MSC Notice 2002-31

Notice of Policy under the Securities Act
National Policy 51-201 Disclosure Standards
and rescission of National Policy 40 Timely Disclosure

I. Notice of Policy and Rescission of Policy

The Commission, together with the other members of the Canadian Securities Administrators (the "CSA" or "we"), have adopted National Policy 51-201 Disclosure Standards ("the Policy").

We have also rescinded National Policy 40 Timely Disclosure. The Commission has also withdrawn OSC Notice 30 Confidential Material Change Reports.[1]

We first published the Policy for comment on May 25, 2001.[2] Appendix A contains a list of the people and organizations who commented on the Policy. We have made a number of changes to the Policy in response to these comments. Appendix B to the notice summarizes the comments and our responses. The changes made to the Policy as a whole are not material and do not introduce new thoughts or directional focus that were not the subject of notice and comment. Accordingly, we are not re-publishing the Policy for comment.

II. Substance and Purpose of the Policy

The Policy has been adopted to address concerns about the practice of selective disclosure. 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 creates opportunities for insider trading and damages investor confidence in the fairness and integrity of the capital markets.

We have not introduced new law in this area as existing Canadian legislation on "tipping" already prohibits selective disclosure. The Policy has two aims. First, it will help to ensure that investors have equal access to important information that may affect their investment decisions. Second, it will help companies to navigate between business pressures and legislative requirements. To achieve these goals, the Policy:

- describes timely disclosure obligations for reporting companies and the confidential filing mechanism contained in securities legislation;
- provides interpretive guidance on existing legislative prohibitions against

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1 (1992) 15 OSCB 4555.

2 In Ontario, see (2001) 24 OSCB 3301.

selective disclosure;

- highlights disclosure practices where companies take on a high degree of risk in light of the legislative prohibitions against selective disclosure;

- gives examples of the types of information likely to be material under securities legislation; and

- lists some "best disclosure" practices that can be adopted by companies to help manage their disclosure obligations.

III. Summary of Responses to Specific Requests for Comment

In this section we discuss the comments received to the specific questions that we raised in the May 2001 notice and our responses. A more detailed summary of the comments received on these specific issues and our responses to the commenters is included in Appendix B.

1. "Necessary course of business" exception

We asked for specific comment on our approach to the "necessary course of business" exception. In particular, should the "necessary course of business" exception cover communications made to a potential private placee?

The May version of the Policy stated that disclosures by a company in connection with a private placement may be in the "necessary course of business". Commenters were divided as to whether this was the right approach. Commenters who supported our approach argued that receipt of material information may be necessary for companies to raise financing. In addition, private placees will typically negotiate with the company for the information that they need in order to make an investment decision. Commenters who opposed our approach argued that private placees, who purchase directly from the company, should not be in a better position (i.e., an informational advantage) than secondary market investors.

We have considered the various arguments and have decided to maintain our original approach. We are concerned that if we take a more restrictive interpretation of the "necessary course of business" exception we may be unduly interfering with the ability of companies to raise funds in the exempt market. We also believe that the legislation provides adequate protections for secondary market investors by prohibiting private placees from further disclosing information received from the company (other than in the "necessary course of business"), or from trading with knowledge of this information until it has been "generally disclosed". To address some of the commenters concerns, however, we have added more guidance in the Policy which recommends that companies make disclosure of such information to the marketplace at the earliest opportunity.

2. "Generally Disclosed"

We asked for specific comment on our approach for determining how a company may satisfy the "generally disclosed" requirement under the tipping provisions.

The May version of the Policy explained how courts and the commissions have interpreted the term "general disclosure". We indicated that a company will likely satisfy the "generally disclosed" requirement under the tipping provisions, for example, by issuing a news release distributed through a widely circulated news or wire service; or making an announcement through a press conference or conference call provided that adequate notice has been given and members of the public may attend or listen to it. We also said that posting information on the company's Web site would not, by itself, be likely to satisfy the "generally disclosed" requirement.

