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SENT BY E-MAIL/ORIGINAL BY MAIL

Toronto, January 31, 2007

Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Manitoba Securities Commission
New Brunswick Securities Commission
Nova Scotia Securities Commission
Ontario Securities Commission
Saskatchewan Financial Services Commission

To the attention of:	
Ms. Denise Duifhuis British Columbia Securities Commission P.O. Box 10142, Pacific Centre 701 West Georgia Street Vancouver, BC V7Y 1L2 e-mail: dduifhuis@bcsc.bc.ca	Ms. Anne-Marie Beaudoin Directrice du secrétariat Autorité des marchés financiers Tour de la Bourse 800, Square Victoria C.P. 246, 22e etage Montréal, QC H4Z 1G3 e-mail: consultation-en-cours@lautorite.qc.ca

Dear Sirs/Mesdames:

RE: Proposed Amendments to National Instrument 55-101 – *Insider Reporting Exemptions* and Companion Policy 55-101 CP – *Insider Reporting Exemptions*

This letter is in response to the request for comments concerning proposed amendments to National Instrument 55-101 – *Insider Reporting Exemptions* ("NI 55-101") and Companion Policy 55-101CP – *Insider Reporting Exemptions* (the "Companion Policy").

We have used the headings outlined in the Request for Comments.

1. Current Amendments (Phase 1)

(a) Insider Lists and Policies

We support the deletion of the requirement to maintain lists of exempt insiders which we believe will reduce the administrative burden of large reporting issuers. We suggest further that the definition of "insider" for the purpose of insider reporting requirements be narrowed to apply to only "true" insiders of an issuer. This will further reduce the administrative burden on issuers while ensuring the market has adequate information regarding the trading of such insiders. (See below under "Proposed Future Amendments (Phase 2)").

With respect to the new guidance contained in Part 4 of the Companion Policy concerning the preparation and updating of a list of persons working for the reporting issuer or their affiliates who have access to material facts or material changes, we would suggest that the second paragraph be amended to delete the words "and help them [reporting issuers] to ensure that insiders are not violating insider trading prohibitions". While it is best practice for a reporting issuer to have written disclosure policies to assist and advise insiders regarding insider trading prohibitions, the obligation to comply with such rules rests on the insider itself. The language suggests that the reporting issuer is responsible for ensuring insiders are not violating insider trading prohibitions.

(b) Definition of major subsidiary

While we acknowledge that the revised definition of "major subsidiary" will reduce the number of insiders required to file insider trading reports, in our view a test based on assets and revenues is not appropriate in determining which directors or senior officers of a subsidiary have access to information regarding material facts or changes with respect to the reporting issuer. A subsidiary may fall within the definition of "major subsidiary" but its directors and senior officers may have no material information regarding the reporting issuer. In certain instances these persons should not be required to file such reports. For example, a director of a major subsidiary which is a holding company will likely not have access to information. In addition, directors who have been appointed for the purpose of meeting a residency requirement of corporate law will be required to file insider reports even where the director's powers have been curtailed by way of a unanimous shareholders' agreement or other similar arrangement. Refining the definition of "ineligible insider" or "insider" to situations where there is access to information will avoid situations such as the foregoing being inadvertently caught by the rules.

2. Proposed Future Amendments (Phase 2)

We strongly support the harmonization of insider trading and reporting requirements throughout Canada. We further support reducing the number of persons who are subject to the insider reporting regime. We are of the view that this will result in a reduction of the burden of the

regime upon insiders and reporting issuers but will also result in market information being more informative to participants. The purpose of the insider reporting requirements is to provide the market with information regarding the trading of persons who are "true" insiders of the issuer i.e. those who are senior policy makers of an organization who have access to information rather then "technical" insiders with no knowledge or access.

The Canadian Securities Administrators ("CSA") have stated that:

> "The purposes of insider reporting obligations are to:
>
> 1. Provide the market with information about trades by those who have the best access to information about a reporting issuer;
>
> 2. Instill greater investor confidence in the market; and
>
> 3. Deter insiders from trading on undisclosed material information."
>
> (*Blueprint for Uniform Securities Laws for Canada*, Uniform Securities Legislation Project, CSA (2003) 26 OSCB 943 at 968).

Of these purposes, we are of the view that the key function is the provision of appropriate information to the market place by persons who have access to material information. While deterrence may also be a potential purpose, we are of the view it is more effectively addressed by the provision of insider trading offences under both securities and criminal law, and appropriate sanctions and penalties for committing such offences.

The reduction of insiders subject to the reporting requirements can be achieved by narrowing the definition of "insider" or by reducing the number of persons who are "ineligible insiders" under NI 55-101 to include only those individuals who have access to information. This will vary from issuer to issuer and therefore titles and bright line tests should not be completely determinative. When the insider reporting requirements and exemptions are combined in one harmonized national instrument we believe this could be best achieved by amending the definition of "insider" to refer to only those true insiders and removing the exemptive regime currently outlined in NI 55-101. In the interim, we are of the view that the definition of "ineligible insider" should be amended so that the reporting obligation only applies to true insiders of a reporting issuer.

