NOTICE

NATIONAL INSTRUMENT 62-103
THE EARLY WARNING SYSTEM AND RELATED
TAKE-OVER BID AND INSIDER REPORTING ISSUES

On December 8, 1999, the Alberta Securities Commission made National Instrument 62-103 The Early Warning System and Related Take-over Bid and Insider Reporting Issuers (the "National Instrument") a Commission rule, effective March 15, 2000. The text of the rule is published in the Alberta Securities Commission Summary of December 17, 1999 and will be published in the Alberta Gazette dated January 15, 2000.

The National Instrument has been made a rule concurrently with National Instrument 62-101 Control Block Distribution Issues and National Instrument 62-102 Disclosure of Outstanding Share Data (collectively, the "Early Warning Instruments").

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

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

The version of National Instrument 62-103 published in 1998 is referred to in this Notice as the "1998 Draft".

As the result of consideration of the comments, the CSA have made a number of minor amendments to National Instrument 62-103 and the other Early Warning Instruments. However, as these changes are not material, the CSA are not republishing those instruments for a further comment period.

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

Substance and Purpose of the National Instrument

The primary purpose of the National Instrument is to provide exemptions from the early warning requirements, the insider reporting requirement, and related provisions to certain institutional investors that have a "passive intent" with respect to their ownership or control of securities of reporting issuers and to permit those entities to disaggregate securities that they own or control for purposes of those requirement in certain circumstances. This relief is designed to facilitate compliance by financial institutions, pension funds, certain mutual funds, portfolio managers, portfolio clients, underwriters in the course of a distribution and pledgees.

Summary of Changes to the National Instrument from the 1998 Draft

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

Section 1.1

Section 1.1 has been amended in several ways.

The definition of *"applicable provisions"* has been amended in three ways. First, the reference to subsection 9.1(4) of the National Instrument has been deleted. That reference relates to the ability to use the exemption from the insider reporting requirements contained in section 9.1 of the National Instrument, and is redundant in light of the fact that the definition of *"applicable provisions"* already includes the "insider reporting requirement". Second, the reference to subsection 2.1(2) of National Instrument 62-101 has been changed to a reference to section 2.1 of that National Instrument. The CSA are satisfied that any relief provided in the National Instrument in respect of "applicable provisions" should properly extend to all of section 2.1 of National Instrument 62-101. Third, a reference to Quebec Policy Statement Q-12 has been added; this addition has been made to ensure that aggregation and Part 8 relief is available in connection with control block distributions in Quebec. As a commenter noted, securities legislation in Quebec does not have a definition of "control block", but Policy Statement Q-12 is a functional equivalent.

The definition of *"control"* has been amended to make specific reference to the language used in securities legislation in connection with the concept of "control". Concern had been expressed in comments that the definition used in the 1998 Draft may inadvertently have changed the operative "control" language used in securities legislation. The new definition defines "*control*" as "the power to exercise control or direction over" a security, but includes similar terms or expressions used in securities legislation. The reference to similar terms or expressions is designed to reflect the fact that the wording of the "control" concept in different legislation varies from jurisdiction to jurisdiction. The definition of *"eligible institutional investor"* has been changed by the deletion of the phrase "full discretionary authority" in paragraph (d), and the replacement of that phrase with a reference to "discretion to vote, acquire or dispose of securities without the express consent of the beneficial owner". The CSA have made this change to clarify what they meant in the 1998 Draft by the phrase "full discretionary authority". The definition has also been changed to ensure that investment

managers are eligible institutional investors only in connection with the securities over which they have discretion.

A definition of *"entity"* has been added to the National Instrument. That term is defined to mean a person or company or a business unit. The term has been added to the Instrument in response to commenters that noted that references to a "person or company" in various references in the 1998 Draft might not technically catch a business unit when necessary. The CSA have therefore amended the Instrument generally throughout to change references from a "person or company" to an "entity" in order to respond to this concern.

The definition of *"financial institution"* has been amended, following comments received in response to the request of the CVMQ in the Notice that was published with the 1998 Draft, to include financial institutions of the G-7 countries.

The definition of *"investment manager"* has been amended in a manner similar to the definition of *"financial institution"* and now includes investment management entities of the G-7 countries.

The definitions of *"offeror"* and *"offeror's securities"* have been amended to include appropriate references under the *Securities Act* (Quebec).

The definition of *"securityholder percentage"* has been amended to clarify that the definition takes into account any aggregation relief relied upon by an entity calculating its holdings of a particular class of security. Some commenters expressed confusion on this point. In addition, the reference in the definition to securities legislation listed in Appendix A has been amended to refer to "applicable" securities legislation. This amendment reflects the fact that some of the securities legislation listed in Appendix A will not be applicable in connection with all calculations of "securityholder percentage".

The definition of *"underwriting period"* has been amended to ensure that the period covered by the definition, for securities acquired by an underwriter upon the exercise of an over-allotment option, extends to four business days after the acquisition of such securities. This change was made in response to comments recommending that the possibility of an over-allotment option be built into the definition.

Section 3.3

Section 3.3 is new, and has been added to provide that the early warning requirements do not apply in connection with the ownership or control of securities issued by a mutual fund to which National Instrument 81-102 Mutual Funds applies. This change reflects existing practice in the market. The CSA are satisfied that there are no compelling policy reasons to require early warning reporting in connection with the acquisition of securities of publicly-traded mutual funds, having regard to the investment restrictions to which those funds are subject.

Section 4.3

Paragraph 4.3(1)(b) has been amended to require the filing of the report referred to in that section within two business days, rather than three days, after the related filing of a press release. The CSA are of the view that the two business day time period more properly accommodates weekends and holidays.

Section 4.7

Section 4.7 has been amended to clarify that a report referred to in that section must include the name of the reporting issuer to which the report relates.

Section 5.1

Paragraph (c) of section 5.1 has been amended to clarify that eligible institutional investors may establish organization-wide investment guidelines without losing the ability to rely on the aggregation relief provided in this section. A similar change has been made to paragraph (d) of section 5.2.

Section 5.4

Section 5.4 has been amended to extend its application to affiliates and associates of eligible institutional investors.

Section 6.1

Section 6.1 has been amended to apply to transactions effected under National Instrument 32-101 Small Securityholder Selling and Purchase Arrangements.

Section 7.1

The lead-in language to this section has been amended to extend the relief provided by the section to securities that are convertible into, exercisable for or exchangeable for, underwritten securities.

Section 8.1

This section has been amended to extend the relief provided by the section to any person or company that receives pledged, mortgaged or encumbered securities as collateral for a debt under a written pledge agreement and in the ordinary course of the business of the person or company. In the 1998 Draft, this relief was proposed to be made available only to financial institutions. After consideration of comments, the CSA are satisfied that the relief should properly apply to all entities that make secured loans as part of their business.

Section 8.2

This section has been revised from the 1998 Draft to clarify its meaning. The section provides relief for pledgees of securities, even if the pledgee has taken steps to dispose of the securities for the purpose of realizing on the loan in question, as long as the securities in question relate to a loan of less than $2,000,000 and do not form part of a control block.

Section 10.1

This section has been amended to provide relief from the moratorium provisions for eligible institutional investors subject to the moratorium provisions of section 4.4. This provision clarifies that an eligible institutional investor relying on the alternative monthly reporting system, and who is therefore subject to the moratorium provisions contained therein, should not be subject to the moratorium provisions associated with the early warning requirements, from which the eligible institutional investor is exempt.

Section 12.1

Section 12.1 has been added to provide that the National Instrument comes into force on March 15, 2000.

Consequential Amendment of Alberta Securities Commission Rules

As a result of the adoption of the National Instrument as a Commission rule, sections 181.5 and 181.7 of the Alberta Securities Commission Rules are repealed, effective at the time that the National Instrument comes into force.

