ASSOCIATION DES BANQUIERS CANADIENS
CANADIAN BANKERS ASSOCIATION

Box 348, Commerce Court West
199 Bay Street, 30th Floor
Toronto, Ontario, Canada M5L 1G2
www.cba.ca

Nathalie Clark
General Counsel & Corporate Secretary
Tel: (416) 362-6093 Ext. 214
Fax: (416) 362-7708
nclark@cba.ca

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British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Nova Scotia Securities Commission
New Brunswick Securities Commission
Office of the Attorney General, Prince Edward Island
Securities Commission of Newfoundland and Labrador
Registrar of Securities, Government of Yukon
Registrar of Securities, Dept. of Justice, Govt. of the Northwest Territories
Registrar of Securities, Legal Registries Division, Dept. of Justice, Govt. of Nunavut

c/o Noreen Bent
Manager and Senior Legal Counsel, Corporate Finance
British Columbia Securities Commission
PO Box 10142, Pacific Centre
701 West Georgia Street
Vancouver, British Columbia V7Y 1L2
Email: nbent@bcsb.bc.ca

and

Me Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
800, square Victoria, 22e étage
C.P. 246, Tour de la Bourse
Montreal, Québec H4Z 1G3
Email: consultation-en-cours@lautorite.qc.ca

Dear Mesdames:

Re: Proposed National Instrument 55-104
***Insider Reporting Requirements and Exemptions* and Related Instruments**

The Canadian Bankers Association ("**CBA**") works on behalf of 50 domestic chartered banks, foreign bank subsidiaries and foreign bank branches operating in Canada and their 257,000

employees to advocate for efficient and effective public policies governing banks and to promote an understanding of the banking industry and its importance to Canadians and the Canadian economy.

The CBA welcomes the opportunity to provide the Canadian Securities Administrators ("**CSA**") with our comments on National Instrument 55-104 *Insider Reporting Requirements and Exemptions* and its related instruments that were published for comment on December 19, 2008 (the "**Proposed Instrument**").

In addition to the general comments set out below, our members have provided their views on the requirement in the Proposed Instrument to disclose economic interests and their responses to the specific requests for comments outlined by the CSA in Appendix A of the Notice accompanying the Proposed Instrument.

General Comments

Our members appreciate the efforts made to harmonize and streamline insider reporting requirements across Canadian jurisdictions. We are also very pleased to see that the Proposed Instrument reduces the number of reporting insiders. We believe that the elimination of unnecessary insider reporting will provide investors with more meaningful information. The proposed reduction will also reduce expenses for, and regulatory burden on, issuers and insiders. We encourage the CSA to continue working towards greater harmonization and efficiency in securities legislation.

Proposed Disclosure of Economic Interests

The CSA has indicated that it is presently reviewing issues relating to the potential use of derivatives to avoid early warning requirements, insider reporting requirements and similar securities law disclosure requirements that are based on the concepts of beneficial ownership and control or direction. Our members are concerned that the concept of "economic interest" is too broad without the inclusion of any exemptions, and that the reforms proposed in this area do not distinguish between derivatives and other similar types of arrangements for investment purposes and those that are not for investment purposes. The latter do not involve any exercise of discretion in connection with an investment decision or generally correlate to material information regarding or influence over the business or securities of a reporting issuer. We have described below the exemptions that fall within the latter category, namely exemptions that were previously available under Multilateral Instrument 55-103 ("MI 55-103") (the equity monetization rules), including exemptions for compensation arrangements, and certain exemptions that are currently available under U.S. securities laws in respect of derivative securities. Our members believe the Proposed Instrument should incorporate similar exemptions.

Exemptions for Compensation Arrangements

Specifically, we suggest that compensation arrangements in respect of which: material terms are publicly disclosed; alteration to the economic interest to the reporting issuer or in a security of the reporting issuer occurs as a result of a pre-established condition or criterion; and alteration does not involve a discrete investment decision (i.e. in the nature of a decision to exercise a stock option) be exempted from reporting by insiders as currently provided by MI 55-103. For clarity, the foregoing does not contemplate compensation arrangements which provide for or permit a conversion of an unit or option into securities, such as stock options.

