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August 25, 2003

SENT BY EMAIL

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

c/o 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

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and to:

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

consultation-en-cours@cvmq.com

Dear Sirs/Mesdames:

Notice and Request for Comment – Changes to Proposed National Instrument 51-102 Continuous Disclosure Obligations

This letter is being submitted to the Canadian Securities Administrators in response to the above noted Notice and Request for Comment published at (2003) 26 OSCB 4577. Defined terms used in this response letter will have the same meaning as used in the Notice and Request for Comment, and we will use the numbering adopted in the Notice and Request for Comment.

A. Responses to Specific Questions Raised in the Notice

Business Acquisition Report

If a new requirement to prepare and file business acquisition reports is imposed, it should not be a subset of the material change reporting requirement if, as proposed, the business acquisition report must be accompanied by historical audited and pro forma financial statements. In our view, it is not reasonable to expect issuers to comply with such financial statement requirements within the time frame for filing of a material change report. A business acquisition report should be required to be filed only for significant acquisitions meeting the significance thresholds outlined in the proposed instrument.

Disclosure of Auditor Review of Interim Financial Statements

We note that section 7050 of the CICA Handbook expresses the view of the CICA Assurance Standards Board that the investing public and investment analysts "might derive an unwarranted level of assurance from a written report regarding a review of interim financial statements issued by an entity's auditor if that report is published". If the Assurance Standards Board's view is correct, the proposed requirement to disclose if a reporting issuer's auditor has not reviewed the financial statements set out in the proposed instrument does not adequately address this concern. The absence of any such disclosure would confirm to those investors who are knowledgeable of this requirement that a review has been performed, but such investors will not have had the benefit of the communication provided to the audit committee by the auditor as required by the CICA Handbook. Investors who are unaware of this requirement would be unaware that a review of the financial statements has been performed by the auditor. In our view, if a requirement with respect to the review of interim financial statements by a reporting issuer's auditor is to be implemented, such requirement should provide for inclusion of the auditor's report, whether qualified or not, or disclosure of the fact that no such review has been performed. The auditor's report should specify the scope of review and the procedures performed so that an investor can understand the distinction between the review performed and an audit.

We also note that in its request for comments the Canadian Securities Administrators have indicated that the CICA Assurance Standards Board has a project to amend section 7050 of the CICA Handbook. We would urge the Canadian Securities Administrators to consult with the CICA so that reporting issuers are not faced with a legal obligation that is inconsistent with the professional obligations of its auditor.

Added MD&A Disclosure

We are of the view that given the ingenuity of the capital markets, any effort to define with any measure of precision what an "off-balance sheet arrangement" is will quickly become outdated with the introduction over time of new financing structures. The determination of what constitutes an off-balance sheet arrangement for the purposes of MD&A disclosure should be left to the operation of applicable generally accepted accounting principles, with the result that any such disclosure will be focussed on any material financing arrangements entered into by an issuer (or a consolidated entity) which are not otherwise reflected on the balance sheet or the notes.

B. Comments on the National Instrument and Accompanying Forms

Section 9.4 – Content of Form of Proxy

Subsections 9.4(5), (8) and (9) reference a "form of proxy of a reporting issuer" whereas the other subsections simply reference a "form of proxy". If subsections 9.4(5), (8) and (9) are intended to apply to solicitations by dissidents as well as solicitations by management, the words "of a reporting issuer" should be deleted.

Section 11.3 – Voting Results

We suggest that the reference to "a meeting of securityholders" should be limited to "meetings in respect of which a person or company was required under the Instrument to send an information circular or form of proxy to registered securityholders of the reporting issuer" (to parallel the language in section 9.3). Without such a limitation, a reporting issuer could find itself in default if, for instance, its noteholders held a meeting to consider various issues without the involvement of the reporting issuer.

Part 12 – Filing of Material Documents

Section 12.1(c) requires a reporting issuer to file "any shareholder or voting trust agreements that can reasonably be regarded as material to an investor in securities of the reporting issuer." We have concerns about how a reporting issuer is to find out about, let alone file, a shareholders agreement or voting trust agreement to which it is not a party. We suggest that section 12.1(c) be

revised to require a reporting issuer only to file any agreement to which the issuer is a party which restricts the exercise of voting rights by shareholders holding not less than 10% of the outstanding voting rights.

In addition, the phrase "that create or materially affect the rights or obligations of securityholders" in section 12.1(d) is unclear. The further limitation that contracts must "reasonably be regarded as material to an investor of securities of the reporting issuer" should suffice. A contract need not create or affect rights or obligations in order for it to be material to investors.

Finally, we suggest that reporting issuers should be required to file the required documents within a fixed number of days of the adoption of the National Instrument. Otherwise, it may be more than a year before certain reporting issuers are required to file such documents.

Form 51-102F1, Annual Information Form

We disagree with making social and environmental policies a separate sub-item under the AIF form, in section 5.1(4). We recommend, instead, that the AIF requirements provide only an instruction that indicates that discussions might be required in respect of social and environmental policies, if they otherwise constitute information required to be disclosed under general AIF and MD&A requirements with respect to the discussion of risks and uncertainties relating to the business and financial condition of the reporting issuer.

