NOTICE OF PROPOSED NATIONAL POLICY 51-201 DISCLOSURE STANDARDS

AND

PROPOSED RESCISSION OF NATIONAL POLICY 40 TIMELY DISCLOSURE

I. INTRODUCTION

The Canadian Securities Administrators (the "CSA" or "We") have become increasingly concerned about the selective disclosure of material corporate information by companies to analysts, institutional investors, and other market participants. Selective disclosure occurs when a company discloses material nonpublic information to one or more individuals or companies and not broadly to the investing public. The practice of selective disclosure poses a serious threat to investor confidence in the fairness and integrity of the capital markets.

The purpose of proposed National Policy 51-201 Disclosure Standards ("Policy 51-201 ") is to: (i) describe the timely disclosure requirements and the confidential filing mechanism contained in securities legislation; (ii) provide interpretive guidance on existing legislative prohibitions against selective disclosure; (iii) highlight disclosure practices where companies take on a high degree of risk in light of the legislative prohibitions against selective disclosure; (iv) give examples of the types of information likely to be material under securities legislation; and (v) list some "best disclosure" practices that can be adopted by companies to ensure that they comply with securities legislation. Policy 51-201 is a CSA initiative and is expected to be implemented as a policy in all of the CSA jurisdictions.

II. BACKGROUND

The Allen Committee

In Canada, attention was focused on the practice of selective disclosure in 1995 when The Toronto Stock Exchange Committee on Corporate Disclosure (the "Allen Committee") released its Interim Report. In the report the Allen Committee acknowledged the importance of meetings with analysts in "fostering open and thorough continuous disclosure practices". The Allen Committee recognized that "benefits may flow to the markets from the legitimate efforts of securities analysts who use their professional expertise to process detailed data and information into commentary that investors find useful and can digest relatively quickly and improve the flow of corporate information into the marketplace". Nevertheless the Allen Committee remained concerned that private meetings with analysts and professional investors had resulted in "selective disclosure of information that should have been disclosed on a general basis". "Quite apart from any questions of compliance with securities laws", the Allen Committee noted that this causes "unfairness in the marketplace".

The Allen Committee made a number of recommendations designed to equalize access to information among investors including: group analyst meetings with retail investor access; wide availability of data books and additional information; and electronic access to corporate information.

Ontario Securities Commission Staff Survey

In October 1999, as a first step in addressing the issue of selective disclosure, staff of the Continuous Disclosure Team of the Ontario Securities Commission (the "OSC") conducted a survey of disclosure practices of public companies (the "Survey"). Four hundred public companies were randomly selected across all industries to participate in the Survey. The Survey explored several areas including: (i) company policies surrounding meetings and discussions with analysts and other groups; (ii) company responses to requests for information that is not available on the public record; (iii) company procedures if material nonpublic information is inadvertently disclosed to select groups; and (iv) the existence of company disclosure policies that address these and related issues.

The survey was not intended to identify companies that may be selectively disclosing information. Rather the objective of the Survey was to seek input from reporting issuers on current practices and identify areas where additional guidance from the CSA would be appropriate.

The results of the Survey were published by the OSC in July, 2000.[1] In general, the results of the Survey indicated that the extent and nature of corporate disclosure policies and practices of issuers are not sufficient to reduce the potential for selective disclosure. For example:

- 71% of the respondents do not have written corporate disclosure policies;
- 81% of the respondents reported that they have one-on-one meetings with analysts;
- 98% of the respondents reported that they typically comment in some form on draft analyst reports; and
- 27% of the respondents indicated that they express a level of comfort on earnings projections.

III. SUMMARY OF POLICY 51-201

Policy 51-201 contains six parts.

Part I contains a number of general provisions relating to the policy including our views on the practice of selective disclosure.

Part II describes the timely disclosure requirements contained in securities legislation and the confidential filing mechanism available under securities legislation.

Part III discusses legislative prohibitions against selective disclosure ("tipping") and insider trading contained in securities legislation and sets out our views concerning the interpretation of

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[1] See Ontario Securities Commission Staff Notice 53-701 Staff Report on Corporate Disclosure Survey ((2000) 23 OSCB 5098).

these prohibitions. Sections 3.3 and 3.5 provide interpretive guidance on the "necessary course of business" exception and the "generally disclosed"[2] requirement. Section 3.7 provides an overview of some of the mitigating factors that we may consider in any enforcement proceedings relating to selective disclosure.

Part IV gives examples of the types of information likely to be material under securities legislation. Section 4.3 provides that information regarding a company's ability to meet consensus earnings published by securities analysts should not be selectively disclosed by a company before the public dissemination of a company's earnings release. If disclosed, such information should be generally disclosed.