As an example, a typical compensation arrangement would consist of the award of phantom share units, as part of an individual's compensation, which have a value linked to the price of a security of the reporting issuer but are not convertible into actual securities, carry no voting rights or privileges in respect of the underlying security that a registered or beneficial owner of the actual security would have, and for which individuals have no power of disposition or conversion before (or at) maturity, which usually occurs automatically on a specified date in the future. Individuals receiving such units do not make any "discrete investment decision" in respect of either the award itself, or the units including at maturity.

The plans under which such units are awarded are also disclosed, in detail, in other publicly available documents of the reporting issuer, as required by other continuous disclosure obligations set out under securities regulations. For instance, reporting issuers include a great amount of detail regarding the award of such units and the plans under which they are awarded in their proxy circulars. The form of executive compensation statement (51-102F6) has also recently been revised and will be adopted by all reporting issuers in respect of the coming fiscal year. It includes improved, useful and detailed information regarding the compensation structures and plans of reporting issuers. Given the amount of disclosure reporting issuers already make regarding their compensation structures and awards of units, our members question the need and value of making disclosure on the System for Electronic Disclosure by Insiders ("**SEDI**") regarding this type of compensation. The disclosure of the number of units awarded to a particular individual would not signal anything to the market or provide any meaningful information to investors. It may even be confusing to investors as unlike in proxy circulars and other disclosure materials, SEDI does not afford insiders the ability to provide explanatory notes or any context for reported amounts. Thus, disclosure on SEDI regarding phantom or similar units could actually be misleading. For example, there are investors who might interpret the number of units held by an individual as being related to an investment decision by the individual, or a material fact or change relating to the reporting issuer, when this is not the case.

Other Exemptions

We note that US securities laws include exemptions from the definition of "derivative securities" (for insider reporting purposes) similar to certain of those previously provided under MI 55-103. These exemptions include:

- Rights of a pledgee of securities to sell the pledged securities;
- Rights of all holders of a class of securities of an issuer to receive securities pro rata, or obligations to dispose of securities, as a result of a merger, exchange offer, or consolidation involving the issuer of the securities;
- Rights or obligations to surrender a security, or have a security withheld, upon the receipt or exercise of a derivative security or the receipt or vesting of equity securities, in order to satisfy the exercise price or the tax withholding consequences of receipt, exercise or vesting;
- Interests in broad-based index options, broad-based index futures, and broad-based publicly traded market baskets of stocks approved for trading by the appropriate federal governmental authority; and
- Options granted to an underwriter in a registered public offering for the purpose of satisfying over-allotments in such offering.

Similarly, under MI 55-103, the following exemptions were also available for:

- an agreement, arrangement or understanding which does not involve, directly or indirectly, an interest in (i) a security of the reporting issuer, or (ii) 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;
- a transfer, pledge or encumbrance of securities by an insider for the purpose of giving collateral for a debt made in good faith so long as there is no limitation on the recourse available against the insider for any amount payable under such debt;
- the receipt by an insider of a transfer, pledge or encumbrance of securities of an issuer if the securities are transferred, pledged or encumbered as collateral for a debt under a written agreement and in the ordinary course of business of the insider;
- an insider, other than an insider that is an individual, that enters into, materially amends or terminates an agreement, arrangement or understanding which is in the nature of a credit derivative;
- a person or company who did not know and, in the exercise of reasonable diligence, could not have known of the alteration to economic exposure or economic interest;
- the acquisition or disposition of a security, or an interest in a security, of an investment fund, provided that securities of the reporting issuer do not form a material component of the investment fund's market value; and
- the acquisition or disposition of a security, or an interest in a security, of an issuer which holds directly or indirectly securities of the reporting issuer, if the insider is not a control person of the issuer; and the insider does not have or share investment control over the securities of the reporting issuer.

We believe that the rationale for providing these exemptions previously remains appropriate and sound and as such, these exemptions should be included in the Proposed Instrument (in addition to our comments above regarding compensation arrangements). We do not believe that any of the arrangements or securities described in the foregoing exempt provisions allow insiders to, or carry a discernable risk that insiders will, profit from material, undisclosed information only by virtue of having, entering into or holding the types of rights, securities or agreements described above. As such, while creating a significant and burdensome reporting requirement on insiders, without the appropriate exemptive provisions, the currently contemplated definitions of economic interest and derivative transaction would not lead to increased disclosure of meaningful disclosure to investors.

Finally, we note that SEDI is currently not able to accommodate the type of disclosure that the proposed disclosure of economic interests requires of insiders.

