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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

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Dear Sirs and Mesdames:

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

Scotia Capital Inc. (SCI or we) is a subsidiary of The Bank of Nova Scotia (the Bank or Scotiabank) and is a member of the Investment Industry Regulatory Organization of Canada.

We appreciate the opportunity to provide the Canadian Securities Administrators (the CSA or you) 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).

We participated in the Securities Committee of the Canadian Bankers Association (CBA) and support the comments on the proposed Instrument made by the CBA. In addition, we wish to make the following comments.

General

We applaud the CSA for taking the initiative to modernize, harmonize and streamline insider reporting in Canada. The current insider reporting requirements and exemptions are set out in a variety of statutes, rules and regulations in each jurisdiction. Consolidating the main insider reporting requirements and exemptions in a single national instrument will make it easier for issuers and insiders to understand their obligations and will help to facilitate timely and effective compliance. However, it is unfortunate that in Ontario the main insider reporting requirements will remain in the *Securities Act* (Ontario).

The "reporting insider" concept: We are delighted to see that the CSA is proposing to significantly reduce the number of persons required to file insider reports. Our preliminary view is that the proposals will result in a 70% reduction in the number of reporting insiders for the Bank. We believe that this will significantly reduce the burden of filing insider reports without negatively impacting on the quality of the information available to the market. Nonetheless, we believe that the group of reporting insiders may still be overly inclusive.

While the CSA has reduced the number of insiders that need to file insider reports by creating the concept of a reporting insider, it does not appear that this logic has been applied to the look back provisions included in section 3.6 of the Proposed Instrument. We recommend that the CSA amend the look back provision so that instead of applying to all officers, the look back only applies to the officers that are identified in the reporting insider concept.

Reportable transactions: The primary reporting obligations under the Proposed Instrument would require a reporting insider to disclose

- beneficial ownership of, or control or direction over securities of the reporting issuer, and
- an interest in, or right or obligation associated with, a related financial instrument involving a security of a reporting issuer.

This means that an individual would be required to file insider reports disclosing not only securities but also related financial instruments that the individual is awarded as part of his or her compensation package. Currently, there is an exemption in MI 55-103 Insider Reporting for Certain Derivative Transactions (Equity Monetization) from the requirement to report a compensation arrangement on an insider report if the compensation arrangement is publicly

disclosed. This exemption has not been continued in the Proposed Instrument. While we understand the CSA's desire to create a class of reportable transactions that doesn't distinguish between physical and cash settled plans, we believe that providing an exemption for certain cash settled compensation plans is appropriate; namely, where the award does not involve an investment decision or an ability to influence the granting of the award by the reporting insider.

The Bank has a number of cash settled incentive programs that would be reportable under the Proposed Instrument. However, we do not believe that reporting activity under these plans through the insider reporting regime would provide useful information to the market especially as these plans are disclosed in the Bank's annual information circular. Two illustrative plans are the Bank's Deferred Stock Unit (DSU) Plan and the Performance Share Unit (PSU) Plan.

- Under the DSU Plan, senior executives may allocate up to 100% of their Management Incentive Plan (MIP) award into DSUs. Participants must make this election at the beginning of the fiscal year for which the MIP award is earned. When the MIP awards are determined following the end of the fiscal year, the amount is then converted to a number of DSUs, based on the market price of Scotiabank common shares on the election eligibility notification date under the DSU Plan. DSUs can be redeemed only when a participant ceases to be an employee of Scotiabank. The value of the DSUs is based on the market value at the date of redemption of an equal number of common shares of Scotiabank.

- Under the PSU Plan, time-based units and performance-based units are annually awarded to eligible executives. The units vest and are redeemable on the last day of the 35th month following the date of the award. For awards granted after December 2007, the redemption value of each unit will be the 20-day average closing share price of a common share of Scotiabank on the Toronto Stock Exchange for the 20 days ending on the unit pricing date. The unit pricing date follows the public dissemination of financial results and is the trading day immediately preceding the first day of Scotiabank's open trading window for insiders following the vesting date.

Deadline for filing: We understand the CSA's desire to make the filing of insider reports more timely. However, we remain concerned about accelerating the filing deadline for insider reports from 10 calendar days to five calendar days. We believe that it is premature to accelerate the filing deadline until the System for Electronic Disclosure by Insiders (SEDI) is made more user friendly for people required to file insider reports.

