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Autorité des marchés financiers
Nova Scotia Securities Commission
New Brunswick Securities Commission
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Registrar of Securities, Government of Yukon
Registrar of Securities, Department of Justice, Government of the Northwest Territories
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Dear Sirs and Mesdames:

Notice and Request for Comment – Proposed National Instrument 55-104 *Insider Reporting Requirements and Exemptions* and related consequential amendments

This letter is submitted in response to the request for comment published December 19, 2008 by the Canadian Securities Administrators on proposed National Instrument 55-104 *Insider Reporting Requirements and Exemptions* (the "Proposed Instrument") and related proposed consequential amendments to other instruments. Our comments on the Proposed Instrument are set out below.

1. Definition of "reporting insider"
2. Definition of "major subsidiary"

We support the idea of narrowing the focus of the insider reporting requirement to a core group of insiders with the greatest access to material undisclosed information and the greatest influence over the reporting issuer (as stated in the request for comment). We also note that the way in which the Proposed Instrument seeks to achieve this result is by making: (1) the group of officers that would be included in the reporting insider group more limited since it does not include all officers, in contrast to current rules; and (2) the group of subsidiaries that would be captured for the purposes of the definition more limited by virtue of the 30% tests.

We think that the impact of the "reporting insider" definition will be most noticeable for larger issuers or those issuers who otherwise have many subsidiaries or a large number of personnel with officer titles (large financial institutions come to mind). However, we think the new definitions will not have much of an impact on other issuers, since the new reporting insider group is likely to be similar to the group of insiders that is required to report under current rules. This is particularly the case because of the continued reference in the proposed definition to subsidiaries (albeit major subsidiaries) and significant shareholders. We believe that, under the proposed definition, many personnel at the subsidiary level, as well as at the significant shareholder level, who do not have routine access to material undisclosed information and do not have significant influence over the reporting issuer will continue to be captured in the definition.

One way to address this would be to have a two-pronged test for individuals at the major subsidiary and significant shareholder levels, such that clause (i) of the proposed definition of reporting insider (the "basket" provision) would be an additional requirement to be considered a reporting insider for those types of individuals. For example, in order for a director of a significant shareholder or major subsidiary to be considered a reporting insider, that person would also have to satisfy the tests in clause (i). (Although those individuals would then be caught by virtue of clause (i) alone making a two-pronged test unnecessary.) For this reason, you should consider removing the concept of major subsidiaries and significant shareholders altogether from the definition (except in clause (d) of the definition since a significant shareholder itself should be an insider). We believe this is feasible since the basket provision in clause (i) captures anyone with routine access and significant influence.

3. Reporting deadline

We have no comment on the proposed change in the reporting deadline from 10 days to five calendar days.

4. Definition of "significant shareholder"

We think that there is a rationale for having different disclosure thresholds for the purposes of the early warning requirements and the insider reporting requirements, since there are different policy considerations that apply to the two regimes. The policy objective addressed by the insider reporting requirements is disclosure of trading activity by persons with routine access to material undisclosed information and significant influence over the reporting issuer. In that regard, it isn't necessarily the case that a person holding more than 10% of a particular class of an issuer's outstanding voting securities will have routine access to material undisclosed information and significant influence over the issuer for the reasons mentioned in the request for comment. Accordingly, we support maintaining the current basis for determining significant ownership – more than 10% of the voting rights attached to all of the issuer's outstanding voting securities.

5. Concept of "post-conversion beneficial ownership"

We believe there are arguments in favour of not using the concept of post-conversion beneficial ownership for the purposes of insider reporting, given the different policy objective of the insider reporting rules as compared with the early warning rules. This is because holding convertible securities of an issuer is not necessarily an indication of having routine access to material undisclosed information and significant influence over the issuer. Generally speaking, holding actual voting rights through voting share ownership at the 10% level provides more of a basis for having significant influence over an issuer than holding convertible securities. Nevertheless, we understand that under U.S. rules, the basis for determining whether a shareholder holds at the 10% level for early warning and insider reporting purposes is the same, and that beneficial ownership of the underlying securities includes ownership of convertible securities if they are convertible within 60 days. Accordingly, the proposal would be more consistent with U.S. rules.