CSA's Specific Requests for Comments

For ease of reference, our members' views have been set out below with the headings referencing the specific request for comment outlined in Appendix A of the Notice accompanying the Proposed Instrument.

A. <u>Definition of "reporting insider"</u>

Our members are very supportive of the CSA's proposal to reduce the number of reporting insiders. We believe that this change will lead to the market receiving more meaningful information regarding insider transactions on a quicker basis, which in turn should contribute to improving the information available to investors as they make choices regarding their investments.

Our members have a concern regarding one aspect of the definition of "reporting insider", namely in respect of the proposed subsection 3.2(1)(i). This subsection provides that (subject to meeting the test set out in subsection 3.2(1)(i)(i)) reporting insiders include "any other insider that directly or indirectly, exercises, or has the ability to exercise *significant power or influence* over the business, operations, capital or development of the reporting issuer or of a major subsidiary of the reporting issuer" (italics added). Our members submit that this new phrasing, which is not a concept currently in securities regulation in Canada, is quite vague. Specifically, subsection 3.2(1)(c) already provides that the definition of "reporting insider" includes "a person or company responsible for a principle business unit, division or function of the reporting issuer or of a major subsidiary of the reporting issuer" and subsection 3.2(1)(f) further provides that a reporting insider include individuals performing similar functions to those performed by the individuals captured under subsection 3.2(1)(c). Our members believe that these sections will capture all the individuals that subsection 3.2(1)(i) intends to, as it is only individuals performing the roles, or having the responsibilities, set out in 3.2(1)(a) to (f) that would have access to information as to material facts or changes concerning the reporting issuer and exercise significant influence over the reporting issuer or its principal business units, divisions or functions (or those of a major subsidiary). As it is currently proposed, subsection 3.2(1)(i) seems to contemplate a separate category of reporting insiders, other than as described above, that our members do not believe currently exists in securities law or, without further clarity, that they may not be able to identify based on the current phrasing of that subsection. Thus, the inclusion of the subsection could lead to inaccurate or over-reporting by issuers, in turn undermining the CSA's attempt in the Proposed Instrument to make insider reporting data more meaningful for investors.

Our members respectfully request that subsection 3.2(1)(i) be removed from the definition of reporting insider. In the alternative, if the CSA feels that the provision does add value, we recommend that it be moved to the Companion Policy so that insiders and issuers may use it as guidance. Specifically, insiders and issuers would be able to use subsection 3.2(1)(i) in the Companion Policy as guidance as to whether exemptive relief with respect to insider reporting requirements would be available to an individual or entity otherwise identified as a reporting insider under s. 3.2(1), but does not have access to material facts or changes concerning the issuer and does not have the ability to exercise significant power or influence over the business and operations of the issuer.

B. Definition of "major subsidiary"

We recommend that the definition of "major subsidiary" be modified to exclude intermediate holding companies (in contrast to operating companies). We believe the CSA is trying to capture insiders of subsidiaries that are substantial enough, in reference to the consolidated entity, that (i) insiders of such subsidiaries would have access to material information and changes and exercise a degree of control akin to the access and control held by an insider of the reporting issuer; and (ii) reporting by insiders of such subsidiaries would provide disclosure to investors as meaningful as the disclosure provided by the insiders of the reporting issuer, with regard to the overall business or securities of the issuer. We do not believe that insiders of holding companies are meant to be or should be captured by this definition.

Holding companies are often created for tax, corporate structuring, regulatory or other purposes, such as to complete an acquisition, and may, as a result, hold assets or other subsidiaries so as to appear to be substantial in size. However, holding companies carry on no business (other than holding assets) and have no operations and as such, generally would have no business or functions for which to assign responsibility to insiders. As such, directors and officers of holding companies generally have no control over any business units, divisions or functions of the reporting issuer or access to material information regarding the reporting issuer by virtue of their positions with the holding company.

Often, directors and officers of companies are head office employees or directors or officers of another operating subsidiary and as such, if they had insider information by virtue of those roles and a significant degree of influence or responsibility over the business of a major subsidiary, they would be captured any way by subsection 3.2(1)(c) of the Proposed Instrument, which provides that reporting insiders include persons responsible for a principal business unit, division or function of a major subsidiary of the reporting issuer.