DATED: December 17, 1999

APPENDIX A

LIST OF COMMENTERS
ON
NATIONAL INSTRUMENT 62-103

1 Simon Romano, Stikeman, Elliott (October 13, 1998).

2 The Investment Funds Institute of Canada (December 7, 1998).

3 Securities Subcommittee of the Business Law Section of the Canadian Bar Association (Ontario) (December 9, 1998).

4 RT Investment Management Holdings Inc. (December 14, 1998).

5 Ogilvy Renault (December 15, 1998).

6 Power Corporation of Canada (December 15, 1998).

7 Canadian Bankers Association (December 15, 1998 and January 8, 1999).

8 Sun Life Assurance Company of Canada (December 27, 1998).

9 Investment Dealers Association of Canada (March 30, 1999).

APPENDIX B

SUMMARY OF COMMENTS RECEIVED
ON
DRAFT NATIONAL INSTRUMENT 62-103
AND
RESPONSE OF THE CANADIAN SECURITIES ADMINISTRATORS

1. INTRODUCTION

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

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

CSA received 10 submissions on the 1998 Draft from 9 commenters. The commenters providing the submissions can be grouped as follows:

Trade Associations	3
- Canadian Bankers Association ("CBA")(2 letters)	
- Securities Subcommittee of the Business Law Section of the Canadian Bar Association (Ontario) (the "Securities Subcommittee")	
- The Investment Funds Institute of Canada ("IFIC")	
Self-Regulatory Organizations	1
- Investment Dealers Association of Canada ("IDA")	
Financial Institutions	3
- Power Corporation of Canada ("Power")	
- RT Investment Management Holdings ("RT")	
- Sun Life Assurance Company ("Sun Life")	
Law Firms and Lawyers	2
- Ogilvy Renault ("Ogilvy")	
- Simon Romano ("Romano")	
TOTAL	**9**

Copies of the comment letters may be viewed at the office of Micromedia, 20 Victoria Street, Toronto, Ontario (416) 312-5211 or (800) 387-2689; the office of the British Columbia Securities Commission, 200-865 Hornby Street, Vancouver, British Columbia (604) 899-6660; the office of the

Alberta Securities Commission 410-300 5th Avenue S.W., Calgary, Alberta (403) 297-6454; and the office of the Commission des valeurs mobilières du Québec, Stock Exchange Tower, 800 Victoria Square, 22nd Floor, Montréal, Québec (514) 940-2150.

The CSA have considered the comments received and thank all commenters for providing their comments. As a result of consideration of the comments, the CSA have made a number of minor amendments to National Instrument 62-103 and the other Early Warning Instruments. However, as these changes are not material, the CSA are not republishing those instruments for a further comment period.

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

2. GENERAL COMMENTS

This section of the Notice describes the comments received on a number of general issues related to the 1998 Draft and to the Early Warning Instruments generally.

General Reaction to the Early Warning Instruments

Some commenters indicated their general support for the CSA initiative relating to the Early Warning Instruments, noting that the initiative dealt with a regulatory area that needed reform. No commenter urged abandonment of the initiative.

Power indicated its general support of the National Instrument, particularly with respect to aggregation relief, stating that the National Instrument represented a substantial step forward, bringing the rules into line with practical reality. (Power also indicated its support of the specific comments on the National Instrument made by IFIC.) IFIC also supported the National Instrument, which it said will provide some welcome relief from the early warning, reporting and take-over bid provisions under securities law; IFIC also supported the alternative monthly reporting system, which it stated is already used by some IFIC members with success. RT was also supportive of the CSA's initiative and objective in establishing a uniform and standard set of early warning rules that will apply across all provinces in Canada. RF mentioned that the proposed alternative monthly reporting system is a "fair compromise", balancing recognition of the passivity of investors, client confidentiality and providing reporting issuers with information on those who vote securities.

Harmonization

The CBA emphasized the importance of there being a uniform approach across Canada for the matters covered by the National Instrument. The CBA stated that it was "vital that the reporting requirements under the early warning, insider reporting and related regimes be absolutely uniform across all Canadian jurisdictions". The CBA "strongly discouraged" any provincial commission from deviating from the national rules.

The Securities Subcommittee urged the CSA to approach the Director under the *Canada Business Corporations Act* ("CBCA") in order to determine if the Director would support a similar approach taken with respect to some requirements under the CBCA in order to promote harmonization between matters dealt with in the Early Warning Instruments that are also dealt with in the CBCA. IFIC emphasized the current difficulty posed by the inconsistency between the take-over bid thresholds in the CBCA and under provincial securities law, and urged the CSA to assist in the process of harmonizing these requirements.

CSA Response

The CSA agree with the importance of harmonization expressed in the comments. With respect to the comments concerning the CBCA, the CSA note that discussions have commenced with the Director under the CBCA concerning the harmonization of some CBCA provisions with corresponding provisions of securities legislation.

Special Warrants and Convertible Securities

The CBA noted that the proposed relief for special warrants contained in the Ontario draft rule published for comment in 1995 (the "Ontario Draft Rule")[2] has not been included in the National Instrument. The CBA stated that it believed that the relief was necessary to ensure accurate early warning reporting given the nature of special warrants. Romano also asked why the relief for special warrants has disappeared.

IFIC stated that, in other regimes, securities regulatory authorities have allowed securityholders to "look through" special warrants to the actual ownership they represent in a reporting issuer. IFIC noted subsection 2.1(4) of National Instrument 81-102 Mutual Funds. IFIC stated that it "strongly believed" that this concept should be carried forward in National Instruments 61-102 and 61-103.

CSA Response

The CSA believe that the regular application of securities legislation is generally appropriate for special warrants, and have made no special provisions for special warrants in the National Instrument.

Repurchase Agreements

The CBA commented that the Early Warning Instruments do not consider the position of repurchase agreements ("repos") in the context of the aggregation requirements. The CBA stated that equity repos will become an important financing technique in Canada within the near future, and the CBA believes that this issue needs to be considered in the context of the Early Warning Instruments. The CBA stated that it would appear, from a technical point of view, that securities acquired by financial institutions as part of a repo transaction must be aggregated for purposes of the early warning rules. The CBA argued that repos, like pledged securities, are merely a financing technique and the

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[2] At (1995) 18 OSCB 4887.

financial institutions do not acquire the securities for an investment purpose. The CBA argued that repos are typically held by financial institutions for very short periods of time, making tracking and recording difficult and cumbersome as a practical matter. The CBA expressed concern that the Early Warning Instruments not impede the development and growth of this important financing technique in Canada. The CBA therefore submitted that it would be consistent to treat securities acquired by financial institution through a repo transaction in the same manner that pledged securities are treated for all purposes under the Early Warning Instruments.

CSA Response

The CSA do not propose to amend the National Instrument at the present time in order to accommodate or deal specifically with repos. The CSA understand that equity repos are not a major component of the Canadian capital markets at this time and do not believe changes to the National Instrument in connection with repos are necessary at this time. The CSA recognize the record keeping complexity that repos could cause for financial institutions and note that some relief might be appropriate with respect to repos in the future.

Securities of Mutual Funds Being Subject to Early Warning Requirements

The Securities Subcommittee and SunLife submitted that the National Instrument should exempt the securities of open-ended mutual funds from being reported on under the early warning requirements. The commenters stated that since the securities of open-ended mutual funds do not trade, but are redeemable on demand, the liquidity problems that may affect publicly traded securities do not arise. It was submitted that, therefore, early warning reporting is not required to inform the markets about the existence of significant blocks of securities. Take-over bids are also not a concern for open-ended mutual funds, and therefore early warning reporting is not required to warn the market of a potential bid. The commenters acknowledged that early warning reporting in respect of mutual funds may be not be required frequently, but in circumstances when such reporting is required, the commenters stated that they do not think it serves any useful market function or policy objective.

The commenters also stated that if the CSA do not accept this recommendation, in the alternative open-ended mutual funds themselves, as well as segregated funds, should be exempted from early warning reporting regarding their ownership of securities of open-ended mutual funds. The extent to which funds-of-funds and segregated funds invest in open-ended mutual funds will be disclosed in their respective prospectuses and information folders. The commenters noted that relief from early warning reporting is generally given and orders granted by CSA members to permit the operation of funds-of-funds. The commenters inferred from this that the CSA have acknowledged that public policy does not require early warning reporting in the context of these types of investments.

CSA Response

The CSA agree with the recommendation and have added section 3.3 to the National Instrument to provide that the early warning requirements do not apply in connection with the ownership or control of securities issued by a mutual fund to which National Instrument 81-102 applies. This change reflects existing practice in the market. The CSA are satisfied that there are no compelling policy

reasons to require early warning reporting in connection with the acquisition of publicly-traded mutual funds, having regard to the investment restrictions to which those funds are subject.

Deletion of Relief for Inadvertent Take-over Bids

A number of commenters commented on the absence from the National Instrument of relief for inadvertent take-over bids.

The CBA suggested that conditions to the relief could be constructed to limit potential for abuse and urged the CSA to reconsider the decision to not include the relief, which had been contained in the Ontario Draft Rule. The CBA suggested that if relief is not incorporated into the rules, then the CSA adopt a national policy that outlines the position of the CSA in connection with an inadvertent crossing of a threshold by a passive institutional investor. The Securities Subcommittee also argued that the provision for inadvertent take-over bids was useful, particularly for foreign institutional investors who do not always obtain prior legal advice when purchasing securities in the Canadian market, and can easily run afoul of Canadian reporting rules, even when their intentions are entirely passive. The Securities Subcommittee also urged the CSA to provide guidance as to the circumstances, if any, in which the CSA would be prepared to grant relief for inadvertent bids. SunLife also urged the retention of these provisions. Romano requested clarification of the CSA's position as to whether retroactive relief is possible.