Part V describes some high risk disclosure practices including: (i) conducting private briefings with analysts; (ii) commenting on draft analyst reports; and (iii) entering into confidentiality agreements with analysts. Section 5.5 outlines our views on companies providing their own earnings "guidance" and section 5.6 outlines our views on the application of National Policy Statement 48 Future-Oriented Financial Information ("NP 48") in such circumstances. Section 5.7 provides guidance dealing with forward-looking statements and the "duty to update". It should be noted that NP 48 is being reformulated and our reconsideration of NP 48 may have an impact on the preparation and dissemination by companies of all types of forward-looking information.

Finally, Part VI lists some "best disclosure" practices that companies can adopt to help ensure good disclosure practices and compliance with securities legislation.

IV. PARALLEL INITIATIVES IN OTHER JURISDICTIONS

United States

Regulation FD was adopted by the U.S. Securities and Exchange Commission in August 2000 and became effective in the United States on October 23, 2000.[3] Regulation FD requires that reporting companies disclose material information through broad non-exclusionary public means and not selectively to securities analysts and other market professionals. Regulation FD essentially provides that whenever an issuer, or any person acting on its behalf, discloses material nonpublic information to specified persons, the issuer must simultaneously (for intentional disclosures) or promptly (for non-intentional disclosures) make public disclosure of that information.

Regulation FD represents a change in the SEC's approach to the issue of selective disclosure.

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[2] The Québec Securities Act requires that information must first be "generally known".

[3] See Release Nos. 33-7881, 34-43154, IC-24599, File No. S7-31-99 Selective Disclosure and Insider Trading.

Over the past thirty years or so, the SEC has framed the issue of potential liability for selective disclosure under principles of fraud law (i.e., Rule 10b-5).[4] Rule 10b-5 is a general anti-fraud rule from which U.S. courts have implied a prohibition against "tipping" and which has evolved and been variously interpreted by U.S. courts over the past several decades. This approach led to uncertain results in establishing which type of selective disclosure is prohibited.[5] Given its recognition that issuers retain control over the precise timing, audience and forum for important corporate disclosure, the SEC has adopted Regulation FD as an issuer disclosure rule.

We considered promulgating a rule similar to Regulation FD. We believe, however, that the existing Canadian insider trading and tipping regime sets out a specific and comprehensive code which, among other things, prohibits all selective disclosures other than those made in the "necessary course of business".

A chart which compares the Canadian and U.S. rules on selective disclosure is contained in Appendix A to this notice.

Australia

In November 1999 the Australian Securities and Investment Commission ("ASIC") issued a draft guidance and discussion paper (*"Heard it on the Grapevine..."*) that proposed guidelines for providing investors with fair access to information and avoiding selective disclosure. While not proposing a change in regulations, the paper suggested "best disclosure practices" in keeping with existing regulatory requirements. Following the release of ASIC's draft guidance note, ASIC, together with the Australian Stock Exchange ("ASX"), embarked on a six-month continuous disclosure surveillance campaign.[6]

On August 23, 2000 ASIC released its final guidance note entitled *"Better Disclosure for*

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4 Rule 10b-5 provides that "it shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or the mails or of any facility of any national stock exchange: (a) To employ any device, scheme or artifice to defraud; (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances in which they were made, not misleading; or (c) To engage in any act, practice or cause of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security".

5 See for example, *Dirks v. SEC*, 463 U.S. 646 (1983), in which the U.S. Supreme Court stated that an analyst tippee would be subject to insider trading liability if the tipper breached a fiduciary duty to shareholders in disclosing material non-public information and the tippee knew or should have known of the breach. As articulated by the Supreme Court, breach of a fiduciary duty exists where the "insider" will benefit, directly or indirectly, from the disclosure such as a pecuniary gain or a reputational benefit that will translate into future earnings.

6 ASX continuous disclosure rules require listed companies to reveal immediately any information that could reasonably be expected to affect the company's share price.

Investors".[7] The final guidance note provides issuers with practical steps that companies can take to improve investor access to their information. The guidance principles adopted largely follow the 10 guidance principles that were first articulated in *"Heard it on the Grapevine..."*.

Policy 51-201 includes guidance which has been derived from ASIC's *"Better Disclosure for Investors"*.

V. PROPOSED RESCISSION OF NATIONAL POLICY STATEMENT 40

The ASC, together with the other members of the CSA propose to rescind National Policy Statement No. 40 Timely Disclosure ("NPS 40"). The proposed rescission of NPS 40 will be effective on the date that Policy 51-201 comes into force.

