



March 19, 2009

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, Department of Justice, Government of the Northwest Territories  
Registrar of Securities, Legal Registries Division, Department of Justice, Government of Nunavut

TransCanada Corporation  
450 - 1st Street S.W.  
Calgary, Alberta, Canada T2P 5H1

tel 403.920.7685  
fax 403.920.2467  
email don\_degrandis@transcanada.com  
web www.transcanada.com

c/o Noreen Bent, Manager and Senior Legal Counsel, Corporate Finance  
British Columbia Securities Commission  
via e-mail to: nbent@bcsc.bc.ca

c/o Anne-Marie Beaudoin, Directrice du secrétariat  
Autorité des marchés financiers  
via e-mail to: consultation-en-cours@lautorite.qc.ca

**Re: Proposed National Instrument 55-104 *Insider Reporting Requirements and Exemptions*, Companion Policy 55-105CP *Insider Reporting Requirements and Exemptions* and Related Consequential Amendments.**

Dear Sirs and Mesdames:

In response to the Notice and Request for Comment dated December 18, 2008 of the Canadian Securities Administrators (the "CSA") and relating to the Proposed National Instrument 55-104 – *Insider Reporting Requirements and Exemptions* (the "**Proposed Rules**") and related proposed companion policy and consequential amendments, we are pleased to provide the following comments.

**A. Specific Requests for Comments**

We provide the following responses to several of your specific requests for comments.

**1. Definition of "reporting insider":**

We agree that the reporting requirement should be limited to insiders who satisfy the criteria of routine access to material undisclosed information and significant influence over the reporting issuer. However, we feel that the persons or companies enumerated in the proposed definition of "reporting insider" are too broad. The exemption currently available under National Instrument 55-101 – *Insider Reporting Exemptions* ("**NI 55-101**"), Part 2

provides that the reporting requirement does not apply to certain directors of major subsidiaries and senior officers that do not in the ordinary course receive or have access to information as to material facts or material changes concerning the reporting issuer before the material facts or changes are generally disclosed. This exemption is no longer available under the Proposed Rules. We would suggest that including directors of major subsidiaries, as well as persons or companies responsible for principal business units, divisions or functions of a major subsidiary, in the enumerated list of the proposed definition of reporting insiders without providing for the exemption in NI 55-101 could potentially increase the number of reporting insiders where an issuer has determined that certain such individuals do not in the ordinary course receive or have access to undisclosed material information. Consequently, while we agree that the concept of a "reporting insider" could work to reduce the number of insiders filing insider reports, for corporations such as ours the enumerated list as proposed would actually increase the number of insiders that must file insider reports. We suggest that directors of major subsidiaries and persons or companies responsible for principal business units of major subsidiaries should be excluded from the enumerated list and be captured by the discretionary category of those individuals that in the ordinary course receive or have access to undisclosed material information.

### **3. *Reporting Deadline:***

We support the acceleration of the reporting deadline for subsequent reports from ten days to five calendar days. However, we do not think it is appropriate to accelerate the reporting deadline for filing initial reports to five calendar days, as new reporting insiders should be allowed time to familiarize themselves with their filing obligations and to gather the information to report.

### **6. *Issuer Grant Report:***

We support the proposed exemption that would permit an issuer to file an "issuer grant report" to assist its insiders in the reporting of option grants. However, we note that it is not clear what the filing deadline is for these issuer grant reports. Section 6.3 of the Proposed Rules does not stipulate a deadline. We support the 90 day deadline for filing the insider's annual report under Parts 5 and 6 of the Proposed Rules. We would not propose accelerating this deadline.

### **8. *Disclosure in shareholder meeting information circulars:***

We do not think that Form 51-102F5 – *Information Circular* should be amended to require an issuer to disclose in its information circular whether any of its reporting insiders have been subject to late filing fees. Inclusion of such information in a significant disclosure document of the issuer may give it an inappropriate level of importance, essentially elevating a late filing fee to the status of a more serious penalty such as a cease trading order, and could have an unnecessarily negative impact on public perception. It may be more appropriate to make such information publicly available through SEDI or through the web sites of the various securities commissions, as is the case on the Alberta Securities Commission web site.

## **B. *Other Comments***

In addition to our responses to the specific requests for comments outlined above, we would also like to comment on the expanded scope of insider reporting requirements.

### **1. *Reporting of Related Financial Instruments:***

Under the Proposed Rules, reporting insiders would be required to report an interest in a "related financial instrument". Under the current reporting regime, including Multilateral Instrument 55-103 – *Insider Reporting for Certain Derivative Transactions (Equity Monetization)* ("**MI 55-103**"), certain exemptions apply to compensation plans where the terms of the compensation agreement are set out in writing and the alteration of economic exposure or economic interest occurs as a result of the satisfaction of a pre-established condition or criterion and does not involve a discrete investment decision by the insider, or where the material terms of the compensation arrangement are disclosed in annual filings of the issuer. It is notable that in an early version of a proposed uniform securities legislation consultation draft, the CSA had proposed a similar reporting regime as in the