CSA Response

The CSA are of the view that, having regard to the wide variety of circumstances that may be present in the case of inadvertent take-over bids, that it is not possible to state a general policy concerning this issue or to provide blanket relief. Inadvertent take-over bids will continue to be considered on a case-by-case basis.

Other Proposed Take-over Bid Relief

RT raised concerns concerning the 20 percent take-over bid threshold of securities legislation. RT stated that, based on the small size of Canadian capital markets, a passive investor acting on behalf of a large client base could easily exceed this limit. RT stated that this limit was established many years ago before the rapid development of growth of the investment management industry. RT recommended that the CSA address this issue as part of its review of the Early Warning Instruments.

CSA Response

The CSA are not, at this time, proposing any amendments to securities legislation concerning the take-over bid threshold. That is outside the scope of the Early Warning Instruments.

Companion Policy

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

CSA Response

The CSA do not believe that a companion policy is necessary in connection with the National Instrument.

3. SPECIFIC REQUESTS FOR COMMENTS FROM THE CVMQ

In the 1998 Notice, the CVMQ specifically requested comment on two issues.

Definition of "financial institution"

A "financial institution" is one type of "eligible institutional investor" under the 1998 Draft and may therefore be entitled to the various types of relief provided. The definition of "financial institution" contained in the 1998 Draft included entities engaged in financial services activities that are supervised and regulated under the insurance laws of the United Kingdom of Great Britain and Northern Ireland. In the 1998 Notice, the CVMQ requested comment on whether the definition of "financial institution" should be expanded to include entities engaged in financial services activities that are entitled to carry on business in Canada and that are supervised and regulated under the insurance laws of any country.

Two responses were received in response to that request.

Ogilvy commented that the definitions of "eligible institutional investor" and "financial institution" should be expanded to encompass not only Canadian, U.S. and U.K. financial institutions, but also comparable financial institutions of other countries having supervisory or regulatory legislation comparable to those existing in Canada, the U.S. and the U.K. Ogilvy stated that, at the very least, the definitions should be expanded to include financial institutions from the G-7 countries.

Romano also submitted that the list should be expanded to include G-7 financial institutions generally.

CSA Response

The CSA, including the CVMQ, agree with the comments. The definitions of "financial institution" and "investment manager" have been amended to include financial institutions of the G-7 countries.

Structure of Aggregation Relief

In the 1998 Notice, the CVMQ requested specific comment on whether the structure of the relief provided by section 5.1 of the 1998 Draft is appropriate in that it would enable the creation of a large number of business units that will be automatically entitled to aggregation relief without the securities regulators' discretionary evaluation. The CVMQ indicated that it would propose to provide aggregation relief only to certain specifically delineated classes of institution, with other eligible institutional investors entitled to obtain relief upon application and the exercise by the authorities of their discretionary powers.

Six commenters commented on the CVMQ proposal and were unanimous in recommending against it.

Ogilvy stated that it agreed with the general approach of the 1998 Draft as one that "appears to blend very well with the trend towards self-regulation which has recently received the support of the CVMQ, more particularly in the framing of the proposed new regime for conflicts of interest in Bill 187". Ogilvy supported aggregation relief for financial conglomerates, arguing that compliance with the existing rules is "in many cases, impossible for such financial conglomerates and in many instances extremely difficult also for other members of the investing public...the requirement to aggregate the holdings of all affiliates and, in some cases, of associates appears to us to be an excellent example of regulatory over-reach where regulatory convenience has led to the imposition of regulatory burdens which far surpass the legitimate regulatory concerns sought to be addressed".

The CBA stated that it was very concerned with the approach proposed by the CVMQ, and that it "strongly believes that a requirement to apply for the aggregation relief in Part 5 [as suggested by the CVMQ] will impose a regulatory burden on both industry participants and commission staff that cannot be justified for policy reasons...We are also very concerned that it will be difficult to ensure that similar applications are treated equally from jurisdiction to jurisdiction (and even within jurisdictions) thus defeating the CSA objective to harmonize securities regulation across the country".

The Securities Subcommittee stated that the CVMQ approach would "create an unnecessary and costly burden on institutional investors and on the CSA in processing requests".

IFIC stated that the relief proposed to be granted in Part 5 of the 1998 Draft is not without significant restriction, which gives the CSA adequate control over the disaggregation process. IFIC noted that the CVMQ provided no detail as to why it is troubled by the scope of the aggregation relief proposed to be granted in Part 5 nor for the rationale for its approach. IFIC stated that "as the justification for the CVMQ's proposal is not apparent, we must strongly object to it. It would be entirely unworkable and render NI 62-103 effectively useless if the CVMQ did not opt in and follow the same rules..." IFIC also stated that the CVMQ proposal would also perpetuate the "unlevel playing field" on which mutual fund companies and some financial institutions operate.

RT stated that the proposal of the CVMQ is "not feasible". In the view of RT, the conditions contained in the rule are sufficient to protect the market.

Romano argued that the approach of the 1998 Draft was consistent with the interpretative guidelines issued by the U.S. Securities and Exchange Commission ("SEC") in January 1998. He stated that the exercise of discretionary relief seems unnecessary and costly given that the National Instrument is dealing with passive institutional investors.

CSA Response

The CVMQ notes the comments received in respect of its specific request for comments.

4. COMMENTS ON SPECIFIC PROVISIONS OF THE 1998 DRAFT

Part 1 - Definitions and Interpretation

Section 1.1 - Definition of "applicable definitions" and "applicable provisions"

These definitions are used to define the provisions of securities regulation in respect of which relief is provided under the National Instrument.

The CBA commented that those terms did not extend the business unit aggregation relief in Part 5 of the National Instrument to all of the appropriate circumstances. The CBA commented that the definitions needed to be expanded to include National Instrument 62-101, all of Part 9 of the National Instrument and section 102 of the *Securities Act* (Ontario) (the "Ontario Act") and similar sections of the securities legislation of other jurisdictions.

The CBA also noted that a recent amendment to Ontario Rule 14-501 Definitions included a definition of "principal shareholder" that refers to control or direction. The CBA indicated that this will need to be subject to aggregation relief. The CBA suggested that a broad provision applicable to all numerical thresholds in securities laws should also be included so as not to miss anything else.

Romano suggested that the definition "acquisition announcement provisions" should be added to the definition of "applicable provisions" in order to provide for aggregation relief for such purposes. Romano also suggested that the definition of "applicable provisions" be broadened to have more general applicable in respect of general ownership concepts in other areas, such as the proposed National Instrument 45-101 concerning rights offerings.

CSA Response

The CSA agree that the definition of "applicable provisions" should extend to all insider reporting requirements, and have therefore deleted the reference to subsection 9.1(4) in the 1998 Draft. As a result, aggregation relief will be available in respect of all "insider reporting requirements" under paragraph (d) of the definition, and that availability in connection with Part 9 of the National Instrument will not be limited by a reference to subsection 9.1(4).

The CSA agree that the definition should extend to all of section 2.1 of National Instrument 62-101, and have amended the definition accordingly. As described in the Notice for National Instrument 62-101, the definition has not been expanded to include section 2.2 of that National Instrument.

Finally the CSA have added a reference to the "acquisition announcement provisions" to the definition.[3] Upon consideration, the CSA believe that it would be consistent with the rest of the National Instrument to permit an eligible institutional investor to apply disaggregation under Part 5 for purposes of compliance with those provisions. To do otherwise would undermine some of the relief provided by the National Instrument, because an eligible institutional investor would be able to comply with the early warning or alternative monthly reporting requirements on a disaggregated basis, but would still have to monitor its compliance with the acquisition announcement provisions on a fully aggregated basis.

The CSA have not added any general provision to the National Instrument providing for aggregation relief for all purposes under securities law. The CSA wish to provide relief only in respect of provisions specifically considered by the CSA.

Definition of "business unit"

The CBA recommended clarification of this definition and asked for confirmation that the definition would not preclude financial institutions from setting up the appropriate structures so that branches, or portions of branches, can be treated as different businesses.

Romano recommended that the CSA clarify that branches, or portions of branches, may in appropriate circumstances be considered "business units" for the purpose of the aggregation requirements.

CSA Response

The CSA believe that the definition is clear, and do not propose to change it. The CSA have added a definition of "entity" to the definitions section of the National Instrument, which is defined to include "a person or company" and a "business unit". The term "entity" is used throughout the National Instrument to replace the term "person or company". The use of the term "entity" is designed to eliminate some confusion over the applicability of various provisions in the National Instrument to business units.