In general, we believe that individuals do not necessarily acquire any knowledge that meets the thresholds of relevancy or materiality underlying the policy rationale of insider reporting regulations by virtue of their positions with a holding company if the associated operating company does not itself meet the definition of 'major subsidiary', and that investors would receive no material or meaningful information from disclosure made by insiders of holding companies. As such, we believe that an exclusion of holding companies from the definition of major subsidiary will curtail over-reporting without any disadvantage to investors.

C. Reporting Deadline

Our members believe that the CSA's proposal to retain the current ten day timeline for filing initial reports is appropriate. A longer filing timeline is appropriate for initial filings because they require the provision of information for the first time by new reporting insiders and require the new insiders to familiarize themselves with SEDI prior to filing initial reports.

We are supportive of the CSA's proposal to accelerate the reporting deadline for subsequent insider reports provided that the necessary changes are made to SEDI so that the proposed accelerated filing deadline can be met by insiders and with the caveat noted in the suggestion below. Our members have found that SEDI is unduly complicated and difficult to use which has resulted in mistakes being made and late filing fees being imposed when those mistakes are rectified. As such, our members are concerned that those difficulties will impede the ability of insiders to report transactions within the shorter time frame proposed by the CSA.

While issues with SEDI may appear to be of a technical nature, we note that it does have substantive implications – i.e. for compliance with the Proposed Instrument – and, as such, urge the CSA to consider SEDI improvements prior to implementing the accelerated reporting deadline. We have included an Appendix A to this document that outlines some of our members' concerns with SEDI. In addition, our members suggest that an option of five calendar days or three business days, whichever is later, be provided so that reporting insiders have sufficient time to file reports where a five calendar day period includes weekends and statutory holidays. For instance, when Christmas and Boxing days fall near weekends, a reporting insider could potentially have only one calendar day to file a report, significantly limiting the amount of time practically needed to file a report.

D. Definition of "Significant Shareholder"

The CSA has included in the Proposed Instrument a new term – "significant shareholder" – to refer to a person or company who is an "insider" under securities legislation because the person has beneficial ownership of or control or direction over, or a combination of beneficial ownership of and control or direction over, whether direct or indirect, securities of an issuer carrying more than 10 percent of the voting rights attached to all of the issuer's outstanding voting securities. Our members are concerned about the CSA's use of the term "significant shareholder" because its definition in the Proposed Instrument diverges from the definition of "significant shareholder" provided in the Universal Market Integrity Rules and therefore may cause confusion. As such, we recommend that a different term be used in the Proposed Instrument to refer to this concept.

The CSA has also indicated that it is considering amending the definition of "significant shareholder" to replace the language of "all of the issuer's outstanding voting securities" with "any class of the issuer's outstanding voting securities". Our members recommend that this amendment not be made. The policy goal for the insider reporting rules is to capture persons with routine access to material information and significant influence over a reporting issuer and therefore it is more appropriate to measure a person's percentage holdings of voting rights across the entire issuer rather than the person's holdings of a particular class of voting securities.

E. <u>Concept of "post-conversion beneficial ownership"</u>

The CSA has introduced in the Proposed Instrument the concept of "significant shareholder" based on "post-conversion beneficial ownership", which is similar to what exists in the early warning regime, and has asked whether stakeholders agree that the insider reporting regime should be harmonized with the early warning regime in this fashion. Our members believe that this proposed change is not beneficial - the concept of "post-conversion beneficial ownership" is more appropriate for the early warning regime and does not fit well with the insider reporting regime. The goal of the early warning regime is to require public disclosure when people either have, or have the potential to acquire, a significant holding in a reporting issuer. The goal of the insider reporting regime is to require persons who actually have access to material information about, and significant influence over, a reporting issuer to disclose their holdings. The measurement of post-conversion beneficial ownership includes the concept of potential ownership which is relevant to the early warning regime but not to the insider reporting regime. In addition, to the extent that it is informative to the market, the early warning regime already provides this disclosure.

We also note in this regard that SEDI does not currently allow accurate reflection of more complicated transactions such as post-conversion data and the information that would appear on SEDI may be misleading to the market. As such, if the CSA chooses to proceed with this amendment, we strongly recommend that the SEDI be modified to allow for a more substantial narrative and careful substantive review by staff before imposing administrative penalties for apparent late filings that do not reflect changes in actual ownership positions. For example, if an insider owned a convertible security, he or she would have to file a report when the conversion right came within the 60 day window and again if he or she did not exercise the conversion right.

