CSA/ACVM

Canadian Securities Administrators | Autorités canadiennes en valeurs mobilières

**Notice of Rule**
**National Instrument 71-102 *Continuous Disclosure and Other Exemptions Relating to Foreign Issuers,* and Companion Policy 71-102CP *Continuous Disclosure and Other Exemptions Relating to Foreign Issuers***

**Introduction**

We, the Canadian Securities Administrators (CSA), have developed a nationally harmonized set of continuous disclosure (CD) requirements for reporting issuers, other than investment funds. The Notice of Rule - National Instrument 51-102 *Continuous Disclosure Obligations* provides information about the rule (the CD Rule).

Concurrently, we developed a nationally harmonized set of exemptions from certain CD and other requirements for foreign reporting issuers. A foreign reporting issuer is a reporting issuer, other than an investment fund, that is incorporated outside of Canada, unless the issuer has more than 50 percent of its voting shares held in Canada and one or more of the following is true: the majority of its directors and officers are Canadian residents, more than 50 percent of its assets are in Canada, or the business is principally administered in Canada. These exemptions are intended to ease compliance for foreign issuers and increase their access to Canadian capital markets.

The exemptions are contained in National Instrument 71-102 *Continuous Disclosure and Other Exemptions Relating to Foreign Issuers* (the Instrument). Companion Policy 71-102CP *Continuous Disclosure and Other Exemptions Relating to Foreign Issuers* (the Policy) provides guidance on interpreting the Instrument.

The Instrument has been made or is expected to be made by each member of the CSA, and will be implemented as

- a rule in each of Alberta, Manitoba, Ontario and Nova Scotia;
- an exemption order in British Columbia;
- a regulation in Saskatchewan and Québec; and
- a policy in all other jurisdictions represented by the CSA.

We also expect that the Policy will be adopted in all jurisdictions.

In Ontario, the Instrument has been made and the Policy has been adopted. The Instrument and other required materials were delivered to the Minister of Finance on December 19, 2003. If the Minister does not approve or reject the Instrument or return it for further consideration, it will come into force on March 30, 2004.

In Québec, the Instrument is a regulation made under section 331.1 of the Act and must be approved, with or without amendment, by the Minister of Finance. The Instrument will come

into force on the date of its publication in the Gazette officielle du Québec or on any later date specified in the regulation. It must also be published in the Bulletin.

Provided all necessary ministerial approvals are obtained, the Instrument will come into force on March 30, 2004. The Policy will come into effect at the same time as the Instrument.

**Substance and Purpose**
The Instrument provides broad relief from most of the requirements in the CD Rule for two sub-categories of foreign reporting issuers - SEC foreign issuers and designated foreign issuers - on the condition that they comply with the CD requirements of the SEC or a designated foreign jurisdiction. It also exempts SEC foreign issuers and designated foreign issuers from certain other requirements of provincial and territorial securities legislation, including insider reporting and early warning, that are not contained in the CD Rule.

The substance and purpose of the Policy is to state our views on the interpretation and application of the Instrument.

**Background**
We first published the Instrument for comment on June 21, 2002. After considering the comments, we revised the Instrument and published the revised version for comment on June 20, 2003. For additional background and the summary of comments received during the first publication period, please refer to the notice we published on June 20, 2003.

**Summary of Written Comments Received by the CSA**
During the last comment period, we received submissions from two commenters on the Instrument. We have considered the comments received and thank all the commenters. The names of the commenters and a summary of the comments on the Instrument, together with our responses, are contained in Appendix A to this notice. The comments and our responses relating to the CD Rule are set out as an appendix to the Notice of Rule – National Instrument 51-102 *Continuous Disclosure Obligations*.

After considering the comments, we have made amendments to the Instrument and Policy. However, as these changes are not material, we are not republishing the Instrument or Policy for a further comment period.

**Summary of Changes to the Proposed Instrument/Policy**
This section describes the noteworthy changes made to the Instrument and Policy since the versions published for comment on June 20, 2003.

***The Instrument***
*Part 1 Definitions*
- The definition of *equity security* has been deleted. This term is defined in National Instrument 14-101 *Definitions*.

- The definition of *executive officer* has been revised to delete the requirement that, to be an executive officer, a person must be the chair or vice-chair on a full-time basis. This provision

was inconsistent with paragraph (f) of the definition, which is not based on whether the person performs a policy-making function on a full- or part-time basis.

- We have deleted the definition of *group scholarship plan*, as this definition is no longer required.