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[3] Section 142 of the *Securities Act* (Alberta), and corresponding provisions of other securities legislation.

Definition of "control"

The CBA recommended revising the definition of "control" to clarify that the definition would not have the effect of changing applicable legal principles and provided proposed wording to the CSA. The CBA expressed concern that the addition of the reference in the definition to "the right" to exercise control or direction may lead to uncertain results. Romano also suggested that using the term "right" has added a "new concept to the mix".

Romano has also questioned whether it was appropriate to use a single definition of "control", when that concept represents slightly different terms used in various places in securities legislation. Romano notes that the concept of "exercising" control or direction is used in the insider reporting and take-over bid provisions of Ontario securities legislation, the concept of having the "power to exercise" is used in the early warning provision and the concept of "holdings" is used in the control block provisions. Romano questioned whether it was appropriate to lump these different concepts together under one term.

CSA Response

The definition of "control" is intended only to be an abbreviated version of the words "the power to exercise control or direction over", "exercises control or direction over" and analogous terms used in securities legislation, in order to improve the clarity and readability of the National Instrument. The intent was not to create any new concepts from those represented by those words under securities legislation. In order to clarify the use of the term, the definition of "control" has been amended to make specific reference to the language used in securities legislation in connection with the concept of "control". The new definition defines "*control*" as the "power to exercise control or direction over" a security, but includes similar terms or expressions used in securities legislation. The reference to similar terms or expressions is designed to reflect that the wording of the "control" concept in different legislation varies from jurisdiction to jurisdiction.

Definition of "control block distribution"

Ogilvy suggested that the definition be revised to include a reference to the provisions of Policy Statement Q-12 of the CVMQ. Ogilvy noted that Policy Statement Q-12 provides for a separate resale regime for shares held by a principal shareholder and it is "generally considered as a functional "second cousin" to the control block distribution provisions existing in the securities legislation of other Canadian provinces".

Ogilvy also noted that the definition of "control block distribution" in the National Instrument was different from the definition of "control distribution" in National Instrument 62-101.

CSA Response

The CSA have added a reference to Quebec Policy Statement Q-12 to the definition of "applicable provisions" in response to Ogilvy's first comment.

The CSA have amended the definition of "control distribution" in National Instrument 62-101 to "control block distribution" to be closer to "control block distribution definition". It is noted, of course, that the definition in National Instrument 62-101 pertains to trades that are "control block distributions", whereas the definition in the National Instrument pertains to the provisions of securities legislation for purposes of the definition of "applicable definitions"; therefore the two definitions are not identical.

Definition of "eligible institutional investor"

Mutual Funds and other investment vehicles

The definition of "eligible institutional investor" includes "a mutual fund that is not a reporting issuer". The Securities Subcommittee, Sun Life and Romano suggested that the mutual funds that were reporting issuers should be included in the definition and therefore eligible to benefit from the relief provided by the National Instrument, particularly in connection with the ability to use the alternative monthly reporting system. Sun Life and the Securities Subcommittee argued that the regulatory regime under which mutual funds operate generally prevents them from acquiring more than 10 percent of the shares of an issuer and prevents them from acquiring securities for the purpose of exercising control or direction over an issuer. The commenters noted that if a mutual fund has obtained a variation of the 10 percent restriction from the regulators, the manner and extent to which the mutual fund may exceed that 10 percent restriction will be set out in its prospectus and so will be a matter of public record. In those circumstances, the policy objective behind the early warning requirement of informing the markets about the existence of significant blocks of securities would be met by the prospectus disclosure and by the monthly reports. SunLife and the Securities Subcommittee argued that there may be circumstances in which the investment manager responsible for the portfolio management of a mutual fund would be reporting under the alternative monthly reporting system, but the mutual fund would have to report under the early warning requirements. It was suggested that this would result in administrative inefficiency and undue costs to the investment manager and the mutual fund.

IFIC suggested that public mutual funds were already included in the definition of "eligible institutional investor" by virtue of paragraph (d) of the definition (which relates to an investment manager "exercising full discretionary authority over securities"). IFIC noted that there are pooled funds in the market that are bigger than some public mutual funds. IFIC urged that, for clarification, public mutual funds should be expressly included in the definition of "eligible institutional investor".

Several commenters also stated other investment vehicles, such as segregated funds or closed-end investment vehicles, should be included in the definition.

CSA Response

The CSA emphasize that public mutual funds are not included in the definition of "eligible institutional investor". The investment manager of a public mutual fund may be an "eligible institutional investor", but not the mutual fund itself. Therefore, mutual funds themselves cannot avail themselves of section 5.1 of the National Instrument.

The CSA note that the inability of mutual funds to disaggregate in their own right should not cause problems in the ordinary course. Public mutual funds are prevented by securities legislation from taking positions in excess of 10 percent of the outstanding voting or equity securities of an issuer, and so should not generally be in a position to be subject to the early warning requirements or the insider reporting requirements. If a mutual fund does receive approval to exceed 10 percent, the terms of the approval could be structured to provide appropriate relief from those requirements.

Closed-end investment funds also are not eligible institutional investors.

The CSA are of the view that no special provisions need be included in the National Instrument to deal with portfolios of segregated funds. The securities in those portfolios may be capable of being disaggregated from those held in other capacities by the relevant insurance company, depending on the ability of the insurance company to satisfy the requirements of section 5.1 of the National Instrument.

Investment Managers with Full Discretionary Authority

Ogilvy suggested that if paragraph (d) was designed to ensure that an investment manager can qualify as an eligible institutional investor only in connection with securities held for the benefit of its managed portfolio accounts, then paragraph (d) should be amended to clarify this.

The Securities Subcommittee recommended that paragraph (d) be amended to clarify the term "full discretionary authority". For instance, if the manager had some accounts where the client retained voting or discretionary authority, would the securities in these accounts be excluded? It was suggested that this issue be clarified in a companion policy.

CSA Response

The CSA agree with the comment. Investment managers with full discretionary authority are eligible institutional investors only in connection with the securities over which they have full discretionary authority. The definition of "eligible institutional investor" has been changed to reflect this.

In addition, the definition of "eligible institutional investor" has been changed by the deletion of the phrase "full discretionary authority" in paragraph (d), and the replacement of that phrase with a reference to "discretion to vote, acquire or dispose of securities without the express consent of the beneficial owner". The CSA have made this change to clarify what they meant in the 1998 Draft by the phrase "full discretionary authority".

Broker-Dealers

The IDA and the CBA submitted that broker-dealers should be included in the definition of "eligible institutional investors". The IDA submitted that many competitors of the broker-dealer community do fall under this definition, and therefore these competitors can receive relief from many of the same activities undertaken by broker-dealers. The IDA specifically referred to the ability of an

eligible institutional investor to qualify for the alternative monthly reporting system and to obtain aggregation relief under the National Instrument. The IDA argued that the inability of broker-dealers to take advantage of these provisions of the National Instrument effectively puts them at a competitive disadvantage to other eligible institutional investors because broker-dealers would be subject to a higher compliance burden.

The CBA stated that if broker-dealers were not included in the definition of eligible institutional investors, then National Instrument 62-101 and Parts 4 and 9 of the National Instrument should be amended to include affiliates or associates of eligible institutional investors.

CSA Response

The CSA have not included "broker-dealers" as "eligible institutional investors" under the National Instrument because the CSA do not consider broker-dealers generally to be institutional investors.

With respect to the CBA comment, the CSA note that they have not extended the relief provided by National Instrument 62-101 and Parts 4 and 9 of the National Instrument to affiliates or associates of eligible institutional investors, as the CSA believe that only institutional investors should have the advantage of the reduced reporting requirements provided by those provisions. The CSA do not wish to provide competitive advantages to organizations that happen to include an eligible institutional investor.

U.K. Pension Funds

The CBA also submitted that U.K. pension funds should be included in the definition of "eligible institutional investor".

CSA Response

The CSA have not made the suggested change, as the definition is designed only to include those investors that commonly take significant positions in Canadian securities. Individual relief for specific U.K. pension funds should be considered for those funds that do typically take significant interests in Canadian securities.

Definition of "formal bid", "offeror" and "offeror's securities"

Ogilvy commented that these terms are not used in the *Securities Act* (Quebec) (the "Quebec Act") and suggested changes to the definition to make the terms tie appropriately to Quebec Act.

CSA Response

The CSA agree with the comment and have made the recommended changes.

Definition of "investment manager"

Ogilvy commented that the definition of "investment manager" would encompass "portfolio advisers". Ogilvy suggested that, because there was a separate definition of "portfolio adviser", an inference could be read into the definition of "investment manager", that portfolio advisers were not meant to be included in that definition. Ogilvy suggested the definition of "investment manager" specifically include portfolio advisers.