Regarding the CSA's request for comment on whether convertible securities (such as options) that are significantly "out of money" should be exempted from post-conversion beneficial ownership calculation for the purposes of determining insider status, we note that the description "significantly out of money" is vague and recommend that the CSA add a definition of the term to the Proposed Instrument. If the CSA proceeds with introducing the concept of "post-conversion beneficial ownership", we agree that convertible securities that are significantly "out of money" should be exempted. In addition, we agree that "eligible institutional investors" should be exempted from the post-conversion beneficial ownership calculation.

F. <u>Issuer Grant Report</u>

The CSA has proposed a new exemption that would permit the issuer to, if it chooses, file an "issuer grant report" on SEDAR that would exempt insider recipients of the grant from the requirement to file an insider report shortly after the option grant. Our members request the CSA to consider revising the exemption so that issuers could report option grants to insiders for the year within 90 days of the year end, instead of 5 days after <u>each</u> grant. Our members believe that the <u>annual</u> reporting of option grants to insiders would be sufficiently timely as option grants

are not exercisable and do not vest, generally, until at least one year after issuance. Options grants comprise a part of an individual's compensation and do not, upon award, reflect an investment decision made by the option grant recipient and do not indicate receipt of or access to insider information regarding an issuer's securities by an option grant recipient. Reporting issuers will have also made extensive disclosure regarding options grants and programs in particular and compensation in general in compliance with continuous disclosure obligations. The filing of issuer grant reports and the annual report we are proposing, serves more to document compensation arrangements that already have been or will be publicly disclosed, in whole or in part.

As such, we agree with the CSA's proposal that the issuer grant report be filed on SEDAR first, pending necessary changes being made to SEDI due to the technical concerns with SEDI that we have previously indicated. We also agree that the deadline for filing the annual report can be extended to 90 days from the end of the calendar year, rather than 30 days although we recommend that, for consistency and to avoid confusion and late filings in connection with the actual calendar day deadline (such as in a leap year where the 90 day deadline is moves to March 30), the CSA set a precise deadline of March 31. Given that our reasoning above also applies to automatic securities purchase plans, we would also recommend that this March 31 deadline be extended to apply to all automatic securities purchase plans.

Finally, we believe that the CSA should not limit the ability to file an issuer grant report to stock options. We believe that this proposal should be extended to any reportable interest that is granted from an issuer to an insider. This would harmonize the reporting requirements for different types of securities which is one of the stated aims of the Proposed Instrument.

G. Report by certain designated insiders for certain historical transactions

Our members support the CSA's proposal to include deemed insider look-back provisions in the Proposed Instrument in order to further harmonize securities legislation across the country. However, we do not believe that these reports should be filed on SEDAR. SEDAR is a proprietary system and not all insiders have access for the purposes of filing documents. In contrast, SEDI is web-based and can be accessed by all insiders. In addition, as the CSA has recognized, filing historical transactions through SEDAR would result in fragmenting insider disclosure between SEDI and SEDAR. On the other hand, our members are cognizant that, as the CSA has also noted, there are technical issues in relation to the treatment by SEDI of historical transaction data as late filings. Thus, we believe that is imperative that SEDI be modified to address this issue prior to the implementation of this provision. It should be clear on SEDI that the insider transaction reported is a result of a deemed look-back and not a late filing.

H. Disclosure in shareholder meeting information circulars

The CSA has proposed an amendment to Form 51-102F5 *Information Circular* that would require an issuer to disclose in its information circular whether any of its insiders have been subject to late filing fees. Our members do not support this amendment. Insiders sometimes file late and are subject to late filing fees for a variety of reasons – mostly inadvertent - that are not material in nature or relevant to the reporting issuer or its securities; this is even more likely to be the case given the accelerated filing deadlines in the Proposed Instrument. As such, the proposed disclosure could be voluminous, depending on the number of insiders, without providing any material information or added value to investors. The disclosure may even be misleading and confusing to investors, highlighting facts that are not necessarily significant to the issuer or its securities.

In addition, the proposed disclosure is inconsistent with the regulations governing disclosure in the Annual Information Form, which specifically provide that directors and executive officers need not disclose "a late filing fee, such as a filing fee that applies to the late filing of an insider report" and such fees are not considered penalties or sanctions. Those rules recognize that the occasional late filing of reports does not warrant disclosure and Form 51-102F5 should continue to remain consistent with that approach. An individual who has received a penalty or sanction has had the opportunity to present a defence before an impartial arbiter; an individual who receives a late filing fee has no such opportunity. To elevate late filing fees to the same disclosure status as a penalty or sanction seems unduly excessive.

