CSA/ACVM Canadian Securities Administrators Autorités canadiennes en valeurs mobilières

Notice and Request for Comment

Proposed National Instrument 55-104 *Insider Reporting Requirements and Exemptions*, Companion Policy 55-104CP *Insider Reporting Requirements and Exemptions* and related consequential amendments

1. Purpose of notice

The Canadian Securities Administrators (the CSA or we) are publishing for a 90-day comment period the following proposed materials:

- National Instrument 55-104 *Insider Reporting Requirements and Exemptions* (the Proposed Instrument);
- Companion Policy 55-104CP *Insider Reporting Requirements and Exemptions* (the Proposed Policy);
- Consequential amendments to Multilateral Instrument 11-102 *Passport System*;
- Consequential amendments to National Instrument 14-101 *Definitions*;
- Consequential amendments to Form 51-102F5 *Information Circular* of National Instrument 51-102 *Continuous Disclosure Obligations*; and
- Consequential amendments to National Instrument 62-103 *The Early Warning System and Related Take-Over Bid and Insider Reporting Issues*.

The Proposed Instrument, the Proposed Policy and the related consequential amendments are collectively referred to as the Proposed Materials.

The Proposed Materials would replace the following instruments (the Current Materials) currently in effect:

- National Instrument 55-101 *Insider Reporting Exemptions* (NI 55-101);
- Companion Policy 55-101CP *Insider Reporting Exemptions*;
- Multilateral Instrument 55-103 *Insider Reporting of Certain Derivative Transactions (Equity Monetization)* (MI 55-103);
- Companion Policy 55-103CP *Insider Reporting of Certain Derivative Transactions (Equity Monetization)*; and
- British Columbia Instrument 55-506 *Exemption from insider reporting requirements for certain derivative transactions*.

We are publishing with this Notice the Proposed Materials and the repeal instruments for the Current Materials. You can also find the Proposed Materials and repeal instruments on the websites of many CSA members.

Certain jurisdictions may include additional local information in Appendix L.

2. Substance and purpose of the Proposed Instrument and the Proposed Policy

The Proposed Instrument will set out the main insider reporting requirements and exemptions for insiders of reporting issuers. The exception is Ontario, where the main insider reporting requirements will remain in the *Securities Act* (Ontario). Despite this difference, the substance of the requirements for insider reporting will be the same across the CSA jurisdictions.

The Proposed Policy provides guidance as to how we would interpret or apply certain provisions of the Proposed Instrument.

3. Summary of the Proposed Instrument

We are publishing the Proposed Materials for comment as part of an initiative to modernize, harmonize and streamline insider reporting in Canada. The insider reporting requirements and exemptions are currently set out in a variety of statutes, rules and regulations in each jurisdiction. We are proposing to consolidate the main insider reporting requirements and exemptions in a single national instrument to make it easier for issuers and insiders to understand their obligations and to help promote timely and effective compliance.

We are also proposing changes to the insider reporting regime that we think will improve its effectiveness. Specifically, we are proposing to

- significantly reduce the number of persons required to file insider reports;
- accelerate the filing deadline for insider reports from 10 calendar days to five calendar days;
- simplify and make more consistent the reporting requirements for stock-based compensation arrangements;
- facilitate insider reporting of stock-based compensation arrangements by allowing issuers to file an "issuer grant report" similar to the current "issuer event report"; and
- require an issuer to disclose in its information circular any late filings by its insiders.

4. Prior request for comment

We have previously requested comment about some of the proposals reflected in the Proposed Materials. In October 2006, we published a Notice and Request for Comment relating to amendments to NI 55-101. As part of that Notice, we outlined at a high level proposals for future amendments to Canadian insider reporting requirements, including amendments that would consolidate the insider reporting requirements and exemptions in a single instrument, refocus the insider reporting requirements on a smaller group of insiders and accelerate the filing deadlines. These proposals were referred to as the "Phase 2 amendments".

As described in the summary of comments and responses included with the Notice of Amendments to NI 55-101, published in June 2007, we generally received positive comments

about our proposals for the Phase 2 amendments. These proposals are now reflected in the Proposed Materials.

