NOTICE

NATIONAL INSTRUMENT 62-101
CONTROL BLOCK DISTRIBUTION ISSUES

On December 8, 1999, the Alberta Securities Commission made National Instrument 62-101 Control Block Distribution Issues (the "National Instrument") a Commission rule, effective March 15, 2000. The text of the rule is published in the Alberta Securities Commission Summary of December 17, 1999 and will be published in the Alberta Gazette dated January 15, 2000.

The National Instrument has been made a rule concurrently with National Instrument 62-102 Disclosure of Outstanding Share Data and National Instrument 62-103 The Early Warning System and Related Take-over Bid and Insider Reporting Issues (collectively, the "Early Warning Instruments").

The National Instrument is an initiative of the Canadian Securities Administrators ("CSA"), and the National Instrument is expected to be adopted as a rule in each of British Columbia, Alberta, Manitoba, Ontario and Nova Scotia, as a Commission regulation in Saskatchewan, and as a policy in all other jurisdictions represented by the CSA.

The CSA published for comment a draft of the National Instrument, and the other Early Warning Instruments, in September 1998.[1] During the comment periods on the Early Warning Instruments, the CSA received submissions from a number of commenters. Five commenters commented specifically on National Instrument 62-101. The names of these commenters and the summary of their comments, together with the CSA responses to those comments, are contained in Appendix A of this Notice. Reference should be made to the Notice of Rule for each of National Instruments 62-102 and 62-103 for a summary and discussion of the specific comments on those instruments. In addition, some of the comments related generally to the Early Warning Instruments; those comments are summarized and discussed in the Notice of Rule for National Instrument 62-103.

The version of National Instrument 62-101 published in 1998 is referred to in this Notice as the "1998 Draft".

As the result of consideration of the comments, the CSA have made a number of minor amendments to National Instrument 62-101 and the other Early Warning Instruments. However, as these changes are not material, the CSA are not republishing those instruments for a further comment period.

Substance and Purpose of the National Instrument

[1] In Alberta, in the September 4, 1998 edition of the Alberta Securities Commission Summary.

There are two purposes of the National Instrument. One purpose is to set out a limited exemption for eligible institutional investors from the prospectus requirements applicable to control block distributions in order to facilitate the ability of those investors to dispose of their securities of an issuer without having to comply with the provisions of securities legislation. Those provisions would require a statement that the investor has no knowledge of undisclosed material information concerning the issuer, or that would impose subsequent hold periods.

The other purpose of the National Instrument is to modify the application of hold periods as they may apply to pledgees disposing of securities that form part of a control block.

Summary of Changes to the National Instrument from the 1998 Draft

This section describes the substantive changes made in the National Instrument from the 1998 Draft. For a detailed summary of the contents of the 1998 Draft, reference should be made to the notice that was published with the 1998 Draft.

A definition of "*information circular requirement*" has been added. This definition references a requirement to deliver an information circular in some circumstances under Policy Statement Q-12 of the Commission des valeurs mobilières du Québec ("CVMQ").

Section 2.1 has been amended to provide an exemption from the information circular requirement in Quebec on the same basis as the exemption from the prospectus requirement provided by Section 2.1.

Subparagraph 2.1(1)(a)(i) has been amended so that the subparagraph refers only to the requirements that all filings required under either the early warning requirements or Part 4 of National Instrument 62-103 in connection with the current securityholding position of the eligible institutional investor in the reporting issuer have been made. A reference to the issue of a news release was deleted as unnecessary. Reference is made to the detailed discussion of the operation of this subparagraph in Appendix A.

In addition, section 4.1 has been added to provide that the National Instrument comes into force on March 15, 2000.

Appendix A has been amended by the addition of a reference to Policy Statement Q-12 of the CVMQ.

DATED: December 17, 1999

APPENDIX A

SUMMARY OF COMMENTS RECEIVED
ON
DRAFT NATIONAL INSTRUMENT 62-101
AND
RESPONSE OF THE CANADIAN SECURITIES ADMINISTRATORS

1. INTRODUCTION

On September 4, 1998, the Canadian Securities Administrators (the "CSA") published for comment National Instrument 62-101 Control Block Distribution Issues. National Instrument 62-101 was published concurrently with National Instrument 62-103 The Early Warning System and Related Take-over Bid and Insider Reporting Issues and National Instrument 62-102 Disclosure of Outstanding Share Data.

In this Notice, the version of the National Instrument 62-101 published in 1998 is called the "1998 Draft" and the final version published with this Notice is called the "National Instrument". National Instruments 62-101, 62-102 and 62-103 are collectively called the "Early Warning Instruments".

