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September 10, 2003

BY E-MAIL AND REGULAR MAIL

Rosann Youck
Chair of the Continuous Disclosure Harmonization Committee
British Columbia Securities Commission
P.O. Box 10142, Pacific Centre
701 West Georgia Street
Vancouver, BC
V7Y 1L2

- and -

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

And to all of the CSA member securities commissions

Dear Ladies and Gentlemen:

Re: CHANGES TO PROPOSED NATIONAL INSTRUMENT 51-102
CONTINUOUS DISCLOSURE OBLIGATIONS

I am writing to pass along some personal observations in response to the Request for Comments by the Canadian Securities Administrators ("CSA") on Changes to Proposed National Instrument 51 – 102 *Continuous Disclosure Obligations* (the "Proposed Instrument") and Companion Policy 51–102CP.

RESPONSE TO SPECIFIC QUESTION

1. Filing Documents. The proposal to limit the requirements for reporting issuers to file copies of materials sent to securityholders or contracts that create or materially affect the rights of securityholders to circumstances where securities of the class are held by more than 50 holders does not strike the right balance between the right of market participants to full

information about reporting issuers and the costs imposed on reporting issuers. The cost to a reporting issuer of filing this material is relatively cheap, while the benefits gleaned by the marketplace from full disclosure are fairly high.

A few years ago, many securities regulators spent a great deal of time and effort addressing selective disclosure: a troubling practice by some reporting issuers of only telling certain investors information or giving these investors (or analysts) information before making general disclosure. If an issuer is permitted to send information only to the holders of one class of securities and is not required to file that information for the general information of the public, is this not a mild, but regulatory-sanctioned, form of selective disclosure?

The proposal might be of less concern if there were clear evidence that the fewer the number of securityholders in a class, the less important any information that directly affected that class would be. Some assurance that changes affecting one class of securities did not have knock-on effects on the other classes of securities or the issuer overall would also be comforting. The group of shareholders that effectively control a company may be few in number and they may be the only holders of certain classes of securities of that company. However, that doesn't mean that the information that the company sends to these investors isn't of importance to the marketplace as a whole. Using the example in the request for comments, improving the payouts made or security given to a bank as the sole holder of a class of securities may well negatively affect other stakeholders of the reporting issuer.

All information sent to securityholders of reporting issuers, other than purely promotional or marketing information, should be available publicly through filing on SEDAR. The proposed *de minimus* exemptions in ss. 11.1 and 12.1(e) should be deleted from the Proposed Instrument.

COMMENTS ON THE PROPOSED INSTRUMENT

Section 4.6 Delivery of Financial Statements. The right to receive financial information pertaining to an issuer in which one has invested is a fundamental right of all securityholders.[1] The Proposed Instrument should make it clear that all securityholders retain the right to receive the reporting issuer's financial statements & MD&A and that the issuer must deliver this material without charge to the investor upon request. This right should not turn on the securityholder's status as a registered or beneficial owner or on the delivery option that may have been chosen by a beneficial owner under National Instrument 54-101 *Communication with Beneficial Owners of Securities of a Reporting Issuer* ("NI 54-101")).

I would suggest that simply deleting the phrase "in the request form required in subsection (1)" from the language of subsection 4.6(3) will achieve the desired result. A parallel change also should be made to subsection 6.7(1) regarding the obligation to deliver the MD&A.

Further, reporting issuers should be required to include a statement in its annual information form, proxy circular or annual financial statements telling securityholders how to exercise this right.

Section 6.4 Disclosure of Outstanding Share Data. National Instrument 62-102 *Disclosure of Outstanding Share Data* ("NI 62-102") was introduced in response to the difficulties faced by

[1] See general corporate law requirements and the OECD Principles of Corporate Governance (Paris, 1999) under Rights of Shareholders, available at http://www.oecd.org/dataoecd/47/50/4347646.pdf

investors in determining the precise number of securities outstanding of a reporting issuer so that these investors could calculate whether they had to file early warning or insider reports as required by securities legislation and National Instrument 62-103 *The Early Warning System and Related Take-Over Bid and Insider Reporting Issues* ("NI 62-103"). Without a clear total number of outstanding securities, the required calculations were difficult, if not impossible, to make. The onus to provide this information was placed on the reporting issuers because they should be in possession of the most complete information regarding their respective capital structures.