We consider that NPS 40 is no longer necessary because (i) the guidance provided in proposed Policy 51-201 incorporates the guidance previously forming part of NPS 40; and (ii) the relevant exchanges have rules and policies in place concerning timely disclosure.[8]

VI. UNPUBLISHED MATERIALS

In proposing Policy 51-201, we have not relied on any significant unpublished study, report, decision or other written materials.

VII. RELATED INSTRUMENTS

In Alberta, Policy 51-201 is related to sections 118 (timely disclosure) and 119 (insider trading and tipping prohibitions) of the *Securities Act* (Alberta).

VIII. COMMENTS

Interested parties are invited to make written submissions with respect to proposed Policy 51-201 and the proposed rescission of NPS 40. In particular, we are requesting comment on:

(i) our approach to the "necessary course of business" exception. For example, should the "necessary course of business" exception cover communications made to a potential private placee? (See section 3.4 of the policy);

(ii) our approach for determining how a company may satisfy the "generally

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[7] See https://www.asic.gov.au.

[8] See The Toronto Stock Exchange Statement on Timely Disclosure and Related Guidelines, the Canadian Venture Exchange Policy 3.3 Timely Disclosure, and Policy I-8 Timely Disclosure By Listed Companies of the Bourse de Montréal Inc. (formerly the Montreal Exchange).

disclosed" requirement under the tipping provisions. For example, are there other means of satisfying the "generally disclosed" requirement? (See section 3.5 of the policy); and

(iii) the practicalities of a company implementing the recommended "best disclosure" practices in Part VI of the policy.

Submissions received by July 25, 2001 will be considered.

Submissions should be sent to all of the Canadian securities regulatory authorities listed below in care of the Ontario Securities Commission, in duplicate, as indicated below:

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Securities Commission
The Manitoba Securities Commission
Ontario Securities Commission
Office of the Administrator, New Brunswick
Registrar of Securities, Prince Edward Island
Nova Scotia Securities Commission
Department of Government Services and Lands, Newfoundland and Labrador
Registrar of Securities, Government of the Northwest Territories
Registrar of Securities, Government of the Yukon Territory
Registrar of Securities, Nunavut

c/o John Stevenson, Secretary
Ontario Securities Commission
20 Queen Street West
Suite 1903, Box 55
Toronto, Ontario M5H 3S8
E-mail: jstevenson@osc.gov.on.ca

Submissions should also be addressed to the Commission des valeurs mobilières du Québec as follows:

Denise Brosseau, Secretary
Commission des valeurs mobilières du Québec
Stock Exchange Tower
800 Victoria Square
P.O. Box 246, 22nd Floor
Montréal, Québec H4Z 1G3

A diskette containing the submissions (in DOS or Windows format, preferably WordPerfect)

should also be submitted. As securities legislation in certain provinces requires that a summary of the written comments received during the comment period be published, confidentiality of submissions received cannot be maintained.

Questions may be referred to any of:

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IX. TEXT OF POLICY 51-201

The text of Policy 51-201 follows, together with footnotes that have been included to provide further background and explanation.

DATED: May 25, 2001.

APPENDIX A

COMPARISON OF "TIPPING" PROVISIONS IN CANADIAN SECURITIES LAW AND REGULATION FD

NOTE: The "tipping" provisions contained in securities legislation are generally similar across Canada. However, the CSA caution that some differences do exist in these legislative provisions. Market participants should therefore consult the applicable legislation of each province and territory for details of the relevant prohibitions.

ELEMENTS	"TIPPING" PROVISIONS	REGULATION FD
Basic Rule or Prohibition	No reporting issuer and no person or company in a special relationship with a reporting issuer shall inform, other than in the necessary course of business, another person or company of a material fact or material change ("privileged information" in the case of Québec) with respect to the reporting issuer before the material fact or material change has been generally disclosed	Whenever an issuer, or any person acting on its behalf, discloses any material nonpublic information regarding the issuer or its securities to any person described in the regulation, the issuer shall make public disclosure of the information: (1) simultaneously, in the case of an intentional disclosure; and (2) promptly, in the case of a non-intentional disclosure
Scope of Communications Covered (Communications "By")	Communications by a reporting issuer and any person or company in a special relationship with a reporting issuer "Person or company in a special relationship with a reporting issuer" includes: & directors, officers, or employees of the reporting issuer & insiders, affiliates or associates of the reporting issuer & persons or companies engaged in any business or professional activity with the reporting issuer & a person or company that learns of material information about the reporting issuer while a director, officer, employee, insider, affiliate or associate of the reporting issuer & a person or company that learns of material information about the reporting issuer from anybody else and knows, or reasonably should have known, that they are a person or company in a special	Communications by an issuer, or any person acting on its behalf "Person acting on behalf of an issuer" is defined as: & any senior official of the issuer or any other officer, employee, or agent of an issuer who regularly communicates with certain persons enumerated in the regulation or with holders of the issuer's securities