CSA Response

The CSA agrees with Ogilvy that the definition of "investment manager" would be wide enough to encompass portfolio advisers. The CSA considers this matter is clear and does not believe that the implication suggested by Ogilvy will likely arise, and have not made the suggested change.

Definition of "joint actor"

Ogilvy noted that the definition of "joint actor" was defined by reference to a "person or company". Ogilvy noted that a business unit may comprise only part of a legal entity, and the "joint actor" relationship may exist only with the business unit if security holdings are disaggregated from those of the larger group. Therefore, the use of the phrase "person or company" may technically not apply properly to business units.

Romano also asked if the concept of "joint actors" needs to be extended to deal with different business units of the same person or company.

CSA Response

The CSA have changed the definition of "joint actor" in the National Instrument by replacing the references in the definition from "person or company" to "entity". That definition now refers an "entity acting jointly or in concert with another entity". The CSA have also amended the definition of "acting jointly or in concert" to ensure that the term applies to "entities" rather than only persons or companies.

Definition of "securityholding percentage"

Ogilvy commented that the definition should be amended to clarify whether Part 5 has an impact on the calculations of securityholding percentage. Ogilvy stated that without this reference to Part 5, the definition appears to suggest that the securityholding percentage must be calculated in relationship to an aggregate group, even if the group is permitted to disaggregate its holdings under Part 5. RT made a similar comment, noting that it appeared that the reference in the definition to the deemed beneficial ownership provisions of securities legislation appeared to negate the aggregation relief provided for under Part 5. RT stated that the deeming provisions would lead to an inappropriate result for its financial organization.

The Securities Subcommittee noted that the definition does not refer to "offeror's securities" and, accordingly, it is not clear whether the definition extends to joint actors.

Romano noted that the definition appears to suggest that it is designed to ensure that all convertible securities owned or controlled are to be included. Romano noted that under subsection 90(1) of the Ontario Act, which applies to the take-over bid and early warning provisions but not the insider reporting or control block provisions, only securities convertible in 60 days or less that are owned are so included.

CSA Response

The CSA note that the definition of "securityholding percentage" is designed to be an abbreviated way of referring to the percentage of securities of a class owned or controlled by a person or company as determined under applicable provisions of securities legislation. It is not designed to change in any way how that percentage is determined.

The CSA have amended the definition to state that "securityholding percentage" is determined as required under applicable securities legislation, and to make reference to the application of any applicable aggregation relief. The definition is not intended to negate the availability of any aggregation relief.

The definition does not explicitly refer to joint actors; whether the securities of a joint actor are to be included in the calculation of the securityholding percentage of an entity will depend upon the operation of the relevant securities legislation that is applicable in the context in which the calculation is being made.

Use of phrase "person or company"

Ogilvy suggested the use of this phrase is confusing in light of the concept of separate business units.

CSA Response

As described above, the CSA have added a definition of "entity" and have replaced references to "a person or company" throughout the National Instrument with references to an "entity".

Definition of "underwriting period"

Ogilvy noted that the definition of "underwriting period" does not make allowance for the period during which over-allotment options can be exercised and which, under the current rules, is still 60 days.

CSA Response

The CSA agree with this comment. The definition of "underwriting period" has been amended to ensure that the period covered by the definition extends to four business days after the acquisition of any securities acquired by an underwriter upon the exercise of an over-allotment option.

Section 1.2

Ogilvy stated that the provisions of section 1.2 relating to effective control do not specify whether the level of ownership should be calculated after giving effect to disaggregation relief in Part 5 of the National Instrument.

RT submitted that the 30 percent level proposed in section 1.2 should be changed to 50 percent. RT stated that the definition was onerous and unnecessary in that an eligible institutional investor could hold 30 percent of the outstanding voting shares of an issuer and still not be able to exercise control over the issuer as the votes may not be exercisable at the same time or on the same issues. RT stated that the potential relief provided by the words "in the absence of evidence to the contrary" is no real relief at all since it puts an onus of proof on the eligible institutional investor but does not provide for a process by which the eligible institutional investor can made such a declaration or provide evidence for a resolution.

CSA Response

With respect to Ogilvy's comments, the determination of "effective control" would be made on a disaggregated basis if applicable in the context. The concept of "effective control" is used in sections 4.2 and 9.1 of the National Instrument in connection with the eligibility criteria for use of the alternative monthly reporting system and insider reporting requirement relief, respectively. Both the alternative monthly reporting system and the insider reporting relief are "applicable provisions" under the National Instrument; therefore aggregation relief is available in the circumstances outlined in section 5.1 and the interpretation of "effective control" would be made on a disaggregated level by an entity whose position in a reporting issuer was made on a disaggregated basis.

In response to RT's comment, the CSA believe that a 30 percent ownership position would represent effective control of many reporting issuers, and that this level is the appropriate level at which to define "effective control" under the National Instrument. A 50 percent threshold is too high. The reference to "in the absence of evidence to the contrary" contained in the definition is based on similar language contained in the definition of "distribution" in the securities legislation of several jurisdictions, which the CSA believe has worked adequately.

Part 2 - General Reliance and Reporting Provisions

Section 2.1

The CBA sought clarification that a person or company may rely on the disclosure made by a reporting issuer under National Instrument 62-102 for all purposes under securities legislation.

Romano recommended that section 2.1 be extended to take-over bid, insider reporting and control block provisions.

IFIC stated that section 2.1 allows reliance provided on either the information disclosed under National Instrument 62-102 or in a more recent material change, as long as the person or company does not know that the information is inaccurate or has changed. IFIC noted that it is not apparent from this provision what information such an investor should rely upon if he, she or it does know that the information is inaccurate or has changed. IFIC suggested that the subsection be clarified to indicate that, in those circumstances, the person or company may rely upon information received from the issuer, and that the issuer should be required to provide this information on request.

IFIC also noted that material change reports required under securities legislation are not currently required to contain information as detailed as that required by section 2.1. IFIC recommended that the CSA require that material change reports include the same information as prescribed in section 2.1

CSA Response

The CSA have continued to restrict the formal application of section 2.1 to early warning and alternative monthly reporting obligations.

With respect to IFIC's comment, the CSA believe that a person or company that is aware that information reported by a reporting issuer in a material change report or under section 2.1 of National Instrument 62-102 is incorrect should use the best information available to it.

The CSA do not intend to change the form of material change reports at this time.

Part 3 - Reporting Requirements under the Early Warning Requirements

Section 3.1

Romano noted that subsection 3.1(1) refers to the contents of the news release, but not prescribe the contents of the required report.

CSA Response

The report is required by securities legislation to contain the same information as is contained in the press release. As the contents of the news release are therefore statutorily prescribed, that issue is not dealt with in the National Instrument.

Part 4 - Alternative Monthly Reporting System

Reporting Threshold

A number of commenters argued in favour of harmonizing the reporting threshold required under section 4.5 of the 1998 Draft with the comparable reporting threshold in the U.S.

IFIC stated that the 5 percent increment as originally proposed in the Ontario Draft Rule is the favoured approach, as it follows the U.S. reporting model and would allow eligible institutional investors to conform their Canadian and U.S. reporting requirements and simplify their compliance. The CBA submitted that the proposed fixed 2.5 percent threshold creates an unjustified regulatory burden for Canadian issuers with cross-border operations as well as an additional barrier to foreign institutional investment in Canadian equities. The CBA stated that a common threshold with the U.S. makes sense, and recommended the "flexible 5%" threshold, in which reporting requirements are based on changes from previously reported positions, rather than in respect of fixed thresholds.

Romano stated that the 2.5 percent threshold will require both Canadian and non-Canadian institutional investors to engage in systems modifications which could be complex and expensive. Romano also stated that a fixed threshold, rather than a requirement to report changes from the previously reported position, is not consistent with the approach taken under the early warning provisions of Ontario securities law. Romano stated that the benefits from this approach were unclear, and that this approach could potentially disincline non-Canadians from investing in Canadian equities, to the detriment of Canadian issuers, investors, intermediaries and the Canadian capital markets generally. Romano suggested that if the CSA did not wish to adopt a position consistent with the U.S. position, the CSA should consider an exemption for non-Canadians who comply in accordance with U.S. rules.

RT also urged a return to the 5 percent threshold, based on changes from the previously reported position, of the Ontario Draft Rule. RT stated that there were few significant additional benefits from the 2.5 percent threshold, but substantial extra work for reporters.

CSA Response

The CSA have decided to continue with the fixed 2.5 percent threshold. The CSA are of the view that a 5 percent threshold does not provide frequent enough reports to keep the market informed of significant securities positions. The CSA also believe that the 2.5 percent threshold is suitable for a smaller securities market in Canada.