I understand that there are circumstances where it is very difficult for an issuer to determine precisely how many securities there may be of a class on conversion of all convertible or exchangeable securities. However, if it is difficult for the issuer, how much more difficult will it be for individual investors? If anyone is going to be asked to make a reasonable estimate of the number of securities outstanding on a fully diluted basis, surely it should be the reporting issuer. Investors should continue to be able to rely on that number for NI 62-103 purposes without having to make their own estimates. If there are concerns about the reporting issuer incurring liability for errors, perhaps the CSA should consider providing a safe harbour for reasonable estimates provided in good faith.

Section 11.1 Additional Filing Requirements. See the comments above under Response to Specific Question regarding the proposed *de minimus* filing exemption.

If the CSA decides that the proposed *de minimus* exemption should continue to be included in the Proposed Instrument, there are some problems with the phrase "sends to more than 50% of the securityholders of a class of securities held by more than 50 securityholders".

- Do you include all securityholders, whether registered holders or beneficial owners? If so, it probably would be advisable to include an express reference to both types of holders, given the language used elsewhere in the Proposed Instrument.[2] As the rationale for the exemption turns on the limited pool of directly affected securityholders, it is very important that all relevant securityholders be counted, regardless of their status as registered holders or beneficial owners. In many companies, the only registered securityholder is the nominee of The Canadian Depository for Securities, so saying the company only has to count registered securityholders would widen the ambit of the exemption substantially.
- If the term "securityholders" does include beneficial owners, there may be some practical difficulty in determining the full number of holders, as there is no central listing of these holders. The issuer could request a list of non-objecting beneficial owners under the process set out in NI 54-101, but this is still will not be a complete list of all securityholders.
- Under National Instrument 54-101 *Communication with Beneficial Owners of Securities of a Reporting Issuer* ("NI 54-101") beneficial owners, which comprise the majority of most issuer's securityholders, may opt (or be deemed to have opted) for no delivery of any information other than proxy-related materials for meetings where non-routine business[3] is to take place. Therefore, the issuer may have many more than 50 securityholders of a class of securities, but only a very small percentage of the holders

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[2] See for example the references to registered holders and beneficial owners in subsection 4.6(1).

[3] See the definition of "routine business" in section 1.1 of NI 54-101.

actually may be sent the materials. I do not believe that this necessarily makes the information less appropriate to be filed on the public database.

Section 11.2 Change of Status Report. As the status of an issuer as a venture issuer will have a significant effect on the information that is made available to investors, it is important that the status be **very** transparent in the marketplace. Simply posting these change of status filings on SEDAR will not make them sufficiently transparent to the investing public, as they will be buried in the "Other" document type on the SEDAR database. Perhaps the CSA should consider adding a separate report category to SEDAR or keeping a separate list of venture issuers on CSA member websites to ease public access to this information.

Section 11.3 Voting Results. I agree with the CSA observation that voting results are important and should be disclosed promptly after a meeting takes place. However, I do not agree that this information is any less important for venture issuers than for larger issuers. Smaller issuers, in which institutional and other sophisticated investors may not have significant investments, are likely to be subject to less external discipline in their meeting practices. It is very difficult for small shareholders to exert much pressure on management. In these circumstances, there is a strong argument that the discipline imposed by disclosure of voting results for anything other than routine business[4] would be more necessary for venture issuers, rather than less. Also, as most of the information required to be filed would already have appeared in the proxy circular and the venture issuer is going to have to tabulate the votes in any event, the marginal costs of filing the results on SEDAR should not be high.

Section 12.1(1) Filing of Certain Material Contracts. Paragraph 12.1(e) of the Proposed Instrument would provide an exemption from filing contracts that affect the rights or obligations of securityholders where that class of securities is held by fewer than 50 securityholders. See the comments above under Response to Specific Question. The first two problems noted under section 11.1 also apply.

If you have any questions or wish a fuller explanation of any of these comments, please feel free to contact me.

Yours truly,

Tanis MacLaren

[4] While not without some practical interpretation problems, the definition of "routine business" in section 1.1 of NI 54-101 might be used as a guide regarding situations where vote disclosure might not be necessary for venture issuers.