NATIONAL POLICY 51-201 DISCLOSURE STANDARDS

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NATIONAL POLICY 51-201 DISCLOSURE STANDARDS

PART I - INTRODUCTION

1.1 ***Purpose:*** (1) It is fundamental that everyone investing in securities have equal access to information that may affect their investment decisions. The Canadian Securities Administrators ("the CSA" or "We") are concerned about the selective disclosure of material corporate information by companies to analysts, institutional investors, investment dealers and other market professionals. Selective disclosure occurs when a company discloses material nonpublic information to one or more individuals or companies and not broadly to the investing public. Selective disclosure can create opportunities for insider trading and also undermines retail investors' confidence in the marketplace as a level playing field.

(2) This policy provides guidance on "best disclosure" practices in a difficult area involving competing business pressures and legislative requirements. Our recommendations are not intended to be prescriptive. We encourage companies to adopt the suggested measures, but they should be implemented flexibly and sensibly to fit the situation of individual companies.

(3) The timely disclosure requirements and prohibitions against selective disclosure are substantially similar everywhere in Canada, but there are differences among the provinces and territories, so companies should carefully review the legislation which is applicable to them for the details.

PART II - TIMELY DISCLOSURE

2.1 ***Timely Disclosure:*** (1) Companies are required by law to immediately disclose a "material change"[1] in their business. For changes that a company initiates, the change occurs once the decision has been made to implement it. This may happen even before a company's directors approve it, if the company thinks it is probable they will do so. A company discloses a material change by issuing and filing a press release describing the

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[1] Securities legislation defines the term material change as "a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer and includes a decision to implement such a change made by the board of directors of the issuer by senior management of the issuer who believe that confirmation of the decision by the board of directors is probable". The Québec Securities Act does not define the term "material change" and provides that "where a material change occurs that is likely to have a significant influence on the value or the market price of the securities of a reporting issuer and is not generally known, the reporting issuer shall immediately prepare and distribute a press release disclosing the substance of the change". See also *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, where the Supreme Court held that a change in assay and drilling results was a material change in the company's assets.

change. A company must also file a material change report as soon as practicable, and no later than 10 days after the change occurs. This policy statement does not alter in any way the timely disclosure obligations of companies.

(2) Announcements of material changes should be factual and balanced. Unfavourable news must be disclosed just as promptly and completely as favourable news. Companies that disclose positive news but withhold negative news could find their disclosure practices subject to scrutiny by securities regulators. A company's press release should contain enough detail to enable the media and investors to understand the substance and importance of the change it is disclosing. Avoid including unnecessary details, exaggerated reports or promotional commentary.

2.2 ***Confidentiality:*** (1) Securities legislation permits a company to delay disclosure of a material change and to keep it confidential temporarily where immediate release of the information would be unduly detrimental to the company's interests.[2] For example, immediate disclosure might interfere with a company's pursuit of a specific objective or strategy, with ongoing negotiations, or with its ability to complete a transaction. If the harm to a company's business from disclosing outweighs the general benefit to the market of immediate disclosure, withholding disclosure is justified. In such cases a company may withhold public disclosure, but it must make a confidential filing with the securities commission.[3] Certain jurisdictions also require companies to renew the confidential filing every 10 days should they want to continue to keep the information confidential.

(2) We discourage companies from delaying disclosure for a lengthy period of time as it becomes less likely that confidentiality can be maintained beyond the short term.

2.3 ***Maintaining Confidentiality:*** (1) Where disclosure of a material change is delayed, a company must maintain complete confidentiality. During the period before a material change is disclosed, market activity in the company's securities should be carefully monitored. Any unusual market activity may mean that news of the matter has been leaked and that certain persons are taking advantage of it. If the confidential material change, or rumours about it, have leaked or appear to be impacting the share price, a company should take immediate steps to ensure that a full public announcement is made. This would include contacting the relevant exchange and asking that trading be halted

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2 Confidentiality is also permitted in situations where the material change consists of a decision to implement a change made by the company's senior management, who believe that confirmation of the decision by the company's board of directors is probable.

3 While the Québec Securities Act does not require a confidential filing, it does relieve a company from the obligation to disclose a material change if senior management reasonably believes that (i) disclosure would be seriously prejudicial to it; and (ii) no one has purchased or sold, or will purchase and sell its securities based on the undisclosed information. A company must issue and file a press release once the reasons for not disclosing no longer exist.

pending the issuance of a news release.[4]

(2) Where a material change is being kept confidential, the company is under a duty to make sure that persons with knowledge of the material change have not made use of such information in purchasing or selling its securities. Such information should not be disclosed to any person or company, except in the necessary course of business.

PART III - OVERVIEW OF THE STATUTORY PROHIBITIONS AGAINST SELECTIVE DISCLOSURE

3.1 ***Tipping and Insider Trading:*** (1) Securities legislation prohibits a reporting issuer and any person or company in a ***special relationship*** with a reporting issuer from informing, other than in the ***necessary course of business***[5], anyone of a ***"material fact"***[6] or a ***"material change"*** (or ***"privileged information"*** in the case of Québec)[7] before that material information[8] has been ***generally disclosed***.[9] This prohibited activity is commonly known as "tipping".

(2) Securities legislation also prohibits anyone in a special relationship with a reporting issuer from purchasing or selling securities of the reporting issuer[10] with knowledge of a material fact or material change about the issuer that has not been generally disclosed.[11]

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4 See The Toronto Stock Exchange Statement on Timely Disclosure and Related Guidelines and the TSX Venture Exchange Policy 3.3 Timely Disclosure.

5 The Alberta and British Columbia Securities Acts use the phrase "is necessary in the course of business". The Québec Securities Act uses the phrase in the "course of business".

6 Securities legislation defines a "material fact" as follows: "material fact, where used in relation to securities issued or proposed to be issued means a fact that significantly affects, or would reasonably be expected to have a significant effect on, the market price or value of such securities".

7 "Privileged information" is defined under the Québec Securities Act as "any information that has not been disclosed to the public and that could affect the decision of a reasonable investor".

8 Material facts and material changes are collectively referred to as "material information". When used in the Policy, material information means both "material facts" and "material changes."

9 The Québec Securities Act uses the term "generally known".

10 For the purposes of the prohibition against illegal insider trading, a "security of the reporting issuer" is deemed to include a security, the market price of which varies materially with the market price of the securities of the issuer (see subsection 76(6)(b) of the Ontario Securities Act).