*Part 3 Filing and Sending of Documents*

- We have revised the requirement to send documents to Canadian securityholders so the documents must be sent at the same time, or as soon as practicable after, the documents are sent under foreign securities laws. This will permit issuers to take any administrative steps necessary to complete the mail-out in Canada. We also now require foreign issuers to send copies to the Canadian securityholders in the same manner as they are sent to the foreign securityholders.

*Part 4 SEC Foreign Issuers*

- SEC foreign issuers are no longer required to issue a news release in Canada to rely on the exemption from material change reporting. We agreed with commenters that suggested this requirement was too onerous. It is sufficient that the foreign news release is filed in Canada.

- We have clarified certain of the exemptions to specifically exempt SEC foreign issuers from the requirements in the CD Rule relating to approval of certain CD documents. It was unclear from the original language that the exemptions extended to the approval requirements.

- We have deleted the exemption for annual reports. There is no longer a need for this exemption, as no Canadian jurisdictions require annual reports to be prepared or filed.

- We have deleted the exemption from the requirement to disclose outstanding share data. This exemption was unnecessary because the disclosure requirement is part of the MD&A disclosure, which SEC foreign issuers are already exempted from.

- In response to comments we received, we have added exemptions from the requirements to disclose voting results and file news releases containing financial information. The exemptions are subject to the SEC foreign issuer complying with its foreign obligations and filing a copy of any document filed with the SEC.

- In response to comments we received, we have added an exemption from the requirement to file copies of documents affecting the rights of securityholders and material contracts not entered into in the ordinary course of business. This exemption is not subject to any conditions. We do not require SEC foreign issuers to file copies of any documents filed with the SEC. Many of the documents will be filed in any event, when the issuer files copies of its Form 10-K in Canada. We decided the benefits of having the documents filed did not justify the potential costs to SEC foreign issuers.

- We have removed the condition in the insider reporting exemption that an insider of an SEC foreign issuer file copies of the insider reports it files with the SEC. We decided that the paper filing of foreign insider reports was too onerous a requirement, and noted that the

corresponding exemption in the multijurisdictional disclosure system (MJDS) does not require insiders to file copies of their foreign insider reports.

- We have added an exemption from the change of auditor requirements for SEC foreign issuers. SEC foreign issuers were already able to rely on a similar exemption in the CD Rule, but the new exemption is less onerous. This is appropriate, given the SEC foreign issuer's limited connection to Canada.

*Part 5 Designated Foreign Issuers*

- Designated foreign issuers are no longer required to issue a news release in Canada to rely on the exemption from material change reporting. We agreed with commenters that suggested this requirement was too onerous. It is sufficient that the foreign news release is filed in Canada.

- We have clarified certain of the exemptions to specifically exempt designated foreign issuers from the requirements in the CD Rule relating to approval of certain CD documents. It was unclear from the original language that the exemptions extended to the approval requirements.

- We have deleted the exemption for annual reports. There is no longer a need for this exemption, as no Canadian jurisdictions require annual reports to be prepared or filed.

- We have deleted the exemption from the requirement to disclose outstanding share data. This exemption was unnecessary because the disclosure requirement is part of the MD&A disclosure, which designated foreign issuers are already exempted from.

- In response to comments we received, we have added exemptions from the requirements to disclose voting results and file news releases containing financial information. The exemptions are subject to the designated foreign issuer complying with its foreign obligations and filing a copy of any document filed with its foreign regulatory authority.

- We have removed the condition in the insider reporting exemption that an insider of a designated foreign issuer file copies of the insider reports it files with the foreign regulatory authority. We decided that the paper filing of foreign insider reports was too onerous a requirement.

- In response to comments we received, we have added an exemption from the requirement to file copies of documents affecting the rights of securityholders and material contracts not entered into in the ordinary course of business. This exemption is not subject to any conditions. We did not require designated foreign issuers to file copies of any documents filed with its foreign regulatory authority. We determined it would be too onerous to require designated foreign issuers whose documents will often not be in French or English to have these documents translated. We decided the benefits of having the documents filed did not justify the potential costs to designated foreign issuers, particularly given their limited connection to Canada.

***The Policy***

- We have updated the Policy, as necessary, to reflect the changes to the Instrument discussed above.

- In response to comments, we have clarified in the Policy that, in determining the percentage of assets located in Canada, the issuer should look to the value of the assets recorded in its most recent consolidated financial statements, either annual or interim.

- We have clarified in the Policy that foreign issuers do not have to file multiple copies of their foreign disclosure documents. If the document is filed once, the issuer can then just cross-reference that filing to satisfy the conditions of other exemptions.