Proposed Rules. One commenter suggested that this would broaden the scope of the current reporting regime, and the CSA responded that the "intention is not to broaden current insider reporting requirements" and that the CSA "envision that the exemptions from the insider reporting requirements contained in section 2.2 of MI 55-103 will be carried forward in the supporting uniform rules."<sup>1</sup> It would seem that the Proposed Rules, while carrying forward most of the currently available exemptions, do not include the exemption for compensation plans where (a) the terms are disclosed in an annual disclosure document, (b) there is no possibility for discrete investment decisions by the reporting insider, or (c) payouts are received in cash, or in cash and/or securities in accordance with pre-established terms and conditions, generally cessation of employment or death. These types of instruments are distinguishable from unencumbered securities where investment decisions are made by the insider. It is notable that in the Notice and Request for Comment on the Proposed Rules, at Item 5, it is stated that the purposes of the insider reporting requirements are, among others, "deterring improper insider trading based on material undisclosed information and increasing market efficiency by providing investors with information concerning the trading activities of insiders of an issuer." We would further note that in response to comments provided on the draft version of MI 55-103, the CSA made the following remarks:

"We understand that some compensation arrangements provide for a payout (in cash or otherwise) only upon the occurrence of certain specified events, such as retirement or other termination of office or employment. In view of the fact that the occurrence of such an event generally will not reflect an investment decision by the participant, the policy rationale for insider reporting do not apply to such an event.

...

If a compensation arrangement allows for an exercise of discretion similar to the exercise of discretion inherent in a conventional stock option plan, we believe that this exercise of discretion should be transparent to the market.

We do not believe that a disclosure requirement should turn simply on whether the plan, for example, provides for a payout in the form of a security, or a payout in the form of a cash amount reflecting the change in value of a security. We believe that the policy rationale underlying an insider reporting system – deterring insider misuse of and profiting from material undisclosed information and signaling insider views as to the prospects of an issuer – apply equally to both forms of plan."<sup>2</sup>

If it was the intention of the CSA under the Proposed Rules to broaden the scope of the reporting requirements, we would question the public policy purpose of including compensation plans where the reporting insider does not have any discretion to trade or otherwise dispose of their interests in the related financial instrument and can make no investment decisions around these instruments. Such disclosure would not seem to further the objectives as stated in Item 5 of the Notice and Request for Comments. In addition, compensation awarded under these types of plans would almost always be captured under annual compensation disclosure requirements for directors and named executive officers, and as such the information would be made publicly available. Especially where discretionary grants of these types of related financial instruments or cash awards thereunder are made annually and disclosed annually by the issuer, it would seem unnecessary to require the insiders to similarly report their annual grants. We would submit that compensation plans that do not involve discrete investment decisions by the insider, that involve payouts in cash and/or securities only in accordance with pre-established conditions, and are disclosed in an issuer's annual filings, should be exempted from the insider reporting requirements.

## **2. Reporting of "Specified Dispositions" under Compensation Plans:**

If the CSA decides to include the type of compensation plans described above in the Proposed Rules and make them subject to reporting requirements, we would suggest that Part 6 of the Proposed Rules include a similar exemption to that contained in Part 5 for "specified dispositions". We would note that in the proposed section

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<sup>1</sup> See summary of comments on and responses to Notice and Request for Comment 11-404 *Consultation Drafts of the Uniform Securities Act and the Model Administration Act* (December 16, 2003).

<sup>2</sup> See Notice of Multilateral Instrument 55-103 and Companion Policy 55-103CP *Insider Reporting for Certain Derivative Transactions (Equity Monetization)* (November 28, 2003).

6.4(1), the term "specified disposition" is used in the context of the insider's alternative reporting requirements for compensation plans. In proposed section 5.4(1), the wording is the same with reference to an automatic securities purchase plan. However, proposed section 5.4 goes on in subsection (2) to exempt specified dispositions from the requirement to file an insider report within five days of the transaction, and indicates that such specified dispositions may be included in the insider's annual report. Proposed section 6.4 does not contain such a distinction; it simply requires all dispositions of securities and related financial instruments acquired under a compensation plan to be disclosed within five days of such disposition. We would suggest that the term "specified disposition" in the context of a compensation plan be defined in Part 6 of the Proposed Rules, and that specified dispositions of securities (and related financial instruments) acquired under a compensation plan be permitted to be included in an insider's annual summary report (6.4(2)(b)) rather than within five days of the disposition. This would ensure that dispositions that occur when cash or securities payouts are received and the associated related financial instruments cancelled pursuant to pre-established terms of a compensation arrangement would not need to be reported by the insider within five days of the event. Where the payout under a compensation plan is based on performance indicators and a formula, it may take an issuer time to determine the payout amounts subsequent to the pre-established vesting date of a compensation plan, and to communicate such payout amounts to the insiders.

In summary, we generally support the Proposed Rules and the simplification of insider reporting obligations. We strongly encourage the CSA to consider amendments to specific areas of the Proposed Rules that we and others have identified as problematic.

We hope you will find the above comments helpful and look forward to your response. If you have any questions or concerns, please contact please contact the undersigned at (403) 920-7685.

Regards,

(signed) "*Donald J. DeGrandis*"

Donald J. DeGrandis, Corporate Secretary