11 Section 187 of the Québec Securities Act provides that "no insider of a reporting issuer having privileged information relating to securities of the issuer may trade in such securities except in the following cases: (i) he is justified in believing that the information is generally known or known to the other party; (ii) he avails himself of an automatic dividend reinvestment plan, automatic subscription plan or any other automatic plan established by a reporting issuer, according to conditions set down in

This prohibited activity is commonly known as "insider trading".

(3) Securities legislation prohibits any person or company who is proposing:

- to make a take-over bid;
- to become a party to a reorganization, amalgamation, merger, arrangement or similar business combination; or
- to acquire a substantial portion of a company's property

from informing anyone of material information that has not been generally disclosed. An exception to this disclosure prohibition is provided where the material information is given in the "necessary course of business" to effect the take-over bid, business combination or acquisition.

(4) It is important to remember that the tipping and insider trading provisions apply to both material facts and material changes. A company's timely disclosure obligations generally only apply to material changes. This means that a company does not have to disclose all material facts on a continuous basis. However, if a company chooses to selectively disclose a material fact, other than in the necessary course of business, this would be in breach of securities legislation.

3.2 ***Persons Subject to Tipping Provisions:*** (1) The tipping provisions generally apply to anyone in a "special relationship" with a reporting issuer.[12] Persons in a special relationship include, but are not limited to:

(a) insiders as defined under securities legislation;

(b) directors, officers and employees;

(c) persons engaging in professional or business activities for or on behalf of the company; and

(d) anyone (a "tippee") who learns of material information from someone that the tippee knows or should know is a person in a special relationship with the company.

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writing, before he learned the information". Section 189 further expands the number of persons who are subject to the prohibition in section 187.

12 The tipping prohibition in Québec applies to insiders and persons listed in section 189 of the Québec Securities Act. 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.

(2) The "special relationship" definition is broad. The tipping prohibition is not limited to communications made by senior management, investor relations professionals and others who regularly communicate with analysts, institutional investors and market professionals. The tipping prohibition applies, for example, to unauthorized disclosures by non-management employees.

(3) There is a potentially infinite chain of tippees who are caught by the prohibitions against tipping and insider trading. Because tippees are themselves considered to be in a special relationship with a reporting issuer, material information may be third or fourth hand and still be subject to the prohibitions.

(4) Because the "special relationship" definition is so broad, it is important that companies establish corporate disclosure policies and clearly define who within the company has responsibility for corporate communications.

3.3 ***Necessary Course of Business****:* (1) The "tipping" provision allows a company to make a selective disclosure if doing so is in the "necessary course of business". The question of whether a particular disclosure is being made in the necessary course of business is a mixed question of law and fact that must be determined in each case and in light of the policy reasons for the tipping provisions. Tipping is prohibited so that everyone in the market has equal access to, and opportunity to act upon, material information. Insider trading and tipping prohibitions are designed to ensure that anyone who has access to material undisclosed information does not trade or assist others in trading to the disadvantage of investors generally.

(2) Different interpretations are being applied, in practice, to the phrase "necessary course of business".[13] As a result, we believe interpretive guidance in this regard is necessary. The "necessary course of business" exception exists so as not to unduly interfere with a company's ordinary business activities. For example, the "necessary course of business" exception would generally cover communications with:

(a) vendors, suppliers, or strategic partners on issues such as research and development, sales and marketing, and supply contracts;
(b) employees, officers, and board members;

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13 See *Re Royal Trustco Ltd. et al. and Ontario Securities Commission* (1983), 42 O.R. (2d) 147 (Div. Ct.) affirming (1981), 2 O.S.C.B. 322C. In Royal Trustco, it was alleged that two officers had revealed to a major shareholder, other than in the "necessary course of business" certain material facts in relation to the affairs of Royal Trustco that had not been generally disclosed including: (i) that approximately 60% of the shares of Royal Trustco were owned by persons or companies who the officers knew or had reason to believe would not tender pursuant to a bid; and (ii) that Royal Trustco management was considering recommending to the board that the dividends payable on the Royal Trustco shares be increased. The Court held that the information disclosed fell within the category of material facts and that such material facts had been made available to such shareholder not "in the necessary course of business" from Royal Trustco's perspective.

(c) lenders, legal counsel, auditors, underwriters, and financial and other professional advisors to the company;
(d) parties to negotiations;
(e) labour unions and industry associations;
(f) government agencies and non-governmental regulators; and
(g) credit rating agencies (provided that the information is disclosed for the purpose of assisting the agency to formulate a credit rating and the agency's ratings generally are or will be publicly available).

(3) Securities legislation prohibits any person or company that is proposing to make a take-over bid, become a party to a reorganization, amalgamation, merger, arrangement or similar business combination or acquire a substantial portion of a company's property from informing anyone of material information that has not been generally disclosed. An exception to this prohibition is provided where the material information is given in the "necessary course of business" to effect the take-over bid, business combination or acquisition.

(4) Disclosures by a company in connection with a private placement may be in the "necessary course of business" for companies to raise financing. The ability to raise financing is important. We recognize that select communications between the parties to a private placement of material information may be necessary to effect the private placement.[14] Communications to controlling shareholders may also, in certain circumstances, be considered in the "necessary course of business."[15] Nevertheless, we believe that in these situations, material information that is provided to private placees and controlling shareholders should be generally disclosed at the earliest opportunity.

(5) The "necessary course of business" exception would not generally permit a company to make a selective disclosure of material corporate information to an analyst, institutional investor or other market professional.[16]

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14 Securities legislation provides an exemption from the insider trading and selective disclosure prohibition where the person or company who trades with material undisclosed information or tips it proves that they reasonably believed that the other party to the trade or the tippee had knowledge of the information. Under the Québec Securities Act, the person or company must be justified in believing that the information is known to the other party.

15 For example, a company may need to share sensitive strategic information with a controlling shareholder when preparing consolidated financial statements.