Our members understand, on the other hand, that certain insiders may habitually make late filings (and are thus subject to late filing fees), which may warrant public notice in the interests of investor protection. We note, though, that the CSA currently has the ability to bring enforcement actions against an individual who may have violated securities laws by habitually not filing an insider report within the required time frame. If the CSA feels strongly that there should be a mechanism to bring habitual late filers to the public's attention for the purposes of investor protection, we suggest that the CSA consider requiring disclosure by the issuer of late filing fees of an insider where a penalty or sanction has in fact been imposed for the late filing of an insider report rather than merely a late filling fee.

The CSA may feel that the proposed amendment would increase timely compliance with the insider reporting requirements. Our members believe that improvements to SEDI may in fact improve compliance and facilitate the ability of insiders to report transactions in a timely manner thus mitigating some of the concerns the CSA may currently have concerning habitual late filers.

I. Broker DRIPS

The Proposed Instrument continues to define an "automatic securities purchase plan" to include, in part, issuer-established dividend reinvestment plans meeting the other requirements of the definition. Many brokerages offer "broker dividend reinvestment plans" that automatically use dividends received in the brokerage account to purchase additional securities of the issuer that made the dividend payment. Provided that such plan meets the other requirements of a "automatic securities purchase plan" set out in the definition, it is not clear why reporting insiders participating in such plans would not have the benefit of deferred reporting. We recommend removing the requirement that that the plan be issuer-established in order to be eligible for deferred reporting.

Other Comments

As indicated above, our members are very supportive of the CSA's attempts to harmonize and stream-line insider reporting requirements across Canadian jurisdictions. To further harmonize securities legislation, we recommend that the CSA consider putting the definition of "reporting insider" into the Proposed Instrument rather than in the separate securities acts across Canada.

Also, in connection with late filings, our members recommend that the CSA harmonize late filing fees across Canadian jurisdictions and eliminate the imposition of a late filing fee where the lateness only occurred as a result of rectifying an error on the original report filed within the deadline. We believe that these two changes will result in a more stream-lined reporting system that is fairer to insiders who inadvertently file erroneous reports.

SEDI - Technical Concerns

As indicated above, our members are concerned that the technical difficulties that insiders have experienced with SEDI have substantive implications for accurate and timely compliance with the Proposed Instrument. We have included in the attached Appendix A our primary technical concerns with SEDI and we encourage the CSA to resolve these issues prior to implementing the Proposed Instrument.

In closing, we appreciate the opportunity to express our members' key concerns regarding the Proposed Instrument. Should you require any further information or have any questions or concerns regarding the foregoing, please do not hesitate to contact me.

Yours truly,

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APPENDIX A

As indicated in our letter, our members have experienced ongoing difficulties with SEDI as a result of the limitations of that system. We urge the CSA to rectify these issues in order to facilitate timely and accurate compliance with the insider reporting rules. Please find below, for your information, a few of the concerns that our members have had with respect to SEDI.

(1) As a general point, our members have found that SEDI is unduly complicated to use which oftentimes leads to insiders relying upon external legal counsel or the issuer itself to file their insider reports on an ongoing basis. It does not seem appropriate that a system that is intended to be used by insiders for fulfilling their legal obligations is so complicated that it requires the assistance or expertise of agents. Indeed, our member banks find that assisting their insiders with the required reports is quite time- and resource-consuming. Even for large institutions like our member banks, it is quite challenging to assist their insiders by filing reports on their behalf - smaller issuers may find that this is too much of a regulatory burden and thus may benefit proportionately more from SEDI improvements.

(2) Currently, a SEDI user is not able to readily discern the difference between historical insiders versus current insiders. As this leads to an inaccurate reflection of the issuer's insiders, we believe that this situation should be rectified.

(3) Currently, the information provided is chronological by type of security and type of ownership, based on which SEDI performs the appropriate calculations. Our members believe that SEDI should be modified to reflect the insider transactions in completely chronological order so that the information is available to those accessing it in a more intuitive fashion and with less possibility for confusion.

(4) We recommend that the technical experts on the SEDI Helpline receive greater resources and training in order to better respond to questions from insiders. In addition, we recommend that the CSA consider instituting a centralized helpline as our members have received, on occasion, different responses to the same query from different jurisdictions.