Section 4.1

The CBA submitted that affiliates or associates of an eligible institutional investor should qualify for the alternative monthly reporting system.

Ogilvy also submitted that the availability of the alternative monthly reporting system be extended to associates and affiliates and segregated business units of eligible institutional investors. Ogilvy

argued that the aggregation relief under Part 5 was available to associates and affiliates of eligible institutional investors.

CSA Response

On the CBA's comment, the CSA remain of the view that the alternative monthly reporting system should be available only to eligible institutional investors, and have not extended the availability of the system to affiliates or associates of those entities. The CSA note that the availability of aggregation relief should relieve many financial organizations of reporting obligations.

Section 4.3

Romano argued that the reference to "three days" in paragraph 4.3(1)(b) should be changed to "two business days".

Romano also believed that there is a discrepancy in subsection 4.3(4) between the use of the term "owned" and the use of the definition "securityholding percentage", which includes both ownership and control.

The CBA believes that paragraph 1(b) of Appendix F is inappropriate. Appendix F contains the requirements for the news release and report required to be made when an eligible institutional investor ceases to use the alternative monthly reporting system. The CBA thought that it is unnecessary to require disclosure of reasons.

Ogilvy questioned the need to require the issuance and filing of a news release where the eligible institutional investor no longer intends to use Part 4 but is not otherwise disqualified. Ogilvy stated that the issue of a news release in these cases appears to confer an unwarranted degree of significance to the decision not to use the alternative monthly reporting system.

CSA Response

The CSA agree with Romano's first comment and have changed the reference to "two business days". The CSA do not agree with his second comment and have not made the suggested change.

The CBA's comment refers to a requirement that a reporter disclose the reason that it is ceasing to use the alternative monthly reporting system. The CSA believe that this information can be important to the market, and have not made the deletion suggested by the CBA. Similarly, the CSA have not deleted the requirement for a press release when the reporter ceases to use the alternative monthly reporting system. The CSA believe that this information can also be important to the market, and should be disclosed.

Section 4.4

Ogilvy stated that the restrictions on acquisitions contained in section 4.4 should run from the date of issuance of the news release rather than the date of the filing, since it is the issue of the news release that begins the process of dissemination of that information in the market. Ogilvy also stated that the

ten day period seems excessively long and recommended a delay of three to five days. Ogilvy stated that it understood that the selection of the ten day period was largely inspired by corresponding U.S. rules, but suggested that the differences in size and diversity between the U.S. and Canadian markets should amply justify the selection of a reduced delay in the context of the Canadian market.

Romano recommended that section 4.4 open with a reference to "an eligible institutional investor" rather than a person or company, and suggested that the section should apply only to the extent one is in a ten percent or greater position.

CSA Response

The CSA have not made the change suggested by Ogilvy. The CSA believe that the date of the filing of a news release is a easily identifiable event that would provide more certainty to the market than the date of the issue of a press release, which may not be picked up and published by any media. The CSA also note that basing the restriction on the time of filing should have the advantage of creating an incentive for the speedy filing of news releases by relevant entities.

The CSA have sympathy for the view that the 10 day period is long, but do not propose to change it at this time. This approach is consistent with the U.S. approach on this matter.

The CSA agree with Romano's comment and have amended section 4.4 to clarify that it is applicable only if the securityholding percentage of the entity is 10 percent or more.

Section 4.5

IFIC requested clarification of the impact of section 4.5 in the case of "grandfathered" holdings, in which an eligible institutional investor has not been required to report, despite holding in excess of 10 percent. Also, IFIC requested clarification on reporting requirements in the case of holdings in excess of 10 percent of a private company where a private company goes public.

Romano asked if the Rules should "grandfather" reports voluntarily filed prior to the Rule coming into force. Romano also suggested that paragraphs (b), (c) and (d) of section 4.5 should clarify that the increase or decrease is from the most recently filed report.

Ogilvy suggested a technical drafting change to the lead-in language of section 4.5.

CSA Response

The CSA believe that the only "grandfathering" that might be applicable in connection with the alternative monthly reporting system might relate to persons or companies that had obtained orders from one or more of the Canadian securities regulatory authorities. Whether "grandfathering" was available in connection with the National Instrument would depend on the terms of the orders. No "grandfathering" provisions will be included in the National instrument.

In the case of a private company going public, the CSA believe that paragraph 4.5(b) of the National Instrument would be applicable. In the month that the issuer became public, the securityholding percentage of an eligible institutional holder would increase to more than 10 percent of a reporting issuer, thereby triggering the filing requirement within 10 days after the end of the month.

The CSA have not made the change suggested by Romano relating to paragraphs (b), (c) and (d) of section 4.5. The CSA believe the language of those paragraphs to be clear.

The CSA also have not changed section 4.5 to incorporate Ogilvy's suggested language.

Section 4.7

Romano suggested that paragraph 4.7(2)(a) should expressly require the name of the reporting issuer and commented that, "as there is no joint actor disclosure required in subsection 4.7(2), silence presumably suffices for purposes of paragraph 4.8(b) where section 4.7 is concerned".

CSA Response

The CSA have changed section 4.7 to clarify the need to include the name of the relevant reporting issuer. The CSA note that, with respect to Romano's second comment, silence would not suffice. If a joint actor was under an obligation to file under section 4.5(d), then a filing by another person or company would not relieve the joint actor from the filing obligation by virtue of section 4.8 unless "the report discloses the information concerning the joint actor" as required by paragraph 4.8(b).

Part 5 - Aggregation Relief

Section 5.1

The CBA commented that the provisions in this section are a significant improvement over past drafts of the Rule and that it appreciated the fact that the CSA considered and responded to submissions from industry participants in this regard. The CBA strongly urged all commissions to adopt this section of the National Instrument without change. In this regard, the CBA noted that it disagreed with the proposal of the CVMQ that relief should not be automatic.

Ogilvy commented that clarification was needed as to how the definition "applicable definitions" tied into the aggregation relief here. Ogilvy wondered whether the intent was to allow "segregation" for purposes of the applicable definitions quite apart from the applicable definitions. Ogilvy also provided a number of specific comments on other sections of the National Instrument in which it raised the issue of how aggregation relief would apply to those sections. The Securities Subcommittee also suggested cross-references to the aggregation relief section throughout the National Instrument in order to clarify how aggregation relief applies to various other provisions.

Romano made a number of technical drafting comments relating to sections 5.1, 5.1(d) and 5.3. He also suggested that the introductory words in section 5.1 should refer to convertible and similar securities, as in section 5.2.

In addition to the foregoing, a number of comments were received on the various conditions to aggregation relief contained in paragraphs (a) through (f) of section 5.1.

SunLife recommended that paragraph 5.1(a) be revised to provide that investment decisions must be made in all circumstances by the business unit or a person or company retained by the business unit to make such decisions, in order to take into account the circumstances in which a business unit delegates investment decisions to a third party.

SunLife also recommended that paragraph 5.1(c) be amended to clarify that the aggregation relief is intended to be unavailable if a business unit, person or company participates in making investment decisions for two business units regarding the *same* securities. SunLife provided some drafting suggestions to clarify this point.

IFIC commented that paragraph 5.1(c) establishes "information barriers" that must be established and observed by separate business units of eligible institutional investors. IFIC stated that it was concerned that the requirements may be a little too inflexible. IFIC stated that isolated instances of crossing the "information barrier" should not preclude reliance on the aggregation relief, and cited support in the United States for this proposition in the SEC's rule pertaining to Beneficial Ownership Reporting Requirement. The SEC stated that isolated instances of crossing the "information barrier" with respect to a particular security should not warrant aggregation of holdings of that particular security.

SunLife suggested that paragraph 5.1(d) be reworded to require that an eligible institutional investor have no reasonable grounds for believing that a business unit does not comply with the applicable provisions and securities legislation related to the applicable definitions, rather than for having positive grounds for believing it does comply. The Securities Subcommittee also commented that paragraph 5.1(d) should be amended to be a negative test (i.e. no grounds for believing that a business unit does not comply). The Securities Subcommittee also asked for guidance as to what actions would constitute "reasonable grounds" in this context.

RT commented that paragraph 5.1(d) was too onerous in that it would require eligible institutional investors to make inquiries of other business units or affiliates as to their practices of reporting relevant holdings. SunLife said that this requirement was onerous and unnecessary and would call for the establishment of a centralized compliance area that would cross business lines that have been deliberately set up to enable business units to operate independently to minimize potential conflicts of interest. SunLife argued that this structure is not in the best interests of clients from a corporate governance perspective.