16 See *In the Matter of Gary George* (1999), 22 OSCB 717, where the Ontario Securities Commission addressed in obiter the issue of a selective disclosure made by an issuer's chief executive officer to an analyst and the subsequent disclosure by the analyst to other members of his firm. We agree with the principles expressed by the Ontario Securities Commission:

> It would appear that some corporate officers see the maintenance of good relations with analysts as being more important than ensuring equality of material information

(6) There may be situations where an analyst will be "brought over the wall" to act as an advisor in a specific transaction involving a reporting issuer they would normally issue research about. In these situations, the analyst becomes a "person in a special relationship" with the reporting issuer and is subject to the prohibitions against tipping and insider trading. This means that the analyst is prohibited from further informing anyone of material undisclosed information they learn in this advisory capacity, including issuing any research recommendations or reports.[17]

(7) We draw a distinction between disclosures to credit rating agencies, which would generally be regarded as being in the "necessary course of business," and disclosures to analysts, which would not be. This distinction is based on differences in the nature of the business they are engaged in and in how they use the information. The credit ratings generated by rating agencies are either confidential (disclosed only to the company seeking the rating) or directed at a wide public audience. Generally, the objective of the rating process is a widely available publication of the rating.[18] The reports generated by analysts are targeted, first and foremost, to an analyst's firm's clients. Also, rating agencies are not in the business of trading in the securities they rate. Sell-side analysts are typically employed by investment dealers that are in the business of buying and selling, underwriting, and advising with respect to securities. Further, securities legislation requires specified ratings from approved rating agencies in certain

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> among shareholders. The fact that it was thought that [the analyst] was about to come out with a report as to [the issuer] which would overvalue its shares would in no way justify [the President] giving the information to [the analyst] rather than publicly disseminating it. If the information was material enough to cause [the analyst] to change his projections, it should have been publicly disseminated. In general, we view one-on-one discussions between an officer of a reporting issuer and an analyst as being fraught with difficulties.

Also see *In the Matter of Air Canada*, where employees of the company disclosed information about third quarter earnings per share results and a revised forecast for the next quarter to 13 analysts who covered the company but not to the marketplace generally. In the Excerpt from the Settlement Hearing Containing the Oral Reasons for Decision, the Ontario Securities Commission said:

> Communication by a corporation with analysts is not covered under some exception; so what is disclosed to analysts, if it is material and will significantly affect the market price, or reasonably may be expected to significantly affect the market price of the shares of the issuer, should not be selectively disclosed.

17 Parties to a transaction in which an analyst is "brought over the wall" should be mindful that bringing an analyst over the wall can be a risky practice and may in itself be a signal to others of a significant development involving a reporting issuer.

18 This is consistent with the reasoning of the SEC in excluding ratings organizations from Regulation FD. As the SEC indicated in paragraph II.B.1.a., of the implementing release, "[r]atings organizations...have a mission of public disclosure; the objective and result of the ratings process is a widely available publication of the rating when it is completed."

circumstances.[19] Consequently, ratings form part of the statutory framework of provincial securities legislation in a way that analysts' reports do not.

(8) When companies communicate with the media, they should be mindful not to selectively disclose material information that has not been generally disclosed. The "necessary course of business" exception would not generally permit a company to make a selective disclosure of material undisclosed information to the media. However, we are not suggesting that companies should stop speaking to the media. We recognize that the media can play an important role in informing and educating the marketplace.

3.4 ***Necessary Course of Business Disclosures and Confidentiality:*** (1) If a company discloses material information under the "necessary course of business" exception, it should make sure those receiving the information understand that they cannot pass the information onto anyone else (other than in the necessary course of business), or trade on the information, until it has been generally disclosed.

(2) We understand that companies sometimes disclose material information pursuant to a confidentiality agreement with the recipient, so that the recipient is prevented from further informing anyone of the material information. Obtaining a confidentiality agreement in these circumstances can be a good practice and may help to safeguard the confidentiality of the information. However, there is no exception to the prohibition against "tipping" for disclosures made pursuant to a confidentiality agreement. The only exception is for disclosures made in the "necessary course of business." Consequently, there must still be a determination, prior to disclosure supported by a confidentiality agreement, that such disclosure is in the "necessary course of business."

3.5 ***Generally Disclosed:*** (1) The tipping prohibition does not require a company to release all material information to the marketplace.[20] Instead, it prohibits a company from disclosing nonpublic material information to anyone (other than in the "necessary course of business") before the company generally discloses the information to the marketplace.

(2) Securities legislation does not define the term "generally disclosed". Insider trading court decisions state that information has been generally disclosed if:

(a) the information has been disseminated in a manner calculated to effectively reach the marketplace; and

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19 For example, under National Instrument 44-101 - Short Form Prospectus Distributions, alternative eligibility requirements allow companies without the requisite public float to issue "approved rating" non-convertible debt, preferred shares or cash-settled derivatives under a short form prospectus.

20 See, however, section 2.1 regarding an issuer's timely disclosure obligations.

(b) public investors have been given a reasonable amount of time to analyze the information.[21]

(3) Except for "material changes," which must be disclosed by news release, securities legislation does not generally require a particular method of disclosure to satisfy the "generally disclosed" requirement. In determining whether material information has been generally disclosed, we will consider all of the relevant facts and circumstances, including the company's traditional practices for publicly disclosing information and how broadly investors and the investment community follow the company. We recognize that the effectiveness of disclosure methods varies between companies. Whatever disclosure method is used to release information, we encourage consistency in a company's disclosure practices.[22]

(4) Companies may satisfy the "generally disclosed" requirement by using one or a combination of the following disclosure methods:

(a) News releases distributed through a widely circulated news or wire service.[23]

(b) Announcements made through press conferences or conference calls that interested members of the public may attend or listen to either in person, by telephone, or by other electronic transmission (including the Internet). A company needs to provide the public with appropriate notice of the conference or call by news release.[24] The notice should include the date and time of the conference or call, a general description of what is to be discussed, and the means of accessing the conference or call.[25] The notice should also indicate for how

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21 *Green v. Charterhouse Group Can. Ltd.* (1976), 12 O.R. (2d) 280. *In the Matter of Harold P. Connor et al.* (1976) Volume II OSCB 149. Existing case law does not establish a firm rule as to what would be a reasonable amount of time for investors to be given to analyze information. The time period will depend on a number of factors including the circumstances in which the event arises, the nature and complexity of the information, the nature of the market for the company's securities, and the manner used to release the information. We recognize that the case law is dated in this respect and that, if the courts were to revisit these decisions today, they may not find the time parameters set out in the decisions appropriate for modern technology.