Specific Requests for Comment

You have asked for comments in response to the following specific questions. For ease of reference we have included your request for comment in italics and then provided our response.

1. ***Definition of "reporting insider"*** *– We are proposing to limit the reporting requirement to persons who are "reporting insiders". The definition of reporting insider comprises i) a list of persons or companies that we think generally satisfy the criteria of having routine access to*

material undisclosed information and significant influence over the reporting issuer; and ii) a "basket" provision that explicitly cites these two criteria.

We invite comments on the following questions:

a. *Do you 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? If not, why not? What other criteria should we use in determining who should have to file insider reports?*

b. *Do you think the persons or companies enumerated in the definition of "reporting insider" are appropriate? If you think any persons or companies should be added or removed, please explain.*

c. *We think that the proposal to limit the reporting requirement to reporting insiders (as currently defined) will significantly reduce the number of insiders who have to file insider reports, particularly for larger issuers with many subsidiaries and affiliates. Do you agree? If possible, please describe the anticipated impact of this change on your organization.*

We agree with the CSA that the current Canadian insider reporting regime requires an overly broad class of persons to file insider reports. This is particularly apparent in the case of large issuers with many subsidiaries and affiliates such as banks and financial institutions. We support the CSA proposal to narrow 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 (the knowledge criteria). We believe that introducing the new concept of "reporting insider" to achieve this end is a good approach. However, we believe that the proposed definition of reporting insider is still overly inclusive.

One of the CSA's stated goals in creating this new class of reporting insider is to replace the current "catch and release approach" with a more principled approach. To over simplify, the new concept is that substantial securityholders and people who satisfy the knowledge criteria should file insider reports. To codify this, the Proposed Instrument contains a basket provision (the knowledge criteria) plus a prescribed list. While we support the combination of a prescriptive list and a basket clause, we believe that the prescriptive list is overly inclusive. It catches classes that either are released (through an exemption provided later in the Proposed Instrument) or may be released (if discretionary relief is applied for) if they do not satisfy the knowledge criteria. A number of examples follow in which a person or company is a reporting insider as a result of the prescriptive list in the Proposed Instrument but may not satisfy the knowledge criteria:

- a person or company responsible for a principle business unit, division or function of a reporting issuer or of a major subsidiary of the reporting issuer (s. 3.2(1)(c)),

- every director, officer and significant shareholder of the management company that provides significant management or administrative services to a reporting issuer or a major subsidiary (s. 3.2(1) (e)),

- a director or officer of a significant shareholder or of a subsidiary of a significant shareholder. [This group is caught by section 3.2(1)(a) & (b) and released by section 9.3 if they do not satisfy the knowledge criteria.]

We recommend that the CSA streamline the definition of reporting insider in the Proposed Instrument by removing from the definition those classes of persons or companies that may not satisfy the knowledge criteria or that would be caught in any event by the knowledge criteria. In addition, we believe that the classes removed from the definition could be included in the Companion Policy to illustrate how the CSA believe the knowledge criteria should be interpreted.

Finally, we question the usefulness of perpetuating the concept that when a reporting issuer is an insider of itself, it should be a reporting insider. What use does information on holdings of an issuer in securities of its own issue provide to the market? If it has no purpose that can be identified, we suggest that the CSA consider deleting it. Moreover, we were interested in the guidance provided by the CSA in section 7.1 of the Companion Policy. It appears that the CSA is of the view that if an issuer is deemed to be the beneficial owner of securities it is also deemed to hold those securities. We wonder whether the CSA intended to obscure the distinction between the concept of "beneficial ownership" and of "holding".

2. ***Definition of "major subsidiary"*** – *We are proposing to amend the percentage thresholds in the definition of "major subsidiary" (currently found in NI 55-101) from 20% of consolidated assets or revenues to 30% in the Proposed Instrument. This would reduce the number of insiders who will be reporting insiders since the definition of reporting insider includes various persons or companies at the major subsidiary level. For example, if we make this change, a director of a subsidiary the assets or revenues of which comprise 25% of the reporting issuer's consolidated assets or revenues on a consolidated basis will no longer be required to file insider reports, since the subsidiary will no longer be a major subsidiary. Do you agree with this change? If not, what should the thresholds be?*

We agree with this change; however, we do not believe that this change will have an impact on our own current filings.