Section 10.2 requires disclosure of whether the director or nominee as a director was a director or executive officer of a company subject to a cease trade order or bankruptcy proceedings, or was subject to penalties or sanctions. Section 7.2 of Form 51-102F5 requires the same disclosure in the information circular. Therefore, it should be unnecessary to include duplicative language in the AIF. For issuers who complete an IPO, such disclosure should appear in the prospectus. Thereafter, it should appear in the proxy circular, which will almost certainly be filed prior to the AIF each year.

Form 51-102F2, Management's Discussion & Analysis

The CSA may wish to consider providing additional guidance to issuers on the scope of the discussion under Section 1.3, Summary of Quarterly Results. It is unclear whether the instructions to "discuss the factors that have caused variations over the quarters" require an issuer to identify general trends which have developed over the eight quarters (much of this discussion will likely have been covered in Section 1.2), compare results in a single quarter against results from the corresponding period in the prior year, or speak to the seasonality of its business.

Form 51-102F5, Information Circular

We welcome the idea of permitting an information circular to incorporate information by reference. However, corporate issuers should be cautioned that the incorporation of information by reference may not satisfy form requirements for information circulars under applicable corporate legislation. Such a caution should be included either in Part 1(c) of Form 51-102F5 or by expanding the cautionary language in item 1.3 of Companion Policy 51-102CP to explicitly refer to the fact that corporate law form requirements may not be satisfied by the incorporation of information by reference into the information circular.

The second paragraph under Part 1(c) states that upon request of a securityholder, a reporting issuer will promptly "and in any event prior to the meeting for which proxies are being solicited" provide a copy of the document incorporated by reference to the securityholder. The requirement that the document be provided prior to the meeting should be deleted. It is not necessary given the requirement to provide the document "promptly" upon request and it raises uncertainty as to whether the form requirements have been met where documents were incorporated by reference and copies were not in fact provided prior to the meeting (perhaps because the request was not received until shortly before the meeting).

Part 2, item 4 should cross-reference the disclosure required under section 2.16 of National Instrument 54-101.

More direction is required if issuers are to be required to provide the additional disclosure required under Part 2, item 9 of Form 51-102F5. Is the disclosure required in the Equity Compensation Plan Information Table intended to cover all awards that may result in an employee holding stock? It does not appear to include, for example, an award of restricted stock made to an employee that is subject to forfeiture for a period of up to three years, unless it is to be addressed by a footnote as contemplated in Instruction (v). In addition, if as contemplated in Instruction (vii) a compensation plan may provide for a formula that automatically increases the number of securities available for issuance based on a percentage of the issuer's outstanding capital, how is the information in column (c) to be calculated? The reference in Instruction (ii) to providing "aggregate plan information for each class of security" is confusing. Is it intended that information should be provided separately for each class or series of equity security instead of being aggregated among all classes or series? How should issuers deal with classes of securities which are inter-convertible? Instruction (iv) requires disclosure on an aggregate basis with respect to "individual options, warrants or rights assumed in connection with a merger, consolidation or other acquisition". This should probably state instead "options, warrants or rights to be issued pursuant to a compensation plan assumed in connection with a merger, consolidation or other acquisition". Finally, we note that the Instructions at varying places use the terms "compensation plan and individual compensation arrangement", "compensation plan" and "equity compensation plan". It would be helpful if consistent language was used throughout.

The first sentence in Part 2, item 14.2 should also reference a cancellation or redemption of securities. The financial statement disclosure required by item 14.2 appears to be required to be made on an unconsolidated basis. It should be sufficient, however, if financial information was consolidated for an entity and all of its subsidiaries and we would suggest that the requirement be revised accordingly. The exception in the second to last sentence in item 14.2 applies only if the transaction affects the number of securities that are outstanding. However, many consolidation transactions provide for cash settlement of any fractional shares that might result in lieu of rounding down and the exception would not appear to be available for such consolidations.

It seems anomalous that if an issuer proposes a restructuring of itself the issuer needs to include the disclosure contemplated in Part 2, item 14.2, but if a dissident proposes the same transaction pursuant to Part 2, item 14.4 the dissident is not required to provide the same disclosure unless the restructuring involves the change, exchange, issue or distribution of securities of the dissident or of an affiliate of the dissident.

Form 51-102F6, Statement of Executive Compensation

The threshold for determining whether disclosure is required of a named executive officer should be increased from $100,000 to at least $150,000 in order to reflect the impact of inflation during the 10 years since the requirement to provide a statement of executive compensation was first introduced in Canada.

The formatting of the instructions accompanying the Summary Compensation Table commencing with the instructions referencing column (f) of such table needs to be corrected.

In item 8.2, replace “signs” with “named pursuant to” since item 9 does not require that signatures from the members of the compensation committee be provided.

The restrictions for the abandonment of a voluntarily provided comparison index as contemplated in item 10.7 are unduly restrictive since shareholders will still have the standard comparison index for comparison purposes. It should be sufficient that the information contemplated in this item be included as a footnote to the performance graph in the first year in which the additional index is no longer included.

C. Draft Ontario Rule 51-801 – Implementing National Instrument 51-102 Continuous Disclosure Obligations

Section 4.2(1)(c) should be amended by adding the words “and by deleting the words ‘and Information Circulars’ in the subtitle of subsection 2.3(1)” at the end of the clause.

* * *

We are please to have this opportunity to provide you with our comments on National Instrument 51-102. If you have any questions or comments please contact Janet Salter at 416.862.5886.

Yours very truly,

OSLER, HOSKIN & HARCOURT LLP

JS:vkl