- We have revised the Policy to specify all of the requirements in the CD Rule that SEC foreign issuers and designated foreign issuers are not exempted from in the Instrument. This will make it easier for those issuers to determine what their CD obligations are.

**Questions**

Please refer your questions to any of:

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**National Instrument**
The text of the Instrument follows, except in British Columbia.

December 19, 2003

## Appendix A
## Summary of Comments and CSA Responses

**Part I Background**

On June 20, 2003 the CSA published for comment, revised versions of the CD Rule and the Instrument. The comment period expired on August 19, 2002. The CSA received submissions relating to the Instrument from the two commenters identified in Schedule 1.

The CSA have considered the comments received and thank all commenters for providing their comments.

**Part II Comments on the Instrument**

**General**

One commenter supported the goal of developing and implementing exemptions for foreign issuers.

*No response required.*

One commenter suggested foreign issuers that previously obtained discretionary relief should be fully grandfathered, and all new provisions in the CD Rule should not apply to them. The commenter suggested this is particularly the case where the Québec Securities Commission required certain parent companies of exchangeable share issuers to become reporting issuers, then granted continuous disclosure relief.

*Response: Under section 13.2 of the CD Rule, foreign issuers may rely on prior relief obtained in a jurisdiction, if the prior relief was granted by the jurisdiction from a provision substantially similar to the CD Rule. When discretionary relief is granted, each jurisdiction considers if it is appropriate to grant relief from the requirements that actually exist in that jurisdiction. The conditions to the relief reflect this. It would not be appropriate, and is in fact beyond the legislative authority in some jurisdictions, to retroactively extend the relief to areas that did not exist at the time the order was originally granted. We also note that the Instrument provides exemptions from most of the requirements of the CD Rule for SEC foreign issuers and designated foreign issuers, provided certain conditions are met. The exemptions in the Instrument reflect the CSA's current position on when it is appropriate for foreign issuers to not have to comply with the CD obligations in the CD Rule.*

One commenter said sections 4.9 and 4.10, and Parts 8, 11, and 12 of the CD Rule should not apply to foreign public companies. With regard to the notice of a restructuring under section 4.9 of the CD Rule, the commenter said foreign issuers will often not consult Canadian counsel in connection with foreign transactions, and interested securityholders can readily find the information they want to know about the foreign issuer.

*Response: The CSA agree that SEC foreign issuers and designated foreign issuers should be given exemptions from sections 11.3 and 11.4 of the CD Rule relating to disclosing voting results, and filing news releases containing financial information. We have added these*

*exemptions, subject to the issuer complying with its foreign obligations and filing a copy of any document filed with its foreign regulatory authority. The CSA also agree that an exemption should be provided from Part 12 of the CD Rule. The benefit of having these documents filed does not justify the burden for SEC foreign issuers and designated foreign issuers.*

*The Instrument already substantially provides exemptions from section 4.10 and Part 8 of the CD Rule. For example, designated foreign issuers are exempt from the change in year-end requirements under section 5.16. SEC foreign issuers can rely on the exemption from the change in year-end requirements for SEC issuers in the CD Rule. SEC foreign issuers and designated foreign issuers are exempt from the financial statement requirements under sections 4.3 and 5.4 of the Instrument. These financial statement exemptions apply to financial statements filed after a reverse takeover. In addition, a new exemption has been added for SEC foreign issuers from the change of auditor requirements in the CD Rule. This exemption is broader than the exemption provided to SEC issuers under the CD Rule, and is more consistent with the general approach to foreign issuers under the Instrument.*

*We disagree that exemptions should be provided from the other sections named by the commenter. In the case of sections 4.9 and 11.2, it is important for both the regulatory authorities and Canadian securityholders to know if there has been a change in the nature or reporting obligations of the reporting issuer. Filing this information will ensure that Canadian securityholders know when and how to obtain the reporting issuer's documents, and that the regulatory authorities are able to respond accurately to their reporting issuers. In the case of section 11.1, the requirement to file documents sent to public securityholders ensures that the documents are available to all Canadian securityholders.*

*It would not be appropriate to extend these exemptions to any foreign public issuer. Unless a reporting issuer can meet the tests set out in the definitions of SEC foreign issuer and designated foreign issuer, it is appropriate for the reporting issuer to comply with the reporting obligations set out in the CD Rule.*

One commenter said exemptions should be given to foreign companies from the takeover bid and issuer bid requirements, as the current limits in securities legislation are too low, and these transactions are like going private transactions. The commenter suggested a complete exemption may be appropriate in most cases.