22 A sudden change from the usual method of generally disclosing material information may attract regulatory attention in certain circumstances; for example, a last minute webcast of poor quarterly results without advance notice when positive quarterly results are generally released in advance of a subsequently scheduled discussion of the results.

23 We encourage companies to file their news releases on SEDAR. Filing a news release on SEDAR alone will not constitute "general disclosure".

24 This is based on guidance provided by the U.S. Securities and Exchange Commission (the "SEC") in the adopting release to Regulation FD.

25 This might include a Web site link to any software that is necessary to access the webcast.

long the company will make a transcript or replay of the call available over its Web site.

(5) We recognize that many companies prefer news release disclosure as the safest means of satisfying the "generally disclosed" requirement. In section 6.6 of the Policy, we recommend as a "best practice" a disclosure model centred around news release disclosure of material information, followed by an open and accessible conference call to discuss the information contained in the news release. However, we believe that alternative methods may also be appropriate. We believe it is important to preserve for companies the flexibility to develop a disclosure model that suits their circumstances and disseminates material information in the manner best calculated to effectively reach the marketplace.

(6) Posting information to a company's Web site will not, by itself, be likely to satisfy the "generally disclosed" requirement. Investors' access to the Internet is not yet sufficiently widespread such that a Web site posting alone would be a means of dissemination "calculated to effectively reach the marketplace." Further, effective dissemination involves the "pushing out" of information into the marketplace. Notwithstanding the ability of some issuers' Web sites to alert interested parties to new postings, Web sites by and large do not push information out into the marketplace. Instead, investors would be required to seek out this information from a company's Web site. Active and effective dissemination of information is central to satisfying the "generally disclosed" requirement.

(7) We support the use of technology in the disclosure process and believe that companies' Web sites can be an important and useful tool in improving communications to the marketplace. As technology evolves and as more investors gain access to the Internet, it may be that postings to certain companies' Web sites alone could satisfy the "generally disclosed" requirement. At such time, we will revisit this policy statement and reconsider the guidance provided on this issue. In the meantime, we strongly encourage companies to utilize their Web sites to improve investor access to corporate information.[26]

3.6 ***Unintentional Disclosure:*** Securities legislation does not provide a safe harbour which allows companies to correct an unintentional selective disclosure of material information. If a company makes an unintentional selective disclosure it should take immediate steps to ensure that a full public announcement is made. This includes contacting the relevant stock exchange and requesting that trading be halted pending the issuance of a news release. Pending the public release of the material information, the company should also tell those parties who have knowledge of the information that the information is material and that it has not been generally disclosed.

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[26] See also The Toronto Stock Exchange's Electronic Communications Disclosure Guidelines.

3.7 ***Administrative Proceedings:*** (1) We may consider any number of mitigating factors in a selective disclosure enforcement proceeding including:

(a) whether and to what extent a company has implemented, maintained and followed reasonable policies and procedures to prevent contraventions of the tipping provisions;

(b) whether any selective disclosure was unintentional; and

(c) what steps were taken to disseminate information that had been unintentionally disclosed (including how quickly the information was disclosed).

If a company's disclosure record shows a pattern of "unintentional selective disclosures", it will be harder to show that a particular selective disclosure was truly unintentional.

(2) Nothing in this policy statement limits our discretion to request information relating to a possible selective disclosure violation or to take enforcement proceedings within our jurisdiction where there has been a breach of the tipping provisions.

PART IV - MATERIALITY

4.1 ***Materiality Standard:*** (1) The definitions of "material fact" and "material change" under securities legislation are based on a market impact test. The definition of "privileged information" contained in the "tipping" provision of the securities legislation of Québec is based on a reasonable investor test. Despite these differences, the two materiality standards are likely to converge, for practical purposes, in most cases.

(2) The definition of a "material fact" includes a two part materiality test. A fact is material when it (i) significantly affects the market price or value of a security; or (ii) would reasonably be expected to have a significant effect on the market price or value of a security. [27]

4.2 ***Materiality Determinations:*** (1) In making materiality judgements, it is necessary to take into account a number of factors that cannot be captured in a simple bright-line standard or test. These include the nature of the information itself, the volatility of the company's securities and prevailing market conditions. The materiality of a particular event or piece of information may vary between companies according to their size, the nature of their operations and many other factors. An event that is "significant" or "major" for a smaller company may not be material to a larger company. Companies

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[27] Section 13 of the Québec Securities Act provides that a prospectus must disclose all material facts likely to affect the value of the market price of the securities to be distributed.

should avoid taking an overly technical approach to determining materiality.[28] Under volatile market conditions, apparently insignificant variances between earnings projections and actual results can have a significant impact on share price once released. For example, information regarding a company's ability to meet consensus earnings[29] published by securities analysts should not be selectively disclosed before general public release.

(2) We encourage companies to monitor the market's reaction to information that is publicly disclosed. Ongoing monitoring and assessment of market reaction to different disclosure will be helpful when making materiality judgements in the future. As a guiding principle, if there is any doubt about whether particular information is material, we encourage companies to err on the side of materiality and release information publicly.[30]

4.3 ***Examples of Potentially Material Information:*** The following are examples of the types of events or information which may be material. This list is not exhaustive and is not a substitute for companies exercising their own judgement in making materiality determinations.

Changes in Corporate Structure

- changes in share ownership that may affect control of the company
- major reorganizations, amalgamations, or mergers
- take-over bids, issuer bids, or insider bids

Changes in Capital Structure

- the public or private sale of additional securities
- planned repurchases or redemptions of securities

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28 See also *Re Royal Trustco Ltd. et al. and Ontario Securities Commission* (1983), 42 O.R. (2d) 147 (Div. Ct.), affirming (1981), 2 OSCB 322C, where the Ontario Securities Commission issued a denial of exemption order against two senior officers of Royal Trustco who disclosed to officers of a Canadian chartered bank that certain shareholders of Royal Trustco did not intend to tender their Royal Trustco shares to a hostile take-over bid by Campeau Corporation. The Ontario Securities Commission held that the disclosure constituted illegal "tipping". On appeal the Divisional Court stated that the term "fact" should not be read "super-critically" and that "information" that shareholders of Royal Trustco did not intend to tender to a hostile take-over bid by Campeau Corporation "was sufficiently factual or a sufficient alteration of circumstances to be a material "change" to fall within the [tipping provision]."

