be available irrespective of SEDAR status. SEDAR usage should be encouraged, not discouraged.

(d) OSC Staff has proposed changes to the term "going private transaction," which should be monitored for consistency with this proposed instrument.

(e) Foreign issuers should be entitled to an exemption from the restructuring notice provisions set out in section 4.9 of NI 51-102, as discussed in Part 5 of this companion policy. Foreign issuers will often not consult Canadian counsel in connection with foreign transactions. In the modern world, interested securityholders who wish to can readily find out what they need to know about foreign companies.

(f) Section 3.2, which sets out requirements relating to the sending of documents to Canadian securityholders, should say "at the same time or promptly following such time," since additional administrative steps will likely be required for many foreign issuers to send such material into Canada.

(g) Sections 4.9 and 4.10, and Parts 8, 11 and 12 of NI 51-102, should not apply to foreign public companies.

(h) I suggest that section 4.11 should be amended to conform to section 5.12 of proposed OSC Rule 71-802 since I do not believe that it is appropriate to treat US issuers worse that those of other countries. This is especially true considering our historical close relationship with the US, as well as the existence of the MJDS and NAFTA.

(i) The proposed instrument does not address take-over bid and issuer bid exemptions for foreign companies, and the current limits are far too low. I suggest that the proposed rule address these issues as

these transactions are like going private transactions. A complete exemption may be appropriate in most cases.

(j) Sections 4.2(c), 5.3(b) and 5.3(c) should not require the issuance and filing of press releases or other documents in Canada. This is costly. Canadian securityholders should instead access the foreign issuer's website or the SEC website. Also, early warning and insider reports, outstanding share reports, etc. should not be required to be filed in Canada. It must be borne in mind that Canada is a minor player in the international capital market, and filing obligations alone will dissuade further access and likely lead to a black eye in the view of current foreign companies. In general, foreign filing requirements should be minimized or avoided wherever possible.

IV. Proposed National Instrument 52-107 Acceptable Accounting Principles, Auditing Standards and Reporting Currency

I wish to make the following comments regarding proposed NI 52-107:

(a) The comments above regarding the definition of "eligible foreign issuer" apply also to NI 52-107, as well as to the definition of "eligible foreign registrant."

(b) The comments above regarding the definitions of "equity security," "exchange-traded security" and "executive officer" apply also to NI 52-107.

(c) Section 3.1(2) and section 6.1(2) relating to acceptable accounting principles should not preclude changes in principles under a specific form of GAAP.

(d) Should it be made clear that this proposed rule does not apply to the prospectuses of non-redeemable investment funds?

(e) It is unclear why financial statements would be required of foreign registrants in this proposed rule, given the place of incorporation limits imposed by the IDA and OSC, among others.

(f) Given the modest size of Canada's capital markets by international standards, foreign issuers that are public companies elsewhere should not be subject to business acquisition report or pro forma requirements, or to Canadian GAAP/GAAS requirements or reconciliation requirements, that are any more onerous than those applicable today. For foreign-incorporated issuers, the proposed

rule may represent a tightening, especially for ongoing disclosure, which seems inappropriate and will serve to discourage foreign issuers from coming to Canada. Alternatively, a rigorous cost/benefit analysis should be undertaken.

Thank you for the opportunity to comment.

Yours truly,

Simon Romano

SAR/he