3. ***Reporting deadline*** – *We propose to retain the current ten day timeline for filing initial reports to accommodate new filers and the time associated with creating new insider profiles on the System for Electronic Disclosure by Insiders (SEDI). However, we propose to accelerate the reporting deadline from 10 days to five calendar days for subsequent insider reports. Do you agree with this proposal? If not, please explain. Do you think that we should also accelerate the reporting deadline for filing initial reports to 5 calendar days? If not, please explain.*

We do not support the CSA's proposal to accelerate the filing deadline from 10 calendar days to 5 calendar days for subsequent insider reports. The CSA makes the following arguments in support of accelerated filing:

- Although reporting insiders will become subject to an accelerated filing deadline, many other insiders will benefit as they will no longer have to file insider reports.

- Reporting issuers that currently file insider reports on behalf of their insiders will benefit through reduced compliance costs due to the smaller class of reporting insiders.

- Investors and other market participants who use the insider reporting system will benefit from a simpler, more focused, and more timely insider reporting system.

Neither SCI nor Scotiabank file insider reports on behalf of their insiders. Consequently, none of the arguments presented in support of accelerated filing address the impact of the accelerated deadline on the individual who will become subject to it. In our experience, individuals strive to file their insider reports on time. Nonetheless, some insider reports are currently filed late. We are concerned that accelerating the filing deadline may increase late filings and put unnecessary stress on individuals that are required to file.

In addition, we would like to remind the CSA that to satisfy the filing requirement, insiders must file on SEDI. While SEDI has many advantages, user friendliness for individuals required to file insider reports is not one of them. We urge the CSA to seriously consider making SEDI more user friendly before accelerating the filing requirements. In addition, we note that an insider may need to seek support from the SEDI help desk or local commission staff before completing a filing. While SEDI is available 7 days a week, neither the SEDI help desk nor local securities commissions are available to provide support 7 days a week. Consequently, we strongly recommend that the support functions are enhanced and perhaps centralized before accelerated filings are introduced.

4. ***Definition of "significant shareholder"*** *– We have included in the Proposed Materials 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. The definition of "significant shareholder" has the same meaning as the corresponding language in the definition of "insider" in securities legislation and has been included in the Proposed Materials to facilitate readability.*

The definition of "significant shareholder" (and the corresponding language in the definition of "insider" in securities legislation) currently refers to "... securities of an issuer carrying more than 10 percent of the voting rights attached to all of the issuer's outstanding voting securities". Accordingly, this language does not make a distinction between different classes of voting securities that may have different voting entitlements.

The current definition may result in situations, particularly in the case of issuers with two-tier (multiple-voting) share structures, where a shareholder may hold a significant proportion of voting securities of a particular class but not be a significant shareholder (or an insider) because of the effect of a separate class of voting securities.

The early warning regime in securities legislation contains a similar disclosure threshold based on beneficial ownership of, or control or direction over voting securities. However, this disclosure threshold refers to "voting ... securities of any class of a reporting issuer". Similarly, the principal stockholder concept in section 16(a) of the U.S. Securities and Exchange Act of 1934 Act refers to "any class of equity security".

We are considering amending the definition of significant shareholder, and seeking legislative amendment of the corresponding provisions in the definition of insider, to replace the language "all of the issuer's outstanding voting securities" with "any class of the issuer's outstanding voting securities". We are not proposing to extend the significant shareholder concept to holders of non-voting equity securities.

We invite comments on the following specific questions:

a. *Do you think a significant shareholder should be determined by the shareholder's holdings of a particular class of voting securities, or is the current basis for determining whether a person is a significant shareholder (based on holdings of all of the issuer's outstanding voting securities) appropriate? Please explain.*

b. *Should different considerations apply to the disclosure thresholds for the purposes of the early warning requirements and the insider reporting requirements?*

We applaud the CSA for creating a harmonized definition that is limited to voting equity securities. We are in favor of maintaining the current basis for determining if a person is an insider (i.e. percentage of shareholdings based on holdings of all of the issuer's outstanding voting securities).

We note that the CSA has determined to call this type of insider a "significant shareholder". Significant shareholder is already a defined term under the Universal Market Integrity Rules (UMIR). Under UMIR, "significant shareholder" means any person holding separately, or in combination with other persons, more than 20 per cent of the outstanding voting securities of an issuer. We are concerned that having one defined term – significant shareholder – that has such different meanings for the purposes of UMIR and the Proposed Instrument is confusing. We suggest that the CSA address this issue either by harmonizing the thresholds or changing the defined term.