The CSA received submissions on the 1998 Draft from five commenters. The commenters providing the submissions can be grouped as follows:

Trade Associations	3
- Canadian Bankers Association ("CBA")	
- Securities Subcommittee of the Business Law Section of the Canadian Bar Association (Ontario) (the "Securities Subcommittee")	
- The Investment Funds Institute of Canada ("IFIC")	
Financial Institution	1
- RT Investment Management Holdings ("RT")	
Lawyer	1
- Simon Romano ("Romano")	
TOTAL	**5**

Copies of the comment letters may be viewed at the office of Micromedia, 20 Victoria Street, Toronto, Ontario (416) 312-5211 or (800) 387-2689; the office of the British Columbia Securities Commission, 200-865 Hornby Street, Vancouver, British Columbia (604) 899-6660; the office of the Alberta Securities Commission, 410-300 5th Avenue S.W., Calgary, Alberta (403) 297-6454; and the office of the Commission des valeurs mobilières du Québec, Stock Exchange Tower, 800 Victoria Square, 22nd Floor, Montréal, Québec (514) 940-2150.

In addition, the CSA received a number of comments on National Instruments 62-102 and 62-103, which are summarized and discussed in the Notices of Rule for those National Instruments published concurrently with this Notice. A number of the comments related generally to the Early Warning Instruments; reference should be made to the Notice of Rule for National Instrument 62-103, which contains a summary and discussion of those comments.

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

The following is a summary of the comments received, together with the CSA's responses and, where applicable, the proposed changes in response to the comments. Terms used in this summary that are defined in the National Instrument have the meanings ascribed to them in that Instrument.

2. GENERAL COMMENTS

Companion Policy

The Securities Subcommittee asked that a companion policy for the National Instrument be provided, on the basis that the National Instrument is highly technical and that interpretative guidance would be helpful.

CSA Response

The CSA do not believe that a companion policy is necessary to accompany the National Instrument.

Availability of Prospectus Exemptions for Pledgees

The CBA stated that this is an appropriate opportunity to clarify that the prospectus requirements will not apply to realizations and dispositions by a pledgee of securities that do not constitute control blocks in the hands of a pledgee. The CBA stated that it was concerned that "securities legislation may be viewed to taint pledged securities of any quantity if they originate from a control block", even if the pledgee itself holds, or is disposing of, securities that do not constitute a control block in the hands of the pledgee.

CSA Response

The comment of the CBA relates to the prospectus requirements under the securities acts of most Canadian jurisdictions,[2] which are not intended to be affected or amended; the CBA's comment is therefore outside the scope of the National Instrument.

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[2] In Alberta, section 112 of the *Securities Act* (Alberta).

Aggregation Relief

The CBA sought clarification that the aggregation relief under Part 5 of National Instrument 62-103 can be relied upon for the purpose of the prospectus exemption for control block distributions provided in section 2.1 of the National Instrument. The CBA noted that the definition of "applicable provisions" in National Instrument 62-103 appears to extend only to subsection 2.1(2) of the National Instrument 62-101, and should be extended to include all of National Instrument 62-101. The CBA argued that the concept of business units is important for the prospectus exemption for control block distributions to enable an eligible institutional investor's other business units to take advantage of the relief, notwithstanding the fact that a separate business unit may have made an acquisition of that class of shares or have appointed directors or have inside information behind Chinese walls.

CSA Response

The CSA agree with this comment and have amended the definition of "applicable provisions" in National Instrument 62-103 to include all of section 2.1 of the National Instrument. It is not technically necessary to include section 2.2 of the National Instrument in that definition.

3. COMMENTS ON SPECIFIC PROVISIONS OF THE 1998 DRAFT

Section 2.1

A number of comments were received concerning the conditions to the availability of the prospectus exemption provided in subsection 2.1(1).

IFIC submitted that the key condition for the use of the prospectus exemption by an eligible institutional investor should be that the eligible institutional investor have a "passive" investment intent in relation to the relevant securities. IFIC argued that the proper test for "passive" intent should be that contained in section 4.2 of National Instrument 62-103, namely that the investor be disqualified if it "makes or intends to make a formal bid" or "proposes or intends to propose" a transaction that gives it effective control of the issuer. Whether the eligible institutional investor has, or receives in the ordinary course of its business, non-disclosed inside information about an issuer should be irrelevant. Consequently, IFIC urged the deletion of the conditions in paragraphs 2.1(1)(a) that pertained to the receipt of inside information (subparagraphs 2.1(1)(a)(ii) and (iii)).

Both the CBA and RT commented that subparagraph 2.1(1)(a)(iii) was too restrictive. Both argued that the prospectus exemption provided by subsection 2.1(1) should be available as long as the eligible institutional investor does not have non-disclosed inside information at the time of the relevant trade; it should not matter whether the eligible institutional investor receives inside information in the ordinary course of its business.