We received three comment letters which said that news releases should be the only acceptable means of generally disclosing material information. One commenter argued that posting information to a company's Web site should be considered general disclosure.

We agree that disclosure by news release is probably the safest way to ensure general disclosure of material information. But we do not believe that it is the only way for companies to make "general disclosure".[3] Securities legislation in this area does not require use of a particular method, or establish a "one size fits all" standard for disclosure; rather it is essential that a company choose a disclosure method that will ensure dissemination of material information in a manner that will effectively reach the market place. The guidance contained in insider trading case law gives companies considerable flexibility in choosing appropriate methods of "general

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[3] In the case of a "material change", securities legislation requires that issuers must issue and file a press release.

disclosure". We therefore believe that it would be undesirable for us to change the Policy to suggest that companies can make "general disclosure" only through a news release.[4] As regulators, we do not want to hinder the use of current technologies in the disclosure process provided that the goals of securities regulation are not undermined.

We also considered whether we should rethink our position with respect to Web site postings. We believe that a company's Web site can be an important component of an effective disclosure process and encourage companies to make use of the Internet to improve investor access to corporate information. We do not believe, however, that posting material information on a company's Web site would alone constitute "general disclosure". Information that is posted to a Web site is not effectively "pushed" out to the marketplace. Instead, investors must seek out this information themselves. As technology evolves in this area we will revisit the guidance in the Policy relating to this issue.

3. Best Disclosure Practices

We asked market participants for comment on the practicalities of a company implementing the recommended "best disclosure" practices in the Policy.

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[4] We note that commenters in the United States are urging the SEC to take a more flexible approach in this area as well. In April 2001, the SEC sponsored a public roundtable discussion to discuss the impact of Regulation FD. The roundtable included issuers, institutional investors, securities analysts, and journalists. One of the issues discussed was the use of technology by issuers to make disclosure. In December 2001 former Commissioner Laura Unger released a report examining the effects of Regulation FD and the concerns raised by roundtable participants (the "Unger Report"). The Unger Report cites comments by roundtable panellists expressing frustration about rules of the US stock exchanges which mandate paper press releases to disclose material information and urging the SEC to permit Regulation FD disclosures by Internet Web site posting. The Unger Report recommends that the SEC should: (i) explore with the exchanges ways to amend their rules to permit greater use of technology to disseminate material information; (ii) allow Regulation FD disclosures to be made by adequately noticed website postings, fully accessible webcasts and electronic mail alerts; (iii) encourage issuers to post written transcripts of webcast presentations and to archive webcasts and transcripts on their Web sites. (See Laura Unger, "Special Study: Regulation Fair Disclosure Revisited").

Commenters were generally supportive of the recommended "best disclosure" practices. One commenter was concerned, however, that the suggested "best practices" will become mandatory requirements, despite our intent that the Policy not be prescriptive. The commenter was also concerned that the guidelines may be burdensome for smaller companies.

The Policy is intended to assist companies in managing their disclosure obligations and minimize the risk of breaching securities law by highlighting some risky disclosure practices. The Policy's objective is to outline what we consider to be good disclosure practices, not to impose regulatory requirements. Hopefully, companies will also recognize the benefits of good disclosure in terms of corporate credibility and market integrity. Each company needs to exercise its own judgment and develop a disclosure regime that meets its own needs and circumstances. We recognize that many large 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 management. We encourage companies to consider adopting the measures discussed in the Policy, but they should be implemented flexibly and sensibly to fit the situation of individual companies. Where particular methods of achieving good disclosure are suggested, our intention is to give meaningful guidance, not to tell companies that no other way is acceptable. Finally, we attempted to reflect in the Policy disclosure practices that many companies have voluntarily adopted.[5]

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[5] For example, the Canadian Investor Relations Institute ("CIRI") conducted a survey of its member companies in May 2001. The CIRI survey showed that 60% of respondents had a written disclosure policy and of those without one, 83% were contemplating developing one within the next 12 months. In 2000, only 43% reported that their company had a written disclosure policy.