5. Concept of "post-conversion beneficial ownership" *– We have introduced in the Proposed Materials the concept of "significant shareholder based on post-conversion beneficial ownership". This concept, which is based on a similar concept which exists in the early warning regime, is intended to ensure that a person cannot avoid crossing a disclosure threshold (either the early warning disclosure threshold or disclosure obligations associated with insider status) by holding a convertible security rather than the underlying security directly. For example, we think that a person who holds 9.9% of an issuer's common shares together with special warrants convertible into an additional 10% of the issuer's common shares, should have the same reporting requirements as a person who holds 19.9% of the issuer's common shares directly.*

We invite comments on the following specific questions:

a. *Do you agree with harmonizing the insider reporting regime with the early warning regime to address securities convertible within 60 days (60-day convertibles)? If not, why not? Should different considerations apply to the disclosure thresholds for the purposes of the early warning requirements and the insider reporting requirements?*

b. *Are you aware of any practical difficulties in applying the disclosure test for 60-day convertibles in the early warning system? If yes, please explain.*

c. *Should we exempt any types of securities or securityholders from this calculation for the purposes of determining insider status? For example, should we exempt convertible securities (such as options) that are significantly "out of the money"? Should we exempt "eligible institutional investors" (as defined in National Instrument 62-103 The Early Warning System and Related Take-Over Bid and Insider Reporting Issues) from this definition for insider reporting purposes?*

While we are generally supportive of attempts by the CSA to harmonize requirements across rules, we do not believe that introducing the concept of "post-conversion beneficial ownership" from the early warning regime into the insider reporting regime is appropriate. Insider reporting is based on routine access to material undisclosed information and significant influence over a reporting issuer. Generally these thresholds are crossed by individuals who have seniority at an issuer or individuals who have access based on holding voting securities. Once convertible securities are converted into voting securities, if the resulting position is a holding of 10% or greater the insider reporting requirement is triggered. It is not appropriate for the insider reporting requirement to be triggered earlier because there is no correlation between a holding of a convertible security and routine access to material undisclosed information and significant influence over a reporting issuer.

6. Issuer grant report *– As explained in the Notice, we are proposing to introduce a new exemption that would permit an issuer, if it so chose, to file on SEDAR an "issuer grant report" to assist its insiders in their reporting of option grants. If the issuer files an issuer grant report, the insider recipients of this grant would then be exempt from the requirement to file an insider report about the grant by the ordinary filing deadline and could instead file an alternative report on an annual basis.*

a. *Do you agree with this proposal? Do you think issuers and insiders will find this exemption useful?*

b. *We are proposing that the issuer grant report be filed on SEDAR, pending necessary changes being made to SEDI. Do you think the information in an issuer grant report is better disclosed through SEDAR or SEDI?*

c. *The issuer grant report exemption contemplates that reporting insiders who rely on this exemption will make an annual filing, similar to the manner in which reporting insiders*

currently report acquisitions under an automatic securities purchase plan. Do you agree with this approach? Do you think annual reporting is sufficiently timely?

d. *We have proposed that the deadline for filing the annual report under Part 5 and Part 6 should be 90 days from the end of the calendar year. Is this appropriate? Should we accelerate this deadline for filing these annual reports to, for example, 30 days from the end of the calendar year?*

We support the proposal to create an optional issuer grant report. We believe that if an issuer chooses to file an issuer grant report, the number of option grants that are reported late could be reduced. However, we not support the proposal that issuer grant reports be filed on SEDAR. We believe that all insider reports should be filed on SEDI.

It is not clear from the Proposed Instrument, when an issuer would have to file an issuer grant report for an insider to avail itself of the resulting exemption. This needs to be clarified.

7. ***Report by certain designated insiders for certain historical transactions*** *– Subsections 1.2(2) and (3) of the Proposed Instrument provide that directors and officers of an issuer may, in certain circumstances, be designated or determined to be insiders of a second issuer. Subsection 3.6(1) of the Proposed Instrument requires these individuals to file, within 10 days of being designated or determined to be an insider of the second issuer, insider reports for transactions involving securities of the second issuer for a historical period of up to six months. These provisions are based on the "deemed insider look-back provisions" in securities legislation of some jurisdictions. The purpose of these provisions is to address concerns over directors and officers of a company proposing to acquire a significant interest in another company by "frontrunning" the acquisition through personal purchases of shares of the second company.*

We have included these deemed insider look-back provisions in the Proposed Instrument in the interests of harmonizing these provisions. We anticipate that the current deemed insider look-back provisions in securities legislation will be repealed effective on the coming into force of the Proposed Instrument.