5. Why are we proposing changes to the current insider reporting regime?

The insider reporting requirements serve a number of functions, including deterring improper insider trading based on material undisclosed information and increasing market efficiency by providing investors with information concerning the trading activities of insiders of an issuer, and, by inference, the insiders' views of their issuer's prospects.

In connection with our proposals for the Phase 2 amendments, we conducted research that compares our current insider reporting requirements with those in other countries.

Based on the results of our research, we have reached the following conclusions:

1. Canadian insider reporting requirements are not fully harmonized. In addition, the main requirements and exemptions are situated in various Acts, regulations and rules across the CSA. This can be confusing for issuers and insiders, who may find it difficult to understand and comply with their obligations, and other market participants, who may find it difficult to analyze the information that is reported. We think it would be helpful to market participants to consolidate the main insider reporting requirements and exemptions in a single instrument.

2. The Canadian insider reporting regime requires an unduly broad class of persons to file insider reports. This is particularly apparent in the case of larger issuers with many subsidiaries and affiliates. In contrast, the insider reporting requirements of the U.S. and the U.K. generally impose an insider reporting requirement on a much narrower class of persons. We propose 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. We propose to achieve this by introducing a new concept of a "reporting insider" and by amending the definition of "major subsidiary".

3. The period allowed for filing insider reports (generally 10 days from the date of the transaction) is too long. In contrast, the insider reporting filing deadlines in the U.S. (generally two-business days from the date of the transaction) and the U.K. (generally within five business days from the date of the transaction) require substantially faster reporting. We are proposing to accelerate the filing deadline from 10 calendar days to five calendar days to make this important information available to the market sooner.

4. The insider reporting requirements relating to different types of stock-based compensation arrangements, such as stock options, phantom stock, stock appreciation rights (SARs), restricted share units (RSUs), deferred share units (DSUs), and similar instruments, are inconsistent and confusing. In contrast, the insider reporting requirements in the U.S. for reporting these instruments are relatively clear. We think we should simplify the insider reporting requirements for such instruments and make

them more consistent. In addition, the inconsistent regulatory treatment of stock-based compensation arrangements has been highlighted by the recent controversy involving stock option back-dating.

5. Some insiders have experienced difficulties in filing insider reports by the required deadline about transactions that originate at the issuer level, such as a grant of stock options by the issuer to insiders, since the issuer may not have provided the insiders with the necessary information in a timely manner. We propose to introduce an exemption that would permit an issuer to file on SEDAR an "issuer grant report". 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.

6. Our approach to dealing with late filing of insider reports is not harmonized. For example, Alberta and Quebec publish a list of late filers, whereas other jurisdictions do not. Our proposals to respond to these concerns include an issuer disclosure requirement, similar to current U.S. requirements, that would require an issuer to disclose in its circular whether any of its insiders have made late filings in the previous year. The effective date proposed for the issuer disclosure requirement is December 31, 2010, allowing for a transition period.

6. Outcomes-based response to these concerns

The Proposed Instrument reflects an outcomes-based approach to insider reporting and ties the requirement to file insider reports to the fundamental policy rationales for the insider reporting requirement. The Proposed Instrument responds to the following questions:

- Who should file insider reports?
- What insider transactions should be reported?
- When should insider transactions be reported?

a) The "reporting insider" concept

Although securities legislation generally imposes an insider reporting requirement on all persons who are "insiders", we have provided a variety of exemptions for insiders who are not significant shareholders, do not exercise an executive officer or director function and do not routinely have access to material undisclosed information about the reporting issuer prior to general disclosure. These exemptions are situated in various rules and regulations adopted in each jurisdiction in Canada.

The insider reporting regime prescribed by the Proposed Instrument replaces this broad "catch and release" approach with a more principled approach that focuses the reporting requirement on a narrower, core group of insiders. The core group includes significant shareholders of the issuer and other insiders who satisfy both of the following criteria:

(i) the insider in the ordinary course has access to material undisclosed information concerning the reporting issuer prior to general disclosure; and

(ii) the insider, directly or indirectly, exercises, or has the ability to exercise, significant power or influence over the business, operations, capital or development of the reporting issuer.