IV. Summary of Changes to Policy

Appendix B to the Notice summarizes the changes made to the Policy in response to comments received. We draw your attention in particular to the following changes:

"Necessary Course of Business"

- the list of examples of possible "necessary course of business" communications has been expanded to address certain communications with controlling shareholders (see section 3.3(4) of the Policy);

- we have explained why we believe that issuer communications with credit rating agencies may be in the "necessary course of business" (see section 3.3(7) of the Policy); and

- the following guidance relating to a company's communication with the media has been added:

  - we explain that relationships with the press and other media, though often contributing to a well informed market, need careful management in instances where undisclosed material information is involved; and

  - we stress that companies are not prohibited from speaking with the media about non material information or material information that has been previously disclosed (see section 3.3(8) of the Policy).

"Generally Disclosed"

- the discussion relating to "general disclosure" has been clarified to recommend that a company make a replay or transcript of analyst conference calls available to the public for a reasonable amount of time (see section 3.5(4) of the Policy)[6]

Materiality

- more examples of material information have been added (see section 4.3 of the Policy); and

- the discussion relating to the timely disclosure policies of the various exchanges has been amended to stress the importance of issuer compliance (see section 4.5(2) of the Policy).

Risks Associated with Certain Disclosure

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[6] The May version of the Policy did not explicitly say that replays were necessary.

- guidance has been added to say that companies should be careful about circulating analyst reports to shareholders or potential investors, as this may constitute an endorsement of the report (see section 5.2 (4) of the Policy); and

- the discussion relating to the "duty to update" has been amended to:

  - delete the suggestion that the obligation to disclose "material changes" creates a "duty to update" voluntary forward looking statements;

  - remind companies that some provincial securities laws 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 the person knows, or ought reasonably to know, is a misrepresentation;[7]

  - recommend that as a matter of "good practice" companies should update earnings estimates; and

  - emphasize that whatever a company's practice is, the company should explain its update policy to investors when making a forward looking statement (see Section 6.9 of the Policy).[8]

Best Disclosure Practices

- we have added a recommendation that a company's board or audit committee should review the following disclosures in advance of their public release by the company:

  - earnings guidance issued by the company; and

  - news releases containing financial information taken from the company's financial statements prior to the release of such statements.

    - we have also clarified that pre-releasing information taken from the company's financial statements without prior board or audit committee review is inconsistent with the requirements of some provinces that require board or audit committee approval of interim and annual financial statements (see section 6.4 of the Policy);

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[7] 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.

[8] The discussion relating to the "duty to update" appeared in section 5.7 of the May version.

- the guidance on the recommended scope of a company's "quiet period" has been amended to say that:

  - companies should avoid discussing earnings expectations and other financial information with analysts and investors during the "quiet period"; and

  - being in the "quiet period" should not prevent a company from conducting normal course communications with analysts or investors or from participating in investor conferences or meetings to discuss information that is in the public domain or that is non-material information (see section 6.10 of the Policy).[9]

- we have added a recommendation that companies concurrently post to their web sites all information that they file on SEDAR (see section 6.12(2) of the Policy).

We also note that various initiatives are currently underway with respect to standards governing financial analysts. In response to the recommendations of the Securities Industry Committee on Analyst Standards (the "Crawford Committee"), the Investment Dealers Association of Canada published its Proposed Policy No. 11 Analyst Standards on July 5, 2002. The CSA is reviewing the proposed IDA policy and further guidance in this area may be forthcoming.

V. Canadian tipping requirements and Regulation FD

In the notice accompanying the May 2001 version of the Policy we discussed what other foreign regulators had done in response to concerns about selective disclosure. In particular we discussed the U.S. Securities and Exchange Commission's Regulation FD. You can read the May 2001 notice for a description of Regulation FD. We have included again as an addendum to this notice a chart which compares the Canadian and U.S. rules on selective disclosure. We believe that it is important that companies continue to keep these differences in mind as compliance with U.S. rules does not necessarily ensure compliance with Canadian rules in this area.