*Response: The Instrument is intended to address continuous disclosure and periodic filing obligations by reporting issuers and insiders. Exemptions from the takeover bid and issuer bid requirements are beyond the scope of this project. These areas, and the exemptions currently in securities legislation, are currently being reviewed in the context of the CSA's Uniform Securities Law project.*

One commenter said early warning, insider reports, outstanding share reports, and so on, should not be required to be filed in Canada under the exemptions. Canada is a minor player in the international capital markets, and filing obligations alone will dissuade further access into the market. In general, the commenter said foreign filing requirements should be minimized or avoided wherever possible.

*Response: We agree that compliance with CD requirements for SEC foreign issuers and designated foreign issuers should be made as simple as possible. This goal must be balanced, though, with the rights of Canadian securityholders of reporting issuers to have easy access to information. The conditions in the Instrument that foreign reporting issuers file copies of their foreign documents to rely on the exemptions, achieve this balance. We have, though, revised the insider reporting exemption so insiders will not be required to file copies of the insider reports they file in their foreign jurisdiction.*

**Part 1 Definitions**

One commenter questioned, in the definition of *eligible foreign reporting issuer,*

- what are the assets or business of a holding entity that has subsidiaries or investees
- how one determines the location of securities
- if the 50% asset test is to be based on book or estimated market value.

The commenter also suggested the term *senior officer*, rather than *executive officer,* should be used in the definition, as it is less broad.

*Response: The definition of* eligible foreign reporting issuer *[now* foreign reporting issuer*] has been revised to clarify that it is the consolidated assets of the issuer that must be considered when applying the definition. We have also clarified in the Policy that the asset test is based on the value recorded in the most recent consolidated financial statements, either annual or interim, of the issuer. An issuer must consider its specific circumstances in determining the location of its assets. For example, if an issuer holds securities in another company, and the investment is accounted for by the cost method, or is marked to market, the issuer may consider the location of the other company's head office for the purpose of determining the location of that investment.*

*We have not replaced the reference to* executive officer *in the definition with* senior officer. *The definition is intended to test whether the reporting issuer is carrying on business predominantly outside of Canada. Part of this is ensuring that the issuer's decisions are being made, and operations directed, from outside of Canada. As a result, it is the location of the chair, vice-chair, president, vice-president, and other people performing policy-making functions, that is relevant, not the location of the issuer's five highest paid employees.*

One commenter said the definition of *equity security* should not include securities that have a residual right to participate in earnings. Instead, it should be limited to a security that carries a residual right to participate in the assets of an issuer on the liquidation or winding-up of the reporting issuer.

*Response: We have deleted the definition of* equity security *in the Instrument as the term is already defined in National Instrument 14-101* Definitions. *That definition refers back to the definition of equity security in securities legislation. It would not be appropriate to change that definition, which has been used for many purposes in many different national and multilateral instruments, in this Instrument.*

One commenter noted the definition of *exchange-traded security*

- excludes all foreign-listed or quoted securities,
- in provinces other than Ontario, appears to exclude TSX listed securities, and,
- in Ontario, excludes TSX Venture listed securities.

*Response: The term is only used in the definition of marketplace. As the definition of marketplace also encompasses exchanges and quotation systems, regardless of where they are located, the limitations to the definition of exchange-traded security suggested by the commenter are irrelevant.*

One commenter suggested paragraphs (e) or (f) of the definition of *executive officer* may be over-broad, as there could be a large number of policy-making personnel (for example, in respect of the privacy policy, or the environmental policy) that should not be considered "executive officers". The terms *senior officer* or *officer* would be more appropriate.

*Response: We disagree. The definition of executive officer is designed to capture persons that are directing the operations of the reporting issuer and making its significant decisions. This includes the people responsible for approving a policy direction and ensuring the policy is implemented and followed (that is, the making of the policy for the issuer). This group is distinct from those personnel that simply develop the policies for consideration. Given this distinction, we do not agree that the definition is too broad.*

**Part 3 Filing and Sending of Documents**

One commenter said the requirement to send documents to Canadian securityholders should permit the sending to be done promptly after the documents are sent under U.S. federal securities law or the laws or requirements of a designated foreign jurisdiction. The commenter noted additional administrative steps will likely be required for many foreign issuers to send the materials into Canada.