This approach is reflected in the new definition of "reporting insider". The reporting insider definition comprises:

(i) a list of persons or companies that includes significant shareholders plus other insiders we think generally satisfy both of the criteria, and

(ii) a "basket" provision that explicitly cites these two criteria.

The insider reporting regime currently includes exemptions that relieve from the reporting requirement persons who do not meet the first of these criteria, that is, persons who do not have routine access to material undisclosed information. Based on our review, we have concluded that we should further narrow the focus of the insider reporting regime to persons who satisfy both this criterion and the criterion of having significant influence over the reporting issuer. We think that narrowing the focus of the insider reporting regime to a core group of senior insiders who have the greatest access to material undisclosed information, together with accelerated reporting, would have an enhanced deterrent effect on the most senior insiders and would result in faster dissemination of the most important information to the market.

In addition, the Proposed Instrument will also address the concern that certain persons who satisfy these two criteria may not currently be required to file insider reports because they may not technically be insiders. For example, as explained in section 6.4 of National Policy 41-201 *Income Trusts and Other Indirect Offerings*, we are concerned that certain persons who would be insiders of an operating entity underlying an income trust if the operating entity were a reporting issuer may not, for technical reasons, be insiders of the income trust. This concern would apply to, for example, directors and officers of a management company that provides management services to the operating entity. Although we think that such persons will generally come within the definition of "insider" based on the definition of "officer" (which includes persons who perform a similar function to an officer), we generally obtain undertakings from an income trust to address this concern.

The Proposed Instrument addresses these concerns by expressly designating certain classes of persons who satisfy these two criteria to be "insiders" and including them within the definition of "reporting insider".

Insiders who are not reporting insiders are still subject to the provisions in Canadian securities legislation prohibiting improper insider trading.

b) Reportable transactions

Under Part 3 of the Proposed Instrument, reporting insiders are generally required to file insider reports disclosing the reporting insider's

(i) beneficial ownership of, or control or direction over, directly or indirectly, securities of the reporting issuer, and

(ii) interest in, or right or obligation associated with, a related financial instrument involving a security of the reporting issuer.

These are the primary insider reporting requirements.

Part 4 of the Proposed Instrument contains a supplemental insider reporting requirement relating to certain agreements, arrangements or understandings that may not technically trigger the above tests for reporting under Part 3 but that otherwise satisfy the policy rationale for insider reporting.

The supplemental insider reporting requirement is consistent with the insider reporting requirement for derivatives that previously existed under MI 55-103. However, because Part 3 of the Proposed Instrument requires insiders, as part of the primary insider reporting requirement, to file insider reports about transactions involving "related financial instruments", most transactions that were previously subject to a reporting requirement under MI 55-103 will be subject to the insider reporting requirement under Part 3 of the Proposed Instrument.

c) Deadline for filing

We are proposing to accelerate the deadline for filing insider reports from 10 calendar days to five calendar days after a trade because we think the market would benefit from more timely dissemination of information relating to insider transactions. Accelerating the reporting deadline should also address concerns about improper activities involving stock options and similar equity-based instruments, including stock option backdating, option repricing, and the opportunistic timing of option grants. More timely disclosure of option grants and public scrutiny of such disclosure would generally limit opportunities for insiders to engage in improper dating practices.

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).

7. Anticipated Impact on Stakeholders

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.

The insider reporting requirement will focus on a more senior, core group of insiders. This should result in an enhanced deterrent and signalling effect (the key reasons for insider reporting) on the core group of senior insiders who have the greatest access to material undisclosed information and who will continue to report. The information from this core group of insiders will not be obscured, as at present, by a large volume of insider reports filed by persons who, although statutory insiders with some access to material undisclosed information, are outside this core group.

8. Impact on SEDI

The Proposed Materials focus on the substantive legal insider reporting requirements rather than the procedural requirements relating to the electronic filing of insider reports. We are not proposing any amendments to National Instrument 55-102 *System for Electronic Disclosure by Insiders (SEDI)* (NI 55-102) as part of this initiative.

