March 18, 2009

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

c/o Noreen Bent,
British Columbia Securities Commission
PO Box 10142, Pacific Centre
701 West Georgia Street
Vancouver, British Columbia V7Y 1L2
Fax: (604) 899-6814
nbent@bcsc.bc.ca

-and-

Me Anne-Marie Beaudoin
Autorité des marches financiers
Secrétaire de l'Autorité
800, square Victoria, 22 eétage
C.P. 246, Tour de la Bourse
Montréal, Québec H4Z 1G3
Fax: (514) 864-6381
consultation-en-cours@lautorite.qc.ca

Dear Sirs / Mesdames,

Re: Comments on Proposed Repeal and Replacement of National Instrument 55-104 *Insider Reporting Requirements and Exemptions* ("NI 55-104" or the "Instrument") and related consequential amendments.

We submit the following comments in response the Notice and Request for Comments published on December 19, 2008 ((2008) 31 OSCB 12117) on NI 55-104 and the related consequential amendments.

Thank you for the opportunity to comment on these proposals. Our comments below have been organized as follows: Section A, consisting of comments on proposed NI 55-104 (including comments on issues highlighted in the "specific requests for comments"); and Section B, consisting of comments on the proposed consequential amendments.

This letter represents the general comments of certain individual members of our securities practice group (and not those of the firm generally or any client of the firm) and are submitted without prejudice to any position taken or that may be taken by our firm on its own behalf or on behalf of any client.

SECTION A. SPECIFIC COMMENTS ON PROPOSED NI 55-104

PART 1: DEFINITIONS AND INTERPRETATION

1. Definition of "compensation arrangements": We raise the question of whether the term "cash" is appropriate for the definition of compensation arrangements given the context in which the term is used in the Instrument.

2. Definition of "issuer event": The application of this definition under existing insider reporting requirements has been problematic with respect to changes to outstanding capital resulting from repurchases by the issuer of the securities. Where an issuer repurchases and then cancels securities under an issuer bid, an investor could become an insider (and under the Instrument, a "significant shareholder") through no action of his, her or its own. Similar to the other events listed in the definition of "issuer event," the investor may not become aware of its having become a "significant shareholder" until well after the reporting deadline. As repurchases and cancellations of securities under an issuer bid may not affect all holdings "in the same manner, on a per share basis" as set out in the definition of issuer event, the definition should be amended to expressly include repurchases by the issuer, or an equivalent exemption should be provided. In contrast, the equivalent exemption from the early warning requirements in s. 6.1 of National Instrument 62-103 *The Early Warning System and Related Take-Over Bid and Insider Reporting Issues* ("**NI 62-103**") is not similarly limited, and applies to a broader range of reductions in outstanding securities resulting from "issuer actions," including repurchases by the issuer itself. In our view, a similar exemption should also be available from the insider reporting requirement.

3. Reporting deadline: We would recommend that the filing deadline for subsequent insider reports be amended from five calendar days, as proposed, to five business days. The CSA's concerns regarding timely dissemination and curtailing improper activities involving stock options would still be addressed, while alleviating the administrative burden on the insider and accommodating for weekends and statutory holidays. Providing for five business days is also in-line with the time period for filing in the U.K.

4. Post-conversion beneficial ownership: Introducing the concept of post-conversion beneficial ownership is problematic. While used in the early warning reporting context, it causes significant problems in the case of out-of-the-money convertible securities and leads to strange results by failing to account for the entire class of subject securities on a fully diluted basis. For example, a holder of a portion of an issue of special warrants may be subject to a reporting obligation despite the fact that, if all of the special warrants are taken into account, the holder would not be a "significant shareholder." For early warning purposes there is sufficient flexibility to explain this. SEDI filings to do not allow for such explanations. In the first instance we would recommend against it. However, if such proposal is to go forward, we would recommend permitting the calculation to be done on a fully-diluted basis and excluding counting convertible securities that are out-of-the-money. These comments apply to proposed NI 55-104, and on a broader basis, to the early warning reporting requirements as well. We have also highlighted other issues raised by the inclusion of post-conversion beneficial ownership in context below. We also suggest moving the exclusion of securities held by a person or company "as an underwriter in the course of a distribution" from subsection 1.1(5) to the end of subsection 1.1(4), so that it is clear that this exclusion applies to the calculation set out in 1.1(4), (5) and (6).

5. Section 1.2 – Persons designated or determined to be insiders. Subsection 1.2(1) should be amended so that it is clear that persons identified in section 1.2 are designated or determined to be insiders for the purposes of NI 55-104 only. Another alternative to achieve the same result may be to included the persons listed in subsection 1.2(1) in the list of "reporting insiders" in subsection 3.2(1) (as opposed to doing it indirectly by designating or determining these persons to be insiders and then including them in the list).