In response to your question regarding whether we are aware of any practical difficulties in applying the disclosure test for 60-day convertibles in the early warning system, we would only provide the following observation for your consideration. In the U.S., we understand that there is a practice of using so-called "blocker" provisions in agreements governing convertible securities. We understand that these provisions can be used to avoid tripping early warning or other thresholds that would otherwise be exceeded by virtue of holding convertible securities of an issuer. Blocker provisions state to the effect that, notwithstanding that the convertible security may be convertible into underlying securities that, together with the other underlying securities of the same class held by the holder, would exceed the relevant threshold (for instance, 5% of the outstanding securities of the class), the convertible security cannot be converted into a number of underlying securities that would not exceed the threshold when considered with other

holdings (for instance, conversion could only result in total holdings of the underlying to be 4.9% or less). However, the holder is able to waive this blocker provision by providing more than 60 days' notice to the issuer. The result is that the convertible security is effectively not convertible within 60 days. Therefore, the holder is not deemed to have beneficial ownership of the underlying securities.

We mention blocker provisions because they could be used in the Canadian context to avoid becoming an insider under current rules, or a significant shareholder under the proposed rules. However, we note that the disclosure requirement under the early warning rules appears to be slightly different than the requirement under insider reporting rules. This is because section 102.1(1) of the *Securities Act* (Ontario) (old section 101 of the Act) specifically refers to acquirors who acquire beneficial ownership of voting or equity securities, or securities convertible into voting or equity securities. These words could be interpreted such that the acquisition of the convertible security itself is disclosable (even if it were not convertible within 60 days by virtue of a blocker provision or otherwise), if the 10% threshold would be exceeded when total holdings of the underlying security are aggregated assuming conversion. For this reason, it is less clear in Canada whether blocker provisions are effective to avoid early warning requirements. Interestingly, the disclosure requirement under the Alternative Monthly Reporting System in NI 62-103 is based only on securityholding percentage (which includes deemed beneficial ownership through holdings of securities convertible within 60 days). This would suggest that a blocker provision could be effective to avoid a disclosure requirement under NI 62-103. However, the section 102.1(1) requirement appears to be different than the NI 62-103 requirement.

6. Issuer grant report

We think issuers and insiders could benefit from the proposed exemption, and we think annual reporting is sufficiently timely for these purposes. However, you may reconsider whether the issuer grant report is better disclosed through SEDAR. We are not clear on the rationale for having this information disclosed on SEDAR and think it will be a significant burden to have to search two different databases. We understand the rationale for having historical transactions disclosed through SEDAR to avoid the late fee issue raised in the request for comment, although we believe it would still be a significant burden for investors to search two different databases in order to view insider reporting information.

7. Report by certain designated insiders for certain historical transactions
8. Disclosure in shareholder meeting information circulars

We have no comment on these proposals.

9. Concept of "related financial instrument"

We believe that cash-settled compensation arrangements such as cash-settled restricted stock units (RSUs) and deferred share units (DSUs) should be excluded from the definition of "related financial instrument". If some of the purposes of insider reporting are to deter improper insider trading based on material undisclosed information and providing investors with the insiders' views of an issuer's prospects, we submit that these purposes are not achieved by requiring reporting of cash-settled compensation arrangements. These types of arrangements are generally not transferable, and therefore there is no insider trading concern. Further, the disclosure of payouts under such arrangements do not provide investors with the insiders' views of an issuer's prospects.

Disclosure of these types of arrangements through insider reporting would be a significant burden, and would not provide meaningful information to the market. This would result in the reporting of a great volume of transactions that will clutter SEDI and make it more difficult for investors to identify useful information. Given that there would be a significant compliance burden with no policy objective achieved (in our view), we would urge you to exclude cash-settled compensation arrangements from the insider reporting requirements and maintain the system of reporting such arrangements in executive compensation disclosure.

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We appreciate this opportunity to comment on the Proposed Instrument. If you have any questions, please direct them to Desmond Lee (dlee@osler.com; 416-862-5945).

Yours very truly,

"Osler, Hoskin & Harcourt LLP"