RT suggested that the paragraph 5.1(e), which requires an eligible institutional investor or affiliate or associate to take reasonable steps to ensure that each other business unit complies with the requirement of Part 5, has the effect of breaking down well-established firewalls by appearing to call for the creation of a centralized compliance function.

CSA Response

The CSA have adopted a number of Romano's technical drafting suggestions.

With respect to the specific comments on the conditions to aggregation relief, the CSA have made no material changes.

On SunLife's comment on paragraph 5.1(a), the CSA have made no change. The CSA consider it important that the investment decisions be made by the business unit, rather than an entity retained by a business unit, in order that these aggregation relief provisions work properly.

The CSA have made the change suggested by SunLife in connection with paragraph 5.1(c).

The CSA have made no changes to paragraphs 5.1(d) and (e). The CSA want to ensure that aggregation relief is not used unless the entity intending to use it believes, and has taken the positive steps to ensure, that other business units comply with the applicable law in connection with the securities owned or controlled by them. The compliance steps and procedures to be implemented are a matter of business judgment of the relevant organization.

Section 5.2

A number of commenters sought clarification of the relationship between section 5.2 and section 5.1. The CBA suggested that the purpose of the section needs to be clarified so that it is clear that the section provides supplemental aggregation relief to investment funds and does not impose additional conditions for the primary business unit relief in section 5.1. Ogilvy submitted that an investment fund not qualifying for relief under section 5.2 could, nevertheless, constitute a separate business unit that could qualify for relief under section 5.1. Ogilvy states that the current language of section 5.2 is not clear as to whether alternative reliance on section 5.1 would be permissible.

Ogilvy also noted that paragraph (f) of section 5.2 requires the portfolio advisor not be controlled by the eligible institutional investor or an affiliate or an associate thereof. Ogilvy noted the possibility that the portfolio advisor be controlled through a business of the eligible institutional investor which has been segregated under section 5.1 and stated that in their view such a control should not disqualify from aggregation relief under section 5.2.

Ogilvy suggested that a definition of "private mutual fund" should be added to accommodate Quebec as this definition does not currently exist under the *Securities Act* (Quebec).

The CBA and SunLife recommended that the term "investment funds" be defined. SunLife suggested that the definition would include public mutual funds, segregated funds and pooled funds.

RT argued that paragraph 5.2(c) should be deleted. RT argued that the requirement that the identity of a portfolio advisor be disclosed in offering materials is unnecessary, and that it was appropriate that aggregation relief be granted in the case of many discretionary investment managers who make private arrangements with their clients and do not produce offering materials.

SunLife also recommended that paragraphs (d) and (f) be amended to remove the prohibition against an affiliate managing the relevant portfolio. SunLife urged that aggregation relief be available to the eligible institutional investor, regardless of whether the portfolio advisor is an affiliate. SunLife argued that the key concept should be that investment decisions are made independently of the investment manager, not that the sub-adviser is unaffiliated with the investment manager. The Securities Subcommittee also submitted that paragraph 5.2(f) should be deleted on the basis that a policy objective of aggregation relief should be to ensure that decision making is made independently, and that it is unnecessary to be concerned over whether a portfolio advisor is affiliated with its client. The CBA made a similar comment.

The CBA submitted that paragraph 5.2(f) is too restrictive.

IFIC urged that mutual funds be treated that same as other eligible institutional investors under section 5.1, and that section 5.2 is accordingly unnecessary.

Romano asked, in reference to the requirements of paragraphs 5.2(b) and (d), "how can control be exercised as opposed to shared"? Romano also asked, in connection with paragraph 5.2(c), whether there should be a requirement to make public the fact the identity of a portfolio advisor.

SunLife and the Securities Subcommittee also made a number of technical drafting suggestions.

CSA Response

The CSA believe that it is clear that section 5.2 is a separate provision from section 5.1, and do not believe that it is necessary to clarify the relationship between the two sections. The CSA do not agree with Ogilvy's comment that an investment fund could qualify as a separate business unit under section 5.1; an investment fund is not an eligible institutional investor or an affiliate or associate of an eligible institutional investor and would be unable to use section 5.1.

The CSA have continued with the requirement that a portfolio adviser be not controlled or control the eligible institutional investor, or affiliates or associates of the eligible institutional investor; the CSA intend that this aggregation relief be available only in circumstances in which the investment management of the investment fund is delegated to an arm's length portfolio manager.

The CSA do not believe it necessary at this time to define "investment funds".

The CSA have changed paragraph 5.2(c) in response to the comment from RT. That paragraph now provides that the portfolio adviser must be identified to the relevant investor in a document, whether in a prospectus, offering document or otherwise.

The CSA note that the reference to the "exercise" as opposed to the "sharing" of control refers to the distinction between a person that is itself exercising control, as opposed to a circumstance in which that person has partially delegated control or is sharing control with another person.

The CSA have also made a number of technical drafting changes suggested by some of the commenters.

Section 5.3

Ogilvy requested clarification as to the nature of the details of the records required to be held under subsection 5.3(2). The Securities Subcommittee made a similar comment.

CSA Response

The CSA believe that what records are kept would properly be a business decision of the relevant entity. Presumably, the records kept should be sufficient to establish the legitimacy of the use of section 5.1 or 5.2, as applicable.

Section 5.4

Ogilvy argued that section 5.4 should refer not only to the eligible institutional investor, but also to its affiliates and associates.

Romano asked if section 5.4 should include the words "pursuant to Part 9" after "required".

CSA Response

The CSA agree with Ogilvy's comment and have made the suggested change.

The CSA have not made a change in connection with Romano's comment.

Part 6 - Issuer Actions

Section 6.1

Ogilvy noted that the benefit of the exemption in subsection (2) of section 6.1 only applies to early warning requirements and not to reports under Part 4.

Romano suggested that clarification of the phrase "affect or are offered to all holders" was unclear in the context of redemptions. Romano wondered if that phrase would include redemption of securities by lot or targeted redemptions.

IFIC suggested that subsections (1) and (2) of section 6.1 be combined to provide that the relief is provided for any increase or decrease in a securityholding percentage "that arises without any action taken by the person or company". IFIC suggested this approach to ensure that all issuer actions that affect a securityholding percentage of a person or company be caught by the section.

Romano also noted that subsection 6.1(3) suggests that the relief may disappear in the middle of a month and sought clarification on how this would affect an alternative monthly reporter. Romano also suggested that subsection 6.1(4) was redundant.

CSA Response

The CSA have amended subsection 6.1(2) to include an exemption from the reporting requirements of Part 4.

The CSA have made no changes in respect of Romano's comments. Subsection 6.1(1) is intended to apply only to redemptions, retractions or repurchases affecting or offered to all securityholders of the relevant class. The CSA do not intend other types of more limited redemptions to trigger the relief offered by this provision. However, section 6.1 has been amended to apply to transactions effected under National Instrument 32-101 Small Securityholder Selling and Purchase Arrangements.

On Romano's comment on subsection 6.1(3), the CSA note that the ordinary rules will apply. For a person or company reporting under the early warning requirements, there may be an immediate obligation to disclose; for those reporting under the alternative monthly reporting system, the obligation to disclose would arise 10 days after the end of the month in which the relevant transaction occurred.

Part 7 - Underwriting Exemptions

Section 7.1

The CBA argued that the use of the term "owned" in section 7.1 in respect of securities held by an underwriter during an underwriting period may be problematic in respect of certain underwritings, as the underwriter may not "own" securities until the end of the period. Romano made the same point.

The CBA and Romano also questioned the need for an underwriter to issue a press release in order to be able to use the relief. The CBA argued that the issuers' press release should be sufficient.

Romano argued that the relief contained in section 7.1 should extend to the underlying securities in case of convertibles.

Romano also inquired as to the steps to be followed by an underwriter after the underwriting period has expired if it owns a greater than 10% position. Would the underwriter be required to comply immediately or could it wait until month-end?

CSA Response

The CSA have not deleted the word "owned". If an underwriter does not own securities during an underwriting period, it would seem that relief from the early warning and alternative monthly reporting requirements would not be necessary. The CSA have amended paragraph 7.1(b) to refer to a press release of either the issuer or the underwriter.

The CSA have also provided that the relief contained in section 7.1 will apply to the underlying securities of underwritten convertible securities.

The CSA notes that underwriters generally will not be eligible institutional investors, and will not be able to use the alternative monthly reporting system. If an underwriter held a 10 percent position in an issuer at the end of an underwriting period, then it would be required to report under the early warning requirements.

Part 8 - Relief for Pledgees

Section 8.1

The CBA expressed concern with the phrase "legally entitled to dispose". The CBA stated that this phrase caused concern because under all standard form pledge agreements, the lender acquires the legal right to realize the collateral upon the default of the borrower at the time the agreement is executed. Once the agreement is executed, a lender is "legally entitled to dispose" of the collateral conditional upon the default of the borrower. The CBA submitted that the trigger point for the relief should be related to the actual exercise of voting or investment power over the pledged securities. Alternatively, the CBA suggested that the trigger point for the relief could be related to a decision to exercise voting or investment power over the securities.