29 The range of earnings estimates issued by analysts following a company.

30 See also Canadian Investor Relations Institute, *"Model Disclosure Policy"*, (February 2001) where CIRI noted in its explanatory notes that "Determining the materiality of information is clearly an area where judgement and experience are of great value. If it is a borderline decision, the information should probably be considered material and released using a broad means of dissemination. Similarly, if several company officials have to deliberate extensively over whether information is material, they should err on the side of materiality and release it publicly".

- planned splits of common shares or offerings of warrants or rights to buy shares
- any share consolidation, share exchange, or stock dividend
- changes in a company's dividend payments or policies
- the possible initiation of a proxy fight
- material modifications to rights of security holders

Changes in Financial Results

- a significant increase or decrease in near-term earnings prospects
- unexpected changes in the financial results for any periods
- shifts in financial circumstances, such as cash flow reductions, major asset write-offs or write-downs
- changes in the value or composition of the company's assets
- any material change in the company's accounting policy

Changes in Business and Operations

- any development that affects the company's resources, technology, products or markets
- a significant change in capital investment plans or corporate objectives
- major labour disputes or disputes with major contractors or suppliers
- significant new contracts, products, patents, or services or significant losses of contracts or business
- significant discoveries by resource companies
- changes to the board of directors or executive management, including the departure of the company's CEO, CFO, COO or president (or persons in equivalent positions)
- the commencement of, or developments in, material legal proceedings or regulatory matters
- waivers of corporate ethics and conduct rules for officers, directors, and other key employees
- any notice that reliance on a prior audit is no longer permissible
- de-listing of the company's securities or their movement from one quotation system or exchange to another

Acquisitions and Dispositions

- significant acquisitions or dispositions of assets, property or joint venture interests
- acquisitions of other companies, including a take-over bid for, or merger with, another company

Changes in Credit Arrangements

- the borrowing or lending of a significant amount of money
- any mortgaging or encumbering of the company's assets
- defaults under debt obligations, agreements to restructure debt, or planned enforcement procedures by a bank or any other creditors
- changes in rating agency decisions
- significant new credit arrangements

4.4 ***External Political, Economic and Social Developments:*** Companies are not generally required to interpret the impact of external political, economic and social developments on their affairs. However, if an external development will have or has had a direct effect on the business and affairs of a company that is both material and uncharacteristic of the effect generally experienced by other companies engaged in the same business or industry, the company is urged to explain, where practical, the particular impact on them. For example, a change in government policy that affects most companies in a particular industry does not require an announcement, but if it affects only one or a few companies in a material way, such companies should make an announcement.

4.5 ***Exchange Policies:*** (1) The Toronto Stock Exchange Inc. (the "TSX") and the TSX Venture Exchange Inc. ("TSX Venture") each have adopted timely disclosure policy statements which include many examples of the types of events or information which may be material. Companies should also refer to the guidance provided in these policies when trying to assess the materiality of a particular fact, change or piece of information.

(2) The TSX and TSX Venture policies require the timely disclosure of "material information". Material information includes both material facts and material changes relating to the business and affairs of a company. The timely disclosure obligations in the exchanges' policies exceed those found in securities legislation. It is not uncommon, or inappropriate, for exchanges to impose requirements on their listed companies which go beyond those imposed by securities legislation.[31] We expect listed companies to comply with the requirements of the exchange they are listed on. Companies who do not comply with an exchange's requirements could find themselves subject to an administrative proceeding before a provincial securities regulator.[32]

PART V - RISKS ASSOCIATED WITH CERTAIN DISCLOSURES

5.1 ***Private Briefings with Analysts, Institutional Investors and other Market Professionals:*** (1) The role that analysts play in seeking out information, analyzing and interpreting it and making recommendations can contribute to a more efficient marketplace. Companies should be sensitive though to the risks involved in private

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31 For example, securities legislation provides that a recognized stock exchange may impose additional requirements within its jurisdiction.

32 See *In the Matter of Air Canada*, *supra*, note 16. In this case, the parties to the settlement agreed that by disclosing earnings information to 13 analysts and not generally disclosing the information, the company failed to comply with the provisions of the TSX Company Manual and thereby acted contrary to the public interest. In the Excerpt from the Settlement Hearing Containing the Oral Reasons for Decision, the Ontario Securities Commission said, "[w]e feel that it will help foster confidence in the financial markets to know that the law requires, and that good corporations will comply with the requirement for, full disclosure of all material information on a timely basis as required by ... the Toronto Stock Exchange's listing agreement and listing requirements."

meetings with analysts. We are not suggesting that companies should stop having private briefings with analysts or that these private meetings are somehow illegal. Companies should have a firm policy of providing only non-material information and publicly disclosed information to analysts.

(2) Companies should not disclose significant data, and in particular financial information such as sales and profit figures, to analysts, institutional investors and other market professionals selectively rather than to the market as a whole. Earnings forecasts are in the same category. Even within these constraints there is plenty of scope to hold a useful dialogue with analysts and other interested parties about a company's prospects, business environment, management philosophy and long term strategy.

(3) Another way to avoid selective disclosure is to include, in the company's regular periodic disclosures, details about topics of interest to analysts. For example, companies should expand the scope of their interim management's discussion and analysis disclosure ("MD&A"). More comprehensive MD&A can have practical benefits including: greater analyst following; more accurate forecasts with fewer revisions; a narrower range between analysts' forecasts; and increased investor interest.

(4) A company cannot make material information immaterial simply by breaking the information into seemingly non-material pieces. At the same time, a company is not prohibited from disclosing non-material information to analysts, even if these pieces help the analyst complete a "mosaic" of information that, taken together, is material undisclosed information about the company.[33]

5.2 ***Analyst Reports:*** (1) It is not unusual for analysts to ask corporate officers to review earnings estimates that they are preparing. A company takes on a high degree of risk of violating securities legislation if it selectively confirms that an analyst's estimate is "on target" or that an analyst's estimate is "too high" or "too low", whether directly or indirectly through implied "guidance".[34]

(2) Even when confirming information previously made public, a company needs to consider whether the selective confirmation itself communicates information above and beyond the initial forecast and whether the additional information is material. This will depend in large part on how much time has passed between the original statement and the company's confirmation, as well as the timing of the two statements relative to the end of the company's fiscal period. For example, a selective confirmation of expected earnings near the end of a quarter is likely to represent guidance (as it may well be based on how

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[33] See also SEC's adopting release to Regulation FD.