However, we anticipate that several of the proposed substantive changes to our insider reporting regime would help address concerns raised by issuers and insiders in relation to SEDI.

For example, reducing the number of persons required to file insider reports would eliminate the reporting burden for those insiders who are no longer required to report. Similarly, we understand that some insiders have experienced difficulties reporting on time transactions that originate at the issuer level, such as a grant of stock options by the issuer to insiders, because of delays in the issuer providing the necessary information. Under the Proposed Instrument, if the issuer files an issuer grant report, the insider recipients of the option grant would be permitted to file an alternative report on an annual basis.

Finally, reducing the number of insiders required to report and introducing a requirement that issuers disclose late insider filings in their circulars will create additional incentives for issuers to assist their insiders with complying with their insider reporting requirements.

9. Consequential amendments to NI 14-101 and NI 62-103

We are proposing an amendment to the definition of "insider reporting requirement" in National Instrument 14-101 *Definitions* to harmonize this definition with the corresponding definition in NI 55-104 and to update the definition so that it also refers to the insider reporting requirements applicable to derivative transactions and the requirement to file an insider profile under NI 55-102 .

As a result of this amendment to the definition of "insider reporting requirement" in NI 14-101, certain consequential amendments to National Instrument 62-103 *The Early Warning System and Related Take-Over Bid and Insider Reporting Issues* (NI 62-103) are necessary. Under Part

9 of NI 62-103, an eligible institutional investor is exempt from the insider reporting requirement for a reporting issuer if the eligible institutional investor complies with the alternative monthly reporting requirements under Part 4 of NI 62-103 and complies with the other conditions in Part 9 of NI 62-103. As a result of the current definition of "insider reporting requirement" in NI 14-101, the exemption from the insider reporting requirements in Part 9 of NI 62-103 is currently an exemption only from the requirement to file insider reports relating to the insider's beneficial ownership of, or control or direction over, securities of the reporting issuer. The exemption does not exempt the eligible institutional investor from the requirement to file insider reports about derivative transactions that may affect the investor's publicly disclosed holdings. This is appropriate since a failure to disclose a monetization transaction or a similar derivative transaction may result in the investor's publicly disclosed holdings being misleading.

However, as a result of the amendment to the definition of "insider reporting requirement" in NI 14-101, in the absence of a corresponding amendment to NI 62-103, eligible institutional investors would be exempt from the requirement to file insider reports about derivative transactions under Part 4 of the Proposed Instrument. Accordingly, we are amending Part 9 of NI 62-103 to make it clear that that the insider reporting requirement applicable to derivative transactions in Part 4 of the Proposed Instrument continues to apply to eligible institutional investors.

10. Future Initiatives

a) Late filing fees

As a related initiative, we are also considering ways to harmonize the late filing fees and other consequences of late insider filings. Only some jurisdictions impose late fees and their rates are different. By administrative practice, jurisdictions do not duplicate late fees but the result is that different late fees apply to insiders depending on the location of the issuer's head office. We are assessing introducing a uniform administrative late fee for late filings regardless of head office jurisdiction. Finally, we are considering whether the list of late filers maintained by certain jurisdictions should become a CSA list. However, we are not proposing any changes relating to late fees or a CSA list of late filers at this time.

b) Issues relating to "hidden ownership" and "empty voting"

We are presently reviewing issues relating to the potential use of derivatives to avoid early warning requirements, insider reporting requirements and similar securities law disclosure requirements that are based on the concepts of beneficial ownership and control or direction.

According to recent studies,[1] a sophisticated investor may be able, through the use of equity swaps or similar derivative arrangements, to accumulate a substantial economic interest in an issuer without public disclosure and then quickly convert this interest into voting securities in time to exercise a vote. (This is referred to as "hidden (morphable) ownership".) The studies also suggest that an investor can, through derivatives or securities borrowing arrangements, acquire voting rights while having no economic stake in the issuer, or even having an economic interest contrary to the issuer's, and seek to influence the outcome of a shareholder vote. (This strategy is referred to as "empty voting"). These studies further suggest that issuers and insiders may be able to employ these strategies to "park" securities with friendly parties to influence how the securities are voted.