6. Section 2.2 – We note that in section 2.2 there is an express reference to "calendar" days whereas elsewhere in the instrument there is no reference to "calendar" (see section 3.3, for example) – all of the references in NI 55-104 should be consistent unless there is an intentional distinction.

7. Section 3.2(1)(c) – This subsection includes a person or company responsible for a principal business unit, division or function of the reporting issuer or of a major subsidiary of the reporting issuer. We note that that the express reference to a person responsible for a principal business unit, division or function of a major subsidiary of a reporting issuer results in a definition that is different from the definitions of "executive officer," "officer" or "senior officer" in securities legislation, such as, for example, the definition in OSC Rule 14-501 or in the *Securities Act* (Alberta). We also question whether this definition is appropriate in respect of all uses of the term "officer" in the Instrument and in its Companion Policy.

8. Subsection 3.2(1)(d) and (h). Subsection (d) and (h) appear to be duplicative in respect of their application to a significant shareholder based on post-

conversion beneficial ownership, given the interpretation provision set out in subsection 3.2(2) that states "reference to a significant shareholder includes a significant shareholder based on post-conversion beneficial ownership."

9. Subsection 3.2(1)(e). We note that the term "officer" is not uniformly defined in all CSA jurisdictions and would recommend a consistent definition for these purposes, as per our comments in paragraph 7 above.

10. Subsection 3.2(1)(g). Including a reporting issuer while it holds its own securities as a reporting insider, as subsection 3.2(1)(g) does, has always been a troublesome concept. The *Canada Business Corporations Act* (s. 39(6)), and other Canadian corporate statutes, require cancellation of repurchased shares, and result in the termination of other obligations, when an issuer acquires its own securities. Thus, an issuer acquiring its own securities should not, in our view, have to report as a reporting insider. If insider reporting obligations are going to continue to be imposed in these circumstances, the regulators should provide a rationale for this requirement. We would also suggest further consideration of whether the reporting requirements set out in section 3.3(b) (relating to interests in related financial instruments) and Part 4 (relating to agreements, arrangements or understandings affecting economic exposure to the reporting issuer, or involving a security of the reporting issuer or a related financial instrument involving a security of a reporting issuer) would be appropriate for the issuer itself where it holds its own securities. In our view, the requirements raise unnecessary complications given the range of agreements, arrangements or understandings that a reporting issuers itself may be party to that could give rise to such reporting obligations (the reporting of which does not necessary advance the policy goals behind the insider reporting requirements).

11. Section 3.3. Further to our other comments relating to post-conversion beneficial ownership above, we note that the reporting requirement in section 3.3 would likely never apply to a "reporting insider" who is a reporting insider only on account of being a "significant shareholder based on post-conversion beneficial ownership" because such reporting insider would not have either (i) direct or indirect, beneficial ownership or control, or control or direction or (ii) an interest, right or obligation associated with a related financial instrument. The same comment also applies to subsection 3.4. We note in this respect that the reporting exemption for nil reports would also appear to exempt significant shareholders based on post-conversion beneficial ownership where such person would not have any of the interests outlined in section 9.4. Given this result, we question whether a significant shareholder based on post-conversion beneficial ownership should be included as a reporting insider at all.

12. Section 3.6(2). In our view all insider reporting related filings should be made on SEDI since SEDI is intended to be the comprehensive reporting system and repository for insider reporting purposes.

13. Part 4 – Part 4 is problematic for a reporting insider who is designated to be a "reporting insider" on account of being a "significant shareholder based on post-conversion beneficial ownership" since it would obligate such a person to file a report under Part 4 even where they do not have (and may not ever have) beneficial ownership, control or direction over securities or any reportable interest in a related financial instrument under Part 3 (including, for example, if the conversion right or obligation is never triggered). We also question why the requirement relating to an initial report under section 4.2 is set out separately and not as part of the requirements relating to an initial report under 3.3. (i.e., in our view it would be easier to follow if the requirements relating to initial reports were in one spot). We suggest, therefore, adding a subsection (c) to Section 3.3 that makes it clear that, upon becoming a reporting insider, a person is required to file a report disclosing the interests set out in subsection 3.3 (a) and (b) and those currently set out in section 4.2.

14. Section 4.3. Corresponding changes should be made to SEDI to allow for the disclosure contemplated by section 4.3.

15. Part 5. Automatic securities purchase plans are expressly provided for yet automatic securities disposition plans are not. While subsection 5.1(3) of the proposed Companion Policy contemplates circumstances under which the regulators may consider granting exemptive relief for automatic securities disposition plans, we suggest that consideration should be given to including an express exemption in NI 55-104 itself on the basis of the criteria for relief outlined in the Companion Policy.