[34] This position follows the position adopted by the SEC in the adopting release to Regulation FD and the position taken by the Australian Securities & Investments Commission in its guidance note "Better Disclosure for Investors" (http://www.asic.gov.au).

the company actually performed). Materiality of a confirmation may also depend on intervening events.[35]

(3) One way companies can try to ensure that analysts' estimates are in line with their own expectations is through the regular and timely public dissemination of qualitative and quantitative information. The better the marketplace is informed, the less likely it is that analysts' estimates will deviate significantly from a company's own expectations.

(4) A company that redistributes an analyst's report to people outside the company risks being seen as endorsing that report. Companies should avoid redistributing analysts' reports to their employees or to people outside the company.[36] If a company elects to post to its Web site or otherwise publish the names of analysts who cover the company and/or their recommendations, the names and/or recommendations of all analysts who cover the company should be similarly posted or published.

5.3 ***Confidentiality Agreements with Analysts:*** While we recognize that relying on a confidentiality agreement to safeguard the continued confidentiality of material information can be a prudent practice, there is no exception to the tipping prohibition for disclosures made to an analyst under a confidentiality agreement.[37] If a company discloses material undisclosed information to an analyst, it has violated the prohibition, with or without a confidentiality agreement (unless the disclosure is made in the necessary course of business). Analysts who get an advance private briefing have an advantage. They have more time to prepare and can therefore brief their firm members and clients sooner than those who did not have access to the information.

5.4 ***Analysts as "Tippees":*** (1) Analysts, institutional investors, investment dealers and other market professionals who receive material undisclosed information from a company are "tippees". It is against the law for a tippee to trade or further inform anyone about such information, other than in the necessary course of business.

(2) We recommend that analysts, institutional investors and other market professionals adopt internal review procedures to help them identify situations where they may have received nonpublic material information and set up guidelines for dealing with such situations.

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35 The guidance with respect to the materiality of confirming information previously made public is based on SEC Staff interpretive guidance on Regulation FD.

36 Companies should also avoid redistributing third party newsletters or tip sheets that contain earnings-related information.

37 By comparison, Regulation FD allows an issuer to make a disclosure of material nonpublic information to an analyst if the analyst enters into a confidentiality agreement with the issuer.

5.5 ***Earnings Guidance:*** (1) Some companies have begun to voluntarily disclose in news releases and on their Web sites their own "financial outlooks". These financial outlooks typically contain certain forecast information such as expected revenues, net income, earnings per share and R&D spending.[38] Companies should ensure that they have a reasonable basis for making such statements and include with their forward-looking statements appropriate statements of risks and cautionary language.

(2) Forward-looking statements may be misleading when they are unreasonably optimistic or aggressive, lack objectivity or are not adequately explained. The risk that such statements may be misleading is often particularly high for companies that have a limited operating history or limited sources of corroboration for the assumptions used.

(3) We strongly recommend that any voluntary forward-looking statement (whether written or oral) also contain:

(a) a statement that the information is forward-looking;

(b) the factors that could cause actual results to differ materially from the forward-looking statement; and

(c) a description of the factors or assumptions that were used in making the forward-looking statement.[39]

Full and clear disclosure of these matters greatly reduces the risk that reasonably-based forward-looking statements will be misleading. Disclosure might include a range of reasonably possible outcomes, a sensitivity analysis, or other qualitative information that helps to explain the related risks.

(4) This disclosure should go beyond mere boilerplate. A company's warnings should be substantive and tailored to the specific future estimates or opinions that are being

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38 This type of voluntary disclosure should be distinguished from MD&A which is required disclosure under securities legislation. Both MD&A and voluntary forward-looking information may involve some prediction or projection. The difference between the two is the nature of the prediction required. MD&A requires a discussion of currently known trends, events, commitments and uncertainties that are reasonably expected to have a material impact on your business, financial condition or results of operation in the future, such as: a reduction in your product prices; erosion in your market share; or the likely non-renewal of a material contract. MD&A does not require that your company provide a detailed forecast of future revenues, income or loss, or other information. Voluntary or optional forward-looking disclosure instead involves making an estimation of future revenues, income or loss, or other information.

39 The recommended disclosures are based on the proposed "safe harbour" provision contained in the CSA's draft legislative proposal to introduce statutory civil liability for investors in the secondary market (see CSA Notice 53-302 - Proposal for a Statutory Civil Remedy for Investors in the Secondary Market and Response to the Proposed Change to the Definitions of "Material Fact" and "Material Change").

forecast. For example, predictions about earnings growth might be qualified by a discussion of the effect of a loss of a key customer. Companies should also identify and quantify the risks. For example, if a company's projected earnings growth is based on a new product introduction which requires governmental approval, the company should explain some of the obstacles to getting such approval and the consequences of not getting the approval. A statement that such approval is beyond the company's control would not be enough.

5.6 ***Application of National Policy Statement 48:***[40] We do not intend for National Policy Statement 48 - Future Oriented Financial Information ("NP 48") to discourage the voluntary disclosure of forward-looking information of the kind described above. In particular, when a company includes forward-looking information in a news release, it does not need an auditor's report. However, we believe that NP 48 contains guidance relating to comparison with actual results, and updating, that may assist companies in improving the quality and clarity of voluntary forward-looking information. NP 48, along with related parts of the CICA Handbook, also has useful information about cautionary language, descriptions of assumptions and other matters.

5.7 ***Selective Disclosure Violations Can Occur in a Variety of Settings:*** Selective disclosure most often occurs in one-on-one discussions (like analyst meetings) and in industry conferences and other types of private meetings and break-out sessions. But it can occur elsewhere. For example, a company should not disclose material nonpublic information at its annual shareholders meeting unless all interested members of the public may attend the meeting and the company has given adequate public notice of the meeting (including a description of what will be discussed at the meeting). Alternatively, a company can issue a news release at or before the time of the meeting.

PART VI - BEST DISCLOSURE PRACTICES

6.1 ***General:*** (1) There are some practical measures that companies can adopt to help ensure good disclosure practices. The consistent application of "best practices" in the disclosure of material information will enhance a company's credibility with analysts and investors, contribute to the fairness and efficiency of the capital markets and investor confidence in those markets, and minimize the risk of non-compliance with securities legislation.