ELEMENTS	"TIPPING" PROVISIONS	REGULATION FD
	relationship. Québec securities legislation extends the prohibition to communications by persons: & having privileged information that, to their knowledge, was disclosed by an insider, affiliate, associate or by any other person having acquired privileged information in the course of his relations with the reporting issuer; and & by persons having acquired privileged information that these persons know to be such	
Scope of Communications Covered (Communications "To")	Communications made to another person or company	Communications made to securities market professionals or holders of the issuer's securities, including: & a broker or dealer, or a person associated with a broker or dealer & an investment adviser, an institutional investment manager or a person associated with either of the foregoing & an investment company or an affiliated person, or & a holder of the issuer's securities under circumstances in which it is reasonably foreseeable that the person will purchase or sell the issuer's securities on the basis of the information Excluded are communications made: & to a person who owes a duty of trust or confidence to the issuer (such as an attorney, investment banker, or accountant) & to a person who expressly agrees to maintain the disclosed information in confidence & to an entity whose primary business is the issuance of credit ratings, provided that the information is disclosed solely for the purpose of

ELEMENTS	"TIPPING" PROVISIONS	REGULATION FD
		developing a credit rating and the entity's ratings are publicly available & in connection with securities offering registered under the Securities Act
Materiality	Any information "that significantly affects, or would reasonably be expected to have a significant effect on, the market price or value" of the securities "Privileged information" is defined in Québec securities legislation as any information "that has not been disclosed to the public and that could affect the decision of a reasonable investor"	U.S. case law interprets materiality as follows: & information is material if "there is a substantial likelihood that a reasonable shareholder would consider it important" in making an investment decision & there must be a substantial likelihood that a fact "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information available"
Timing of Required Disclosure	An issuer must **first** generally disclose material information before it discloses it to any person or company Where a "material change" occurs in the affairs of a reporting issuer, the issuer must immediately issue and file a press release disclosing the nature and substance of the change, followed by a material change report filed within ten days of the date on which the change occurred	For an "intentional" selective disclosure, the issuer is required to publicly disclose the same information simultaneously & a selective disclosure is "intentional" when the issuer or person acting on their behalf either knows or is reckless in not knowing, prior to making the disclosure, that the information is both material and nonpublic When an issuer makes a non-intentional disclosure of material nonpublic information, it is required to make public disclosure "promptly" & "promptly" means as soon as reasonably practicable (but in no event after the later of 24 hours or the commencement of the next day's trading on the New York Stock Exchange) after a senior official of the issuer learns that there has been a non-intentional disclosure that the senior official knows, or is reckless in not knowing, is both material and nonpublic
Standard of Required	Material information must first be "generally disclosed" before it can be	An issuer must make "public disclosure" of material nonpublic information it

ELEMENTS	"TIPPING" PROVISIONS	REGULATION FD
Disclosure	communicated to another person or company Provincial securities legislation does not define "generally disclosed" Québec securities legislation uses the term "generally known"	discloses "Public disclosure" is defined in the regulation to include: & the furnishing or filing with the Securities and Exchange Commission of a Form 8-K & in the alternative, disclosure "that is reasonably designed to provide broad, non-exclusionary distribution of the information to the public"
"Necessary Course of Business"	Communication of material undisclosed information "in the necessary course of business" is exempt from the "tipping" provisions	
Liability and Defences	Violations of the "tipping" provisions are subject to enforcement action by the appropriate provincial securities regulatory authority These proceedings can include: & administrative proceedings before provincial tribunals for orders in the public interest, including cease trade orders, suspensions of registration, removal of exemptions and prohibitions from acting as director or officer of an issuer & civil proceedings before the courts for a declaration that a person or company is not complying with provincial securities law and for the imposition of any order the courts consider appropriate, or & proceedings in provincial offences court for fines or imprisonment or both No person or company shall be found to have breached the "tipping" provisions if they can prove that they reasonably believed that the material information in question had been generally disclosed (or, in Québec, was generally known)	Violations of Regulation FD are subject to enforcement action by the Securities and Exchange Commission These proceedings can include: & administrative proceedings for cease-and-desist orders, or & civil proceedings for injunctive relief or fines Regulation FD does not create any new duties under the antifraud or private litigation provisions of U.S. securities law & there is no liability for an issuer under Rule 10b-5 and there is no creation of private liability for issuers **solely** for violations of Regulation FD