16. Part 6. We would recommend that the issuer grant report also be filed via SEDI and not SEDAR so as to keep all insider reporting relating disclosure under the same system (and not require insiders to be obligated to check both SEDAR and SEDI for necessary information). We also recommend that disclosure under subsection 6.3(b) be amended to require disclosure on an aggregate basis only, and not with respect to each director or officer. In the case of officers, this could potentially include a very long list of people, including people who are not otherwise subject to any public disclosure requirements relating to their compensation. The reference to "acquisition of securities" in section 6.2 and section 6.4 is not clear. It should be clarified whether this is intended to apply to grants and exercises, in the case of option-based compensation arrangements, and to grants and vesting, in the case of other types of arrangements (non-option based).

17. Part 7. Please see our comments relating to issuer bids in paragraph 1 above. We also recommend that, for clarity, subsection 7.3 be amended to make express reference to "a transaction…involving <u>the acquisition by the issuer</u> of securities of its own issue."

18. Part 9 – General Exemptions. We note that subsection 2.2(a) of Multilateral Instrument 55-103 *Insider Reporting for Certain Derivative Transactions (Equity*

Monetization) contains an exemption from reporting in respect of any agreement, arrangement or understanding which does not involve, directly or indirectly, an interest in a security of a reporting issuer or a derivative in respect of which the underlying security, interest, benchmark or formula is or includes as a material component a security of the reporting issuer. We note that NI 55-104 does not contain a similar exemption, nor are the definitions of applicable terms such as "related financial instrument," "economic exposure," and "economic interest" sufficiently narrow to exempt agreements, arrangements or understandings that would be exempted under subsection 2.2(a) of MI 55-103. If this change is intentional, the regulators should provide a rationale as it represents a significant departure in policy from MI 55-103. If the change is not intended, the Instrument should be amended to include a similar exemption, either expressly or through amendments to the applicable definitions. We would recommend continuing with the *status quo* approach.

19. Section 9.5. We raise the question whether subsection 9.5(b) should also include reference to reporting of interests required under Part 4 of NI 55-104.

20. Section 9.7. It is not clear what the exemption contained in subsection (e) is intended to exempt: if it is acquisitions of securities of an investment fund it is not clear why the exemption makes reference to "securities of the reporting issuer" as opposed to "securities of the reporting insider." We also raise the question whether the exemptions set out in subsection (e) or (f) are worded broadly enough to cover all reporting obligations under Part 3 and 4 of NI 55-104. For example, should references to an acquisition or disposition of a security or an interest in a security also include an interest in, or right or obligation associated with, a related financial instrument? Similarly, the interests set out in subsections (e) and (f) do not clearly apply to reporting obligations that could be triggered under Part 4. The result is that a person may not have a reporting requirement with respect to direct or indirect beneficial ownership, control or direction of the securities, but may still have a reporting obligation with respect to related financial instruments or agreements or arrangements covered by Part 4. Additional guidance should also be provided for the purposes of determining whether the securities form a "material component" of an investment fund's market value for the purposes of subsection (e).

PART 2: CONSEQUENTIAL AMENDMENTS

21. NI 62-103 – We do not agree with the proposed changes to NI 62-103. In our view, contrary to the suggestion under paragraph 9 of the request for comments, s. 2.2(c) of NI 55-103 exempts eligible institutional investors from equity monetization reports in the same way that Part 9 of NI 62-103 exempts eligible institutional investors from the insider reporting requirement generally. This is appropriate, as the structure of the alternative monthly reporting system was designed to enable eligible institutional investors to

only review their holdings on a monthly basis. A similar approach should apply under the proposed amendments as currently exists. The proposed amendments would result in imposing a requirement upon an eligible institutional investor to disclose interests covered by Part 4 of NI 55-104 even though such investor would not have any corresponding requirement to file an initial insider report outside of the alternative monthly reporting systems.

22. Form 51-102F5 – The proposed disclosure under Item 17 is problematic as the information required to comply will not be available to, or verifiable by, the reporting issuer, including, for example, a description of why a late filing fee was imposed. If the CSA maintains its proposal to require this disclosure, we are of the view that the disclosure should be limited to insiders who repeatedly incur late filing fees. In this regard, the form would have to prescribe at what point an insider becomes a "repeat offender", so as to require disclosure.

Thank you for the opportunity to comment on these proposals.

Regards,

Simon A. Romano
Ramandeep K. Grewal