The commenters suggested that other provisions of securities legislation, such as the prohibitions on tipping and on insider trading, should be sufficient to deal with any concerns raised by the receipt of inside information in the ordinary course.

RT argued that subparagraph 2.1(1)(a)(iv) should be deleted. RT submitted that the concept of "effective control" used in that provision is confusing due to the deeming provisions of securities legislation. RT provided additional comments on the definition of "effective control", which are summarized and discussed in the Notice of Rule for National Instrument 62-103.

The CBA submitted that paragraph 2.1(1)(b) should be deleted. The CBA noted that lenders, in connection with a workout or reorganization, may select, nominate or designate officers or directors of a reporting issuer. The CBA stated that it "seems unreasonable" to deny lenders access to the relief offered by section 2.1 in such circumstances, particularly in light of subparagraph 2.1(1)(a)(ii) and the fiduciary duties of officers and directors.

Romano provided a number of drafting comments on section 2.1. He suggested that the reference to "current" in subparagraph 2.1(1)(a)(i) be deleted, and that provision simply reference the issue and filing of all required reports. He also indicated that he found the reference to the word "held" in paragraph 2.1(1)(d) confusing and suggested alternative language.

CSA Response

The conditions to the prospectus exemption provided by section 2.1 of the National Instrument have not been materially changed by the CSA in response to the comments. The CSA consider each such condition important to the relief provided by the section. The CSA note that the relief is provided to eligible institutional investors that do not have, and are not in a position to have, inside information concerning the subject reporting issuer. The exemption is analogous to the prospectus exemptions contained in securities legislation[3] that provide a prospectus exemption for control block distributions or pledgees selling pledged securities if the seller certifies that it has no inside information concerning the subject reporting issuer. The exemption contained in section 2.1 provides similar relief, but eliminates the need for the certificate; this is done on the basis that additional conditions ensuring that the eligible institutional investor not be in a position to have inside information are satisfied. Therefore, the CSA consider it appropriate that there be conditions that the seller not have inside information, not have access in the ordinary course to inside information and not have another relationship that could give it access to inside information, such as effective control or a role nominating or designating directors or officers of the subject reporting issuer.

The CSA agree with one of Romano's drafting comments concerning subparagraph 2.1(1)(a)(i), and have deleted the reference to the issue of a press release.

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[3] Section 112 of the *Securities Act* (Alberta) and corresponding provisions in other securities legislation.

The CSA have not made the suggested change on the deletion of the reference to "current" in order to avoid a possible ambiguity. The intent of subparagraph 2.1(1)(a)(i) is that the eligible institutional investor must have made all required filings with respect to its *current* securityholding position. The CSA believe that a deletion of the word "current" could suggest that if any filing at any time in the past had been missed by the eligible institutional investor, it would forever be denied the use of this exemption. The CSA wish to make the exemption available as long as all required filings in connection with its current position have been made.

The CSA also note that this exemption continues to be available **i**f there has been a change in the securityholding percentage of the eligible institutional investor in an issuer that has not triggered a reporting requirement under either the early warning requirements or the alternative monthly reporting system. For example, an eligible institutional investor that reported a position of 13 percent under the alternative monthly reporting system is still eligible to use the exemption contained in this Instrument, subject to compliance with the other conditions, if its position has changed to 14 percent. In that situation, the eligible institutional investor would have made all required reports in connection with its current 14 percent position - i.e., it would have reported when its position was 13 percent and no new reporting requirements have yet arisen.

Section 2.2

As with subsection 2.1(1), the CBA urged that aggregation relief be available in respect of section 2.2.

Romano requested a footnote or comment explaining the intended result of paragraph 2.2(2)(b). Romano asked if the result of this provision was that any acquisition, even post-realization, by the pledgee would be irrelevant.

CSA Response

The CSA have not provided aggregation relief with respect to section 2.2 of the National Instrument. Section 2.2 pertains to the hold period provisions contained in the securities legislation of some jurisdictions that, in turn, relate to prospectus exemptions contained in that securities legislation. The National Instrument, and National Instrument 62-103, generally do not deal with existing prospectus exemptions.

The CSA note that subsection 2.2(2) pertains to the hold period provisions of securities legislation of three jurisdictions set out in Appendix C of the National Instrument. Those provisions provide, in effect, that where a seller of securities that acquired securities under a specified exemption, the seller cannot distribute any security of that class under the control block/pledgee exemption unless all securities of that class were held by the seller for a specified hold period. Subsection 2.2(2) provides that, in effect, a pledgee need not be delayed in distributing securities by those hold periods, as subsection (2) deems the pledgee to have held the securities for the required hold periods.