The CBA also discussed concerns relating to the integration of section 8.1 relief with aggregation relief under the National Instrument. The CBA stated that through realizations, bank branches acquire voting and investment power over securities. At this point, the aggregation relief in section 8.1 will terminate. Depending on the relevant circumstances, a branch may dispose of the securities, retain actual control of the realized securities or move the securities to another business unit within a bank for actual control. The CBA submitted that where a branch retains actual control and the conditions in section 5.1 are satisfied, the bank should be relieved from aggregating the securityholdings of the branch with its other securityholdings. The CBA suggested this issue could be clarified by including a specific reference to branches (or portions of branches) in the definition of "business unit".

The IDA requested clarification of how Part 8 would be applied in relation to shares held in margin accounts, whether or not the margin loans have crystallized. In other words, by the mere fact that "a broker/dealer has pledged their securities as margin loans", must they aggregate all margin loans that are above the de minimis accounts provided for in section 8.2?

The IDA also submitted that relief should be granted to IDA members from the applicable provisions and the applicable definitions in situations where a broker/dealer calls in a margin loan and sells its security. When a margin loan is called in, a broker/dealer seldom takes such securities into inventory, but instead sells usually the securities immediately into the market, and therefore only "owns" the securities for as little as a few minutes. To require reporting for such holdings would impose an excessive compliance burden and may be misleading to the market.

Ogilvy also inquired why the relief provided to financial institutions under Part 8 was not also available to brokers holding security interests in securities.

The Securities Subcommittee stated that it was unclear under section 8.1 whether the relief for pledgees applies even if the pledgees have and exercised the right to vote the pledged securities. The Securities Subcommittee suggested that consideration be given to expand subsection 8.1(2) to include circumstances where the pledgee has and exercises the right to vote the securities prior to being legally entitled to dispose of the securities.
Romano also stated that relief should extend until a decision to act has been made by a pledgee. Romano stated that otherwise, there would be cross-border inconsistencies and unnecessary costs.

CSA Response

The CSA have amended Part 8 to extend the relief to any person or company that, in effect, takes security on loans as part of its ordinary business.

In response to the CBA's point on the trigger point for the end of the relief provided by subsection 8.1(1), the CSA have not changed the basic approach of subsection 8.1(2). A pledgee's relief should end when it is legally entitled to dispose of the securities in question; that is, when it has taken all necessary steps under both the relevant agreements and applicable statutes to be able to sell. The CSA have amended subsection 8.1(2) by replacing the word "if" with the words "at any time that" for greater clarity.

Section 8.2

The Securities Subcommittee stated that the requirement in paragraph 8.2(b) that the pledged securities not be voting or equity securities is somewhat mystifying, as, if the pledged securities are not voting or equity securities, the pledgee is not subject to the reporting requirements. Romano raised the same point.

The CBA commented that the de minimis relief in section 8.2 was wrongly structured. The CBA argued that de minimis relief is not required "for securities that are controlled by a financial institution as a pledgee"; during those times, the pledged relief in section 8.1 should provide the necessary aggregation relief. Rather, the CBA argued that the de minimis relief is important for financial institutions in the "realization mode". At this point, the financial institution acquires actual control of the securities and is not a "pledgee" within the meaning of the National Instrument. The CBA also raised the issue as to why the relief extended only to non-voting or non-equity securities.

CSA Response

The CSA have amended section 8.2 to clarify its intent. Section 8.2 now provides that the de minimis relief is available if the principal amount of debt is less than $2,000,000 unless the pledged securities, and securities into which they are convertible, exercisable or exchangeable, constitute 10 percent or more of a class of voting or equity securities.

Part 9 - Insider Reporting Exemption

Section 9.1

The CBA and Ogilvy suggested that affiliates or associates of eligible institutional investors should qualify for the insider reporting exemption.

IFIC raised concerns with the conditions to relief under subsection 9.1(1). IFIC urged the deletion of paragraphs (b) and (c) on the basis that if an eligible institutional investor has or receives knowledge of any material fact or material change with respect to the reporting issuer that has not been generally disclosed, that knowledge should not automatically characterize the investor as being not "passive".

The CBA objected to the requirement contained in section 9.1 that the eligible institutional investor must maintain continuous insider reporting records. The CBA suggested that the existing regulatory burden is associated in substantial part with the need to keep records that enable a filer to prepare the reports, not with respect to the filing of reports directly.

IFIC urged the deletion of paragraphs 9.1.(1)(b) and (c) on the basis that failure to comply with those paragraphs should not disqualify an eligible institutional investor from being considered "passive". IFIC made a similar point with respect to the corresponding provisions of subsection 2.1(1) of National Instrument 62-101.

The CBA urged that paragraphs (d) and (e) of subsection 9.1(1) be removed on the basis that they were overly restrictive. The CBA stated that the restriction contained in paragraph 9.1(c), that an eligible institutional investor not possess inside information, should be sufficient to protect the market from abuse.

RT also objected to paragraph 9.1(1)(d). RT argued that in the ordinary course of business, it is possible for an investment manager to be provided with such factual information about issuers that is not generally disclosed; however, this should not disqualify an investment manager from being considered "passive". RT also argued that it is unfair to require an investment adviser to determine whether information it obtains about an issuer is material.

Romano referred to paragraph 9.1(1)(a), which refers to a "current" securityholding position. Because of ambiguities as to the meaning of "current", Romano suggested that the conditions in paragraph (a) simply be that the eligible institutional investor has filed all required reports.

Romano commented that paragraph 9.1(1)(e) should facilitate the nomination of unaffiliated and unrelated independent directors, which may well benefit all shareholders.
Romano queried as to how long subsection 9.1(2) would require the maintenance of records.

Romano argued that subsection 9.1(3) should include the words "an insider of a reporting issuer and that is" before the word "filing", to clarify that it only applies to 10% and plus situations.

Romano suggested that in paragraph 9.1(3)(b), one may not know the date of the issuer's action to determine whether one has taken any action since that date.

CSA Response

The conditions to the insider reporting provided by section 9.1 have not been materially changed by the CSA in response to the comments. The CSA consider each such condition important to the relief provided by the section. The CSA note that this relief is designed only for eligible institutional investors that do not have, and are not in a position to have, inside information concerning the subject reporting issuer in the ordinary course of its activities. The exemptions provided by this Instrument are only for eligible institutional investors that do not have a close relationship with a subject issuer.

With respect to the comment concerning the maintenance of records, the CSA believe that ordinary principles of record retention should apply in these circumstances.

Section 11.1

Romano inquired whether any remedy for an appeal to the Ontario Securities Commission of a director's decision under subsection 11.1(1) is possible, pending the proposed changes to Section 8(1) of the Act. If not, is it appropriate to limit relief to the director?

CSA Response

The Ontario Commission notes that subsection 8(1) referred to in Romano's comment is a reference to the proposed "Red Tape Amendment" considered by the Ontario legislature prior to dissolution of the legislature before the 1999 provincial election. Subsection 8(1) would have provided the Commission with a general power to review any decision made by the Director. The Ontario Commission notes that, even without the proposed amendment to subsection 8(1), subsection 8(2) of the Ontario Act allows "any person or company directly affected by the decision of the Director" to request and be entitled to a hearing before the Commission in connection with a decision of the Director. Subsection 8(3) then provides the Commission with the power to "by order confirm the decision under review or make such other decision as the Commission considers proper".

Appendices E and F

Romano argued that paragraph 1(a) should expressly require the name of the reporting issuer. In paragraph 1(d), if there is shared control, is it required to be disclosed under (i), (ii) or neither, in light of the wording in (iii)?

CSA Response

Paragraph 1(a) has been changed to explicitly require disclosure of the name of the reporting issuer. No changes are necessary to paragraph 1(d).

Appendix F

Romano stated that paragraph 1(b) seems unnecessary and likely to lead to potentially serious premature disclosure or else a statement that the person no longer intends to rely on the relief without more. Paragraph 1(c) should expressly require the name of the reporting issuer. Paragraph 1(i) is not appropriate here.

CSA Response

Paragraph 1(c) has been amended to explicitly require disclosure of the name of the reporting issuer. No other changes are necessary.

TIPs/HIPs

Romano inquired whether it was possible to extend HIPs and TIPs early warning reporting relief (as per July 31, 1995 and March 12, 1996 OSC Orders) to the alternative monthly reporting system.

CSA Response

The CSA are not providing that relief at the present time.