Support for reducing the number of insiders subject to the regime can be found in the CSA's Uniform Securities Legislation Project (the "USL"). Following public consultation, the CSA published a proposed *Uniform Securities Act* (the "USL Act"). In the USL Act, the CSA endorsed the concept of "access to information". The proposed definition of insider included directors or senior officers of an issuer where they are the CEO, COO or CFO of the reporting

issuer or any other officer whose "responsibilities routinely give the officer access to insider information relating to the reporting issuer" (section 1.2, USL Act). The "access" test is also applied to any director or senior officer of a subsidiary of the issuer.

In contrast, the current definition of "ineligible insider" is not based solely on access to information. A director of a major subsidiary will be an "ineligible insider" who must report trading even where there is no access to material information on the reporting issuer. Likewise, a senior officer in charge of a principal business unit, division or function of the issuer or a major subsidiary will also be an "ineligible insider" even where there is no access to information regarding the reporting issuer. In larger issuers, these persons may not have any access to information regarding the reporting issuer. We are of the view that only where directors and officers have access should they be required to make the necessary filing.

The U.S. has also adopted a policy-making test in defining which officers are subject to the insider reporting requirements. Officer is defined to include only those officers of the reporting issuer or a subsidiary who perform "policy-making functions of the issuer". This is in contrast to NI 55-101 which precludes the availability of the exemption to "senior officers in charge of a principal business unit, division or function of the reporting issuer or a major subsidiary of the reporting issuer", even where they have no access to material information or do not perform policy-making functions in respect of the issuer. We further note that the U.S. rules provide guidance that policy-making functions that are not significant are not included within the definition of "policy-making" function for the purposes of determining whether an officer is required to file an insider trading report. (See Rule 16A-1 of the General Rules and Regulations promulgated under the *Securities Exchange Act of 1934*.)

In our view, both of these definitions attempt to restrict insiders to those true insiders who have access to information or responsibilities that could effect the strategic direction or future performance of the issuer. It is their trading activities with which the market is concerned. We would urge the reconsideration of the definition of "insider" in any future harmonized legislation and the definition of "ineligible insiders" in current NI 55-101.

3. Request for Comments

(a) Extending the exemption contained in Part V of NI 55-101

You have requested views on whether the exemption currently available to directors and officers of the reporting issuer or a subsidiary of the reporting issuer to defer reporting acquisitions under an automatic securities purchase plan (an "ASPP") should be extended to persons who own or control more than 10% of the voting securities of a reporting issuer. While we think that such insiders are not normally participants in such plans, we see no policy reason why the exemption should not be available to such persons. If a plan falls within the definition of an ASPP and no

discreet investment decision is being made, we see no basis to distinguish between a 10% securityholder and directors and senior officers of an issuer.

(b) Press Release in Connection with Automatic Securities Purchase Plans

We are of the view that the necessary information required to rely on the ASPP exemption contained in section 5.1 of NI 55-101 could be appropriately disseminated by filing a notice on SEDAR rather than issuing a press release. We think it is unlikely that information contained in a press release regarding an ASPP would be picked up by external media and disseminated in the market place, at least not on any regular basis. Accordingly, in our view, a notice on SEDAR would be a more effective method of providing the same information to market participants who are interested in such information.

We are further of the view that enhancing the System for Electronic Disclosure by Insiders to allow the reporting of ASPPs by an issuer report, similar to an "issuer event" report, would be the best alternative. This approach would have the advantage of being more efficient for issuers and their insiders and would place all information relating to the grant of stock options and the exercise, acquisition or disposition of securities by directors and senior officers in one place.

(c) Options Back-Dating and Timing of Stock Option Grants

While we cannot comment on whether the disclosure of grants of options and issuer derivatives to executive officers and directors provides a greater "signalling" function to the market than similar grants made to other insiders, we are again of the view that if a ASPP is truly an automatic plan with no discreet investment decision being made upon granting, then such disclosure if properly understood should not provide a signal in the market. This is because such an automatic plan reflects a decision of the issuer to provide compensation and incentives on a regular and recurring basis rather than an individual investment decision. In addition, as in the case of item (a) above, we would see no reason to distinguish in such an instance between executive officers and directors and other insiders given there are no discreet investment decisions being made if the grant is truly automatic.

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This letter has been prepared by the Securities Law Group of Ogilvy Renault LLP but may not reflect the views of all its members. If you have any questions concerning these comments, please contact Andrew Fleming (direct line (416) 216-4007 or by e-mail at afleming@ogilvyrenault.com) or Tracey Kernahan (direct line (416) 216-2045 or by e-mail at tkernahan@ogilvyrenault.com).

Yours very truly,

Ogilvy Renault LLP

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