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[9] The May version of the Policy recommended that companies consider stopping all communications with analysts, institutional investors and other market professionals during the "quiet period".

VI. Ongoing monitoring by the Commission

As part of the Commission's ongoing continuous disclosure review program, Staff in the Continuous Disclosure Team ("CD Team") will typically request a copy of a company's written disclosure policy or a description of the company's corporate disclosure practices if there is no policy in place. Staff provides feedback in areas where the policy can be improved, and encourages boards and audit committees to consider this feedback in assessing the adequacy of the company's disclosure practices. The results of these reviews will be reported as part of the CD Team's annual report on the progress of its continuous disclosure review program. The CD Team has also been monitoring disclosure sources for any indications of selective disclosure.

VII. Text of Policy

The text of the Policy follows.

DATED: July 12, 2002.

Addendum
Comparison of "Tipping" Provisions in Canadian Securities Law and Regulation FD

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

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

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

ELEMENTS	"TIPPING" PROVISIONS	REGULATION FD
Materiality	Any information "that significantly affects, or would reasonably be expected to have a significant effect on, the market price or value" of the securities. "Privileged information" is defined in Québec securities legislation as any information "that has not been disclosed to the public and that could affect the decision of a reasonable investor".	U.S. case law interprets materiality as follows: ➢ information is material if "there is a substantial likelihood that a reasonable shareholder would consider it important" in making an investment decision ➢ there must be a substantial likelihood that a fact "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information available".
Timing of Required Disclosure	An issuer must **first** generally disclose material information before it discloses it to any person or company. Where a "material change" occurs in the affairs of a reporting issuer, the issuer must immediately issue and file a press release disclosing the nature and substance of the change, followed by a material change report filed within ten days of the date on which the change occurred.	For an "intentional" selective disclosure, the issuer is required to publicly disclose the same information simultaneously. ➢ a selective disclosure is "intentional" when the issuer or person acting on their behalf either knows or is reckless in not knowing, prior to making the disclosure, that the information is both material and nonpublic. When an issuer makes a non-intentional disclosure of material nonpublic information, it is required to make public disclosure "promptly". ➢ "promptly" means as soon as reasonably practicable (but in no event after the later of 24 hours or the commencement of the next day's trading on the New York Stock Exchange) after a senior official of the issuer learns that there has been a non-intentional disclosure that the senior official knows, or is reckless in not knowing, is both material and nonpublic.
Standard of Required Disclosure	Material information must first be "generally disclosed" before it can be communicated to another person or company. Provincial securities legislation does not define "generally disclosed". Québec securities legislation uses the term "generally known".	An issuer must make "public disclosure" of material nonpublic information it discloses. "Public disclosure" is defined in the regulation to include: ➢ the furnishing or filing with the Securities and Exchange Commission of a Form 8-K ➢ in the alternative, disclosure "that is reasonably designed to provide broad,

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

Appendix A

List of Commenters

1. Association for Investment Management and Research - Canadian Advocacy Council
2. Canada Life
3. Canadian Investor Relations Institute (CIRI)
4. TSX Venture Exchange Inc. (TSX Venture Exchange) - (Note - at the time of the comment letter, TSX Venture Exchange Inc. was the Canadian Venture Exchange (CDNX))
5. Howson Tattersall Investment Counsel
6. Intrawest Corporation
7. John Kaiser, Canspec Research
8. McCarthy Tétrault LLP
9. Ogilvy Renault
10. Ontario Bar Association - Securities Subcommittee of the Business Law Section (OBA)
11. Simon Romano
12. J.D. Scarlett
13. Scotia Capital Inc.
14. Shareholder Association for Research and Education
15. Toronto Stock Exchange Inc. (TSX)