Currently, insiders who are required to file insider reports in accordance with the deemed insider look-back provisions must file these reports on SEDI. Under the Proposed Instrument, these individuals will be required to file insider reports in respect of these historical transactions in paper format on SEDAR. We have proposed this change because we understand some insiders have experienced difficulties in filing reports about these historical transactions on SEDI and have inadvertently triggered late fees. In addition, because these filings will commonly arise in a takeover bid context, we think it may be helpful for market participants to view these filings in conjunction with other filings relating to the take-over bid. However, we acknowledge that this may raise a concern about fragmenting an insider's disclosure so that historical transactions are disclosed on SEDAR but that current and future transactions are disclosed on SEDI.

Do you agree with the proposal to require these filings to be made on SEDAR rather than on

SEDI? Alternatively, do you think these filings should continue to be made on SEDI? Please explain.

We support the CSA's desire to harmonize the deemed look back provisions by including them in the Proposed Instrument. The CSA note that these filings have inadvertently triggered late fees and have tried to address this issue by creating an alternative method of filing (i.e. on SEDAR instead of on SEDI). While we appreciate the CSA's attempt to address this issue, we do not believe that filing on SEDAR is an appropriate solution. As you know, SEDAR is a propriety system that is not web based. Consequently, insiders cannot file on SEDAR without hiring a filing agent. Consequently, we believe that the filing must remain on SEDI. Nonetheless, we urge the CSA to continue to try to address this issue. One approach might be to modify SEDI to make it clear when a look back filing is being made.

8. Disclosure in shareholder meeting information circulars *– We are proposing an amendment to Form 51-102F5 Information Circular of National Instrument 51-102 Continuous Disclosure Obligations that would require an issuer to disclose in its information circular whether any of its insiders have been subject to late filings fees. Do you agree with the proposal to require issuers to disclose whether any of its insiders have been subject to late filings fees? Do you think the disclosure requirement should apply only to insiders who repeatedly incur late filing fees? Please explain.*

We do not support adding disclosure of late filing fees to the information circular for the following reasons.

- First, we are not convinced that adding disclosure of late filing fees to the Scotiabank information circular is adding information that would be valued by Scotiabank investors. Late filings can happen for a number of reasons: vacation, mistake, and misunderstanding to name a few. They do not in and of themselves indicate an unwillingness to comply with the requirements. We are concerned that disclosing late filing fee in the information circular will place disproportionate attention on these late filings and confuse Scotiabank securityholders.

- Second, Scotiabank is responsible for the accuracy of the disclosure in its information circular. Scotiabank does not file insider reports for its insiders and therefore is not aware if these reports are filed late or have been subject to late filing fees. If the CSA required ScotiaBank to disclose late filing fees in its information circular, Scotiabank would have to develop new processes to gather this information.

Consequently, we believe that the cost of including disclosure of late filing fees in the ScotiaBank information circular outweighs the benefit.

However, we strongly encourage the CSA to develop a harmonized approach to dealing with late filing of insider reports. We understand that the CSA is considering ways to harmonize the late filing fees and other consequences of late filings. We believe that this is a worthwhile initiative and we encourage the CSA to pursue it.

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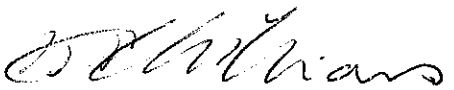
In closing, we applaud the CSA for making this initiative a priority and encourage the CSA to continue to focus on initiatives that streamline, harmonize and modernize current requirements. We found the materials thoughtful and engaging. While we would like to see the CSA go further in simplifying both the substantive (the Proposed Instrument) and technical (SEDI) requirements, we recognize that regulatory change is subject to constraints and we believe that the adoption of the Proposed Instrument will make significant improvements to the insider reporting regime.

Should you require any further information, please do not hesitate to call Katy Waugh at (416) 866-3489 or Iva Vranic at (416) 863-7101.

Yours truly,



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