The authors of these studies note that these strategies can undermine securities regulatory requirements that are based on the concept of beneficial ownership of voting securities and that a number of jurisdictions, including the United Kingdom, Australia and Switzerland, have recently introduced important disclosure-based reforms in an attempt to deal with the hidden ownership aspect of this problem.

For example, the Financial Services Authority (the FSA) in the UK published a consultation paper in November 2007 relating to proposals to require disclosure of substantial economic interests in a public company held through "contracts for difference" or similar derivative instruments.[2] In July 2008, the FSA announced that it had decided that "a general disclosure regime for long CfD positions (i.e., derivative positions that provide the holder with an economic interest in shares of an issuer) will be implemented as the most effective means of addressing concerns in relation to voting rights and corporate influence. Existing share and CfD holdings, in the same company, should be aggregated for disclosure purposes".[3] The FSA issued a Feedback and Policy Statement in October 2008 and announced that final rules would be made in February 2009 to come into force on September 1, 2009.

We are reviewing the recent reform proposals in other jurisdictions and are considering developing similar proposals for Canada. We are also separately reviewing issues relating to empty voting. We would welcome comment from market participants in Canada on the proposals other jurisdictions are making and on issues relating to empty voting generally.

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1 See, for example, Henry T.C. Hu & Bernard Black, *Equity and Debt Decoupling and Empty Voting: Importance and Extensions*, University of Pennsylvania Law Review, vol 156, no. 3, January 2008 at 625 and various earlier papers cited therein. In the U.S., the question of whether an investor may be considered to have "beneficial ownership" of securities held by a counterparty to an equity swap was recently considered in the decision of the United States District Court for the Southern District of New York in the case *CSX Corporation v. The Children's Investment Fund Management (UK) LLP, et al.*, dated June 11, 2008. In Canada, the Ontario Securities Commission recently had the opportunity to consider similar issues in the Sears Canada decision; see *In the Matter of Sears Canada Inc., Sears Holding Corporation, and SHLD Acquisition Corp. v. Hawkeye Capital Management, LLC, Knott Partners Management, LLC, and Pershing Square Capital Management, L.P.* dated August 8, 2006.

2 See the Financial Services Authority, Disclosure of Contracts for Difference – Consultation and draft Handbook text, available at www.fsa.gov.uk .

3 See the FSA, Contracts for Difference Policy Update, available at www.fsa.gov.uk .

Appendices

We have set out in Appendix A a set of specific questions for which we are seeking comment. The full text of the Proposed Instrument and the Proposed Policy are set out in Appendices B and C to this Notice. The text of the various consequential amendments and proposed repeals is set out in Appendices D to K. Certain jurisdictions may include additional information in Appendix L.

Request for Comments

We welcome your general comments on the Proposed Materials.

We also invite comments on specific aspects of the Proposed Instrument. The request for specific comments is located in Appendix A to this Notice.

Please submit your comments in writing on or before March 19, 2009. If you are not sending your comments by email, please include a CD ROM containing the submissions (in Windows format, Word).

Address your submission to the following CSA member commissions:

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, Department of Justice, Government of the Northwest Territories
Registrar of Securities, Legal Registries Division, Department of Justice, Government of Nunavut

Please deliver your comments **only** to the addresses that follow. Your comments will be forwarded to the remaining CSA member jurisdictions.

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We cannot keep submissions confidential because securities legislation in certain provinces requires publication of a summary of the written comments received during the comment period. Comments will be posted to the OSC web-site at www.osc.gov.on.ca.

Questions

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The text of the Proposed Materials follows in Appendices B to G or can be found elsewhere on a CSA member website.

December 18, 2008

Appendix A

Specific Requests for Comment

In addition to your general comments on the Proposed Materials, we also invite comments on specific aspects of the Proposed Instrument.

Specific aspects of the Proposed Instrument

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.

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?

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.

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[1] 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

[1] See section 5.2 of Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids* and section 102.1 of the *Securities Act* (Ontario).

(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?

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,[2] 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?

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.

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[2] See section 1.8 of Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids* and subsection 90(1) of the *Securities Act* (Ontario).

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?

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

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.