*Response: We agree that it may be difficult for SEC foreign issuers and designated foreign issuers to mail documents to their Canadian securityholders at the same time they mail them to their foreign securityholders. We have revised the wording in section 3.2 to require the mailing at the same time as, or as soon as practicable after, the document is sent to the foreign securityholders. This is consistent with the timing for filing copies of documents that are filed or furnished to the SEC or a foreign regulatory authority in section 3.1.*

**Part 4 SEC Foreign Issuers**

One commenter said the material change reporting exemption should not require the issuer to issue and file a press release or other document in Canada, as it is costly, and Canadian securityholders can instead access the information on the internet.

*Response: We agree that SEC foreign issuers should not be required to issue in Canada their foreign news releases relating to material changes. We have removed this condition from the exemption. We do not agree that the news release should not have to be filed here. Under the Instrument, Canadian securityholders should have access to the same information about SEC*

*foreign issuers as securityholders in the issuer's local jurisdiction. That information is made available by the issuer filing it with the appropriate securities regulatory authorities.*

Two commenters said that the insider reporting exemption should be available even if the SEC foreign issuer is a SEDI issuer. The commenters suggested the exemption currently discourages issuers from becoming electronic filers under National Instrument 13-101 *System for Electronic Document Analysis and Retrieval (SEDAR)* (NI 13-101). One commenter said the requirement that the issuer not be a SEDI issuer is inconsistent with the approach in the Instrument that compliance with foreign laws will in most circumstances be sufficient.

*Response: We have not revised the exemption as suggested. As SEDI has made filing and retrieving insider reports easier for insiders and investors, we do not agree that it is necessary, or appropriate, to extend the exemption at this time. Although the Instrument provides that compliance with foreign laws will in most circumstances be sufficient, this is based on the issuer's foreign disclosure documents being filed in Canada. They system for filing insider reports electronically through SEDI does not, however, permit the filing of foreign documents, and paper insider filings would not provide useful, accessible disclosure, If an issuer in an electronic filer on SEDAR, its insiders should file on SEDI.*

One commenter suggested the exemption for going private transactions and related party transactions should conform to section 5.12 of proposed Ontario Securities Commission Rule 71-802 [now the Instrument], as U.S. issuers should not be treated worse than those of other countries.

*Response: SEC foreign issuers are not treated worse than those of other countries in the exemption for going private transactions and related party transactions. To rely on the exemption, SEC foreign issuers cannot have more than 20% of its equity securities held by Canadian residents. Designated foreign issuers, by definition, cannot have more than 10% of their equity securities held by Canadians. Further, the exemption in the Instrument is consistent with similar treatment of U.S. issuers under MJDS.*

One commenter noted that staff of the Ontario Securities Commission have proposed changes to the term *going private transaction* which should be monitored for consistency with the Instrument.

*Response: We have reviewed the proposed and confirmed that changes are not required to the Instrument as a result of the revisions.*

**Part 5 Designated Foreign Issuers**

One commenter said the material change reporting exemption should not require the issuer to issue and file a press release or other document in Canada, as it is costly, and Canadian securityholders can instead access the information on the internet.

Response: *We agree that designated foreign issuers should not be required to issue in Canada their foreign news releases relating to material changes. We have removed this condition from the exemption. We do not agree that the news release should not have to be filed here. Under the*

*Instrument, Canadian securityholders should have access to the same information about designated foreign issuers as securityholders in the issuer's local jurisdiction. That information is made available by the issuer filing it with the appropriate securities regulatory authorities.*

Two commenters said that the insider reporting exemption should be available even if the designated foreign issuer is a SEDI issuer. The commenters suggested the exemption currently discourages issuers from becoming electronic filers under NI 13-101. One commenter said the requirement that the issuer not be a SEDI issuer is inconsistent with the approach in the Instrument that compliance with foreign laws will in most circumstances be sufficient.

*Response: We have not revised the exemption as suggested. As SEDI has made filing and retrieving insider reports easier for insiders and investors, we do not agree that it is necessary, or appropriate, to extend the exemption at this time. Although the Instrument provides that compliance with foreign laws will in most circumstances be sufficient, this is based on the issuer's foreign disclosure documents being filed in Canada. They system for filing insider reports electronically through SEDI does not, however, permit the filing of foreign documents, and paper insider filings would not provide useful, accessible disclosure, If an issuer in an electronic filer on SEDAR, its insiders should file on SEDI.*

**Schedule 1 to Appendix A**
**List of Commenters**

Gregory J. Hogan, Stikeman Elliott LLP – August 5, 2003

Simon Romano – August 11, 2003