(2) The measures recommended in this policy statement are not intended to be prescriptive. We recognize that many large listed companies have specialist investor relations staff and devote considerable resources to disclosure, while in smaller companies this is often just one of the many roles of senior officers. We encourage

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[40] NP 48 is under consideration and is being reformulated. See proposed rule 52-101 Future Oriented Financial Information (July 18, 1997).

companies to adopt the measures suggested in this policy statement, but they should be implemented flexibly and sensibly to fit the situation of each individual company.

6.2 ***Establishing a Corporate Disclosure Policy:*** (1) Establish a written corporate disclosure policy. A disclosure policy gives you a process for disclosure and promotes an understanding of legal requirements among your directors, officers and employees. The process of creating it is itself a benefit, because it forces a critical examination of your current disclosure practices.

(2) You should design a policy that is practical to implement. Your policy should be reviewed and approved by your board of directors and widely distributed to your officers and employees. Directors, officers and those employees who are, or may be, involved in making disclosure decisions should also be trained so that they understand and can apply the disclosure policy. Your policy should be periodically reviewed and updated, as necessary, and responsibility for these functions (i.e., review and update of the policy and education of appropriate employees and company officials) should be clearly assigned within your company.

(3) The focus of your disclosure policy should be on promoting consistent disclosure practices aimed at informative, timely and broadly disseminated disclosure of material information to the market. Every disclosure policy should generally include the following:

(a) how to decide what information is material;
(b) policy on reviewing analyst reports;
(c) how to release earnings announcements and conduct related analyst calls and meetings;
(d) how to conduct meetings with investors and the media;
(e) what to say or not to say at industry conferences;
(f) how to use electronic media and the corporate Web site;
(g) policy on the use of forecasts and other forward-looking information (including a policy regarding issuing updates);
(h) procedures for reviewing briefings and discussions with analysts, institutional investors and other market professionals;
(i) how to deal with unintentional selective disclosures;
(j) how to respond to market rumours;
(k) policy on trading restrictions; and
(l) policy on “quiet periods”.

6.3 ***Overseeing and Coordinating Disclosure:*** Establish a committee of company personnel or assign a senior officer to be responsible for:

(a) developing and implementing your disclosure policy;
(b) monitoring the effectiveness of and compliance with your disclosure policy;

(c) educating your directors, officers and certain employees about disclosure issues and your disclosure policy;
(d) reviewing and authorizing disclosure (including electronic, written and oral disclosure) in advance of its public release; and
(e) monitoring your Web site.

6.4 ***Board and Audit Committee Review of Certain Disclosure:*** (1) Have your board of directors or audit committee review the following disclosures in advance of their public release by the company:

- earnings guidance; and
- news releases containing financial information based on a company's financial statements prior to the release of such statements.[41]

You should also indicate at the time such information is publicly released whether your board or audit committee has reviewed the disclosure. Having your board or audit committee review such disclosure in advance of its public release acts as a good discipline on management and helps to increase the quality, credibility and objectivity of such disclosures. This review process also helps to force a critical examination of all issues related to the disclosure and reduces the risk of having to make subsequent adjustments or amendments to the information it contains.

(2) Where feasible, issue your earnings news release[42] concurrently with the filing of your quarterly or annual financial statements. This will help to ensure that a complete financial picture is available to analysts and investors at the time the earnings release is provided. Coordinating the release of a company's earnings information with the filing of its quarterly or annual financial statements will also facilitate review of these disclosures by the board or audit committee of the company.[43]

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41 Some provinces require that annual financial statements be reviewed by a company's audit committee (if the company has an audit committee) before board approval. A board of directors must also review interim financial statements before they are filed and distributed. In the case of interim financial statements, boards are permitted to delegate this review function to the audit committee (see for example, OSC Rule 52-501 Financial Statements). Where such a requirement exists at law, we believe that extracting information from financial statements that have not been reviewed by the board or audit committee and releasing that information to the marketplace in a news release is inconsistent with the prior review requirement.

42 Companies often issue news releases announcing corporate earnings which highlight major items and may include *pro forma* results.

43 Certain jurisdictions impose a requirement to concurrently deliver to shareholders financial statements that are filed. This may militate against the early filing of annual financial statements to avoid the cost of mailing them twice, once at the time of early filing and subsequently as part of the company's annual report. The CSA is considering eliminating this concurrent delivery obligation in the context of harmonizing continuous disclosure requirements across the country.

6.5 ***Authorizing Company Spokespersons:*** Limit the number of people who are authorized to speak on behalf of your company to analysts, the media and investors. Ideally, your spokesperson should be a member(s) of senior management. Spokespersons should be knowledgeable about your disclosure record and aware of analysts' reports relating to your company. Everyone in your company should know who the company spokespersons are and refer all inquiries from analysts, investors and the media to them. Having a limited number of company spokespersons helps to reduce the risk of:

(a) unauthorized disclosures;
(b) inconsistent statements by different people in the company; and
(c) statements that are inconsistent with the public disclosure record of the company.[44]

6.6 ***Recommended Disclosure Model:*** (1) You should consider using the following disclosure model when making a planned disclosure of material corporate information, such as a scheduled earnings release:

(a) issue a news release containing the information (for example, your quarterly financial results) through a widely circulated news or wire service;
(b) provide advance public notice by news release of the date and time of a conference call to discuss the information, the subject matter of the call and the means for accessing it;
(c) hold the conference call in an open manner, permitting investors and others to listen either by telephone or through Internet webcasting; and
(d) provide dial-in and/or web replay or make transcripts of the call available for a reasonable period of time after the analyst conference call.[45]

(2) The combination of news release disclosure of the material information and an open and accessible conference call to subsequently discuss the information should help to ensure that the information is disseminated in a manner calculated to effectively reach the marketplace and minimize the risk of an inadvertent selective disclosure during the follow-up call.

6.7 ***Analyst Conference Calls and Industry Conferences:*** (1) Hold analyst conference calls and industry conferences in an open manner, allowing any interested party to listen either by telephone and/or through a webcast. This helps to reduce the risk of selective disclosure.

(2) Company officials should meet before an analyst conference call, private analyst meeting or industry conference. Where practical, statements and responses to anticipated

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44 In some circumstances a company's designated spokesperson will not be informed of developing mergers and acquisitions until necessary, to avoid leakage of the information.

45 This model disclosure policy was recommended by the SEC in the adopting release to Regulation FD.

questions should be scripted in advance and reviewed by the appropriate people within your company. Scripting will help to identify any material corporate information that may need to be publicly disclosed through a news release.

(3) Keep detailed records and/or transcripts of any conference call, meeting or industry conference. These should be reviewed to determine whether any unintentional selective disclosure has occurred. If so, you should take immediate steps to ensure that a full public announcement is made, including contacting the relevant stock exchange and asking that trading be halted pending the issuance of a news release.

6.8 ***Analyst Reports:*** Establish a policy for reviewing analyst reports. As noted in section 5.2 of the Policy, there is a serious risk of violating the tipping prohibition if you express comfort with or provide guidance on an analyst's report, earnings model or earnings estimates. There is also a risk of selectively disclosing material non-financial information in the course of reviewing an analyst's report. If your policy allows for the review of analyst reports, your review should be limited to identifying publicly disclosed factual information that may affect an analyst's model or to pointing out inaccuracies or omissions with reference to publicly available information about your company.

6.9 ***Updating Forward-Looking Information:*** When making voluntary forward-looking statements, clearly indicate what your practice is for updating those statements. We believe that updating forward-looking information in light of subsequent developments is a good practice that can enhance a company's credibility with analysts and investors. Whatever your practice is, you should disclose it at the time you make any forward-looking statement and adhere to it consistently.[46]

6.10 ***Quiet Periods:*** Observe a quarterly quiet period, during which no earnings guidance or comments with respect to the current quarter's operations or expected results will be provided to analysts, investors or other market professionals. The quiet period should run between the end of the quarter and the release of a quarterly earnings

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[46] See *Re Royal Trustco Limited, Kenneth Allan White, and John Merton Scholes* (1981) 2 OSCB 322C, where the Ontario Securities Commission considered whether the directors of a reporting issuer had an obligation to update information previously disclosed in a directors' circular in response to a take-over bid. The Ontario Securities Commission stated as follows: "The Commission is of the view that there is in Ontario today a duty to update information previously communicated when that information in the light of subsequent events and absent further explanation, becomes misleading."

Also, some provinces have provisions in their securities legislation that prohibit a person, while engaging in investor relations activities or with the intention of effecting a trade in a security, from making a statement that they know, or ought reasonably to know, is a misrepresentation. This prohibition could impliedly extend to a previously issued statement which the market continues to rely upon but has subsequently become misleading and has not been amended or withdrawn.

announcement although, in practice, quiet periods vary by company.[47] Companies need not stop all communications with analysts or investors during the quiet period. However, communications should be limited to responding to inquiries concerning publicly available or non-material information.

6.11 ***Insider Trading Policies and Blackout Periods:*** Adopt an insider trading policy that provides for a senior officer to approve and monitor the trading activity of all your insiders, officers, and senior employees. Your insider trading policy should prohibit purchases and sales at any time by insiders and employees who are in possession of material nonpublic information. Your policy should also provide for trading "blackout periods" when trading by insiders, officers and employees may typically not take place (for example a blackout period which surrounds regularly scheduled earnings announcements). However, insiders, officers and employees should have the opportunity to apply to the company's trading officer for approval to trade the company's securities during the blackout period. A company's blackout period may mirror the quiet period described above.

6.12 ***Electronic Communications:*** (1) Establish a team responsible for creating and maintaining the company Web site. The Web site should be up to date and accurate. You should date all material information when it is posted or modified. You should also move outdated information to an archive. Archiving allows the public to continue accessing information that may have historical or other value even though it is no longer current. You should establish minimum retention periods for information that is posted to and archived on your Web site. Retention periods may vary depending on the kind of information posted.[48] You should also explain how your Web site is set up and maintained. You should remember that posting material information on your Web site is not acceptable as the sole means of satisfying legal requirements to "generally disclose" information.

(2) Use current technology to improve investor access to your information. You should concurrently post to your Web site, if you have one, all documents that you file on SEDAR. You should also post on the investor relations part of your Web site all supplemental information that you give to analysts, institutional investors and other market professionals. This would include data books, fact sheets, slides of investor presentations and other materials distributed at analyst or industry presentations.[49] When

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47 Some companies adopt a quiet period beginning at the start of the third month of the quarter, and ending upon issuance of the earnings release. Other companies wait until two weeks before the end of the quarter or even the first day of the month following the end of the quarter to start the quiet period.

48 See the TSX's Electronic Communications Disclosure Guidelines.

49 This recommendation is based on the recommendations contained in The Toronto Stock Exchange Committee on Corporate Disclosure's final report issued in March 1997 and in the TSX's Electronic Communications Disclosure Guidelines. See also the guidance note "Better Disclosure for Investors" issued by the Australian Securities & Investments Commission (http://www.asic.gov.au).

you make a presentation at an industry sponsored conference try to have your presentation and "question and answer" session webcast.

6.13 ***Chat Rooms, Bulletin Boards and e-mails:*** Do not participate in, host or link to chat rooms or bulletin boards. Your disclosure policy should prohibit your employees from discussing corporate matters in these forums. This will help to protect your company from the liability that could arise from the well-intentioned, but sporadic, efforts of employees to correct rumours or defend the company. You should consider requiring employees to report to a designated company official any discussion pertaining to your company which they find on the Internet. If your Web site allows viewers to send you e-mail messages, remember the risk of selective disclosure when responding.

6.14 ***Handling Rumours:*** Adopt a "no comment" policy with respect to market rumours and make sure that the policy is applied consistently.[50] Otherwise, an inconsistent response may be interpreted as "tipping". You may be required by your exchange to make a clarifying statement where trading in your company's securities appears to be heavily influenced by rumours. If material information has been leaked and appears to be affecting trading activity in your company's securities, you should take immediate steps to ensure that a full public announcement is made. This includes contacting your exchange and asking that trading be halted pending the issuance of a news release.[51]

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50 A "no comment" policy means that you respond with a statement to the effect that "it is our policy not to comment on market rumours or speculation".

51 If the rumour relates to a material change in the company's affairs that has, in fact, occurred, you have a legal obligation to make timely disclosure of the change.