

**13.1.5 Notice of Approval – Application to Vary the Recognition and Designation Order of CDS Ltd.**

**APPLICATION TO VARY THE RECOGNITION AND DESIGNATION ORDER  
OF THE CANADIAN DEPOSITORY FOR SECURITIES LIMITED**

**NOTICE OF APPROVAL**

On October 17, 2006, the Commission issued an order (“Recognition Order”) pursuant to subsection 21.2(1) and section 144 of the *Securities Act* (Ontario) varying and restating the current recognition and designation order of The Canadian Depository for Securities Limited (“CDS Ltd.”) as a clearing agency, and recognising and designating a new wholly-owned subsidiary of CDS Ltd., CDS Clearing and Depository Services Inc. (“CDS Clearing”), as a clearing agency.

The Commission published for comment the CDS application for a variation on September 8, 2006 at (2006) 29 OSCB 7323. No comments were received.

By letter dated October 4, 2006, (attached as Appendix “A”) CDS Ltd. advised of certain changes to the information provided in the initial application letter dated August 30, 2006. The original intention was to have the board of CDS Clearing mirror the board of CDS Ltd., however, it has since been decided that CDS Ltd. will, pursuant to a unanimous shareholder agreement, assume responsibility for managing, or supervising management of, the business and affairs of CDS Clearing. The recognition and designation order has been revised to reflect this change. (The revised order (without the attached schedule and appendices) is attached as Appendix “B”). The amendments to the recognition and designation order are not material.

No other revisions have been made to the CDS Recognition Order.

APPENDIX "A"

Cindy Petlock  
Manager, Market Regulation  
Ontario Securities Commission  
20 Queen Street West, Suite 800  
Toronto, Ontario  
M5H 3S8

October 4, 2006

Dear Ms. Petlock:

**Re: Restructuring of The Canadian Depository for Securities Limited ("CDS Ltd.")**

Further to our letter of August 30, 2006, in relation to this matter, this letter is to notify you of one change to the proposed Restructuring of CDS Ltd. as set out in the original letter. Specifically, our intention had been to have mirror boards for CDS Ltd. and CDS Clearing (as well as the other non-regulated subsidiaries), but we have determined, as an interim measure, to enter into a Unanimous Shareholder Agreement ("USA") between CDS Ltd. and CDS Clearing whereby all the rights, powers, duties and liabilities of the directors of the subsidiary corporation are transferred to the parent during the term of such agreement.

**A. Background**

CDS Clearing was incorporated on August 18, 2006. Five "office incorporators" were named as its first directors: Ian Gilhooley, Chief Operating Officer; Steve Blake, Chief Financial Officer; Mark Weseluck, Executive Director, Customer Service and Product Development; Keith Evans, Executive Director, Operations; and, Toomas Marley, Chief Legal Officer; each an officer of CDS Ltd. The use of office incorporators enabled the expeditious incorporation of the company, adoption of by-laws and banking resolutions and the conduct of other administrative matters for the organization of CDS Clearing. At that time, the intention was to replace these office incorporators on November 1, 2006, with the CDS Ltd. board members, thereby creating the mirror boards.

As indicated in the August 30<sup>th</sup> letter, there are various corporate governance matters which are being dealt with by the board of CDS Ltd. Additionally, as a result of a review by the CDS Ltd. shareholders' committee of reports relating to corporate governance and a strategic evaluation of CDS Ltd., the shareholders determined to appoint four new members to the board of CDS Ltd. In view of these developments and to continue to maintain the status quo in respect of the corporate governance of both CDS Ltd. and CDS Clearing, it was determined that the mechanism of an USA would be used as an interim measure until the governance issues are resolved.

**B. Unanimous Shareholder Agreement**

The USA is created under section 146 of the Canada Business Corporations Act under which both CDS Ltd. and CDS Clearing are incorporated. Sub-section (1) provides as follows:

"An otherwise lawful written agreement among all the shareholders of a corporation, or among all the shareholders and one or more persons who are not shareholders, that restricts, in whole or in part, the powers of the directors to manage, or supervise the management of, the business and affairs of the corporation is valid."

The effect of an USA is set out in sub-section (5):

"To the extent that a unanimous shareholder agreement restricts the powers of the directors to manage, or supervise the management of, the business and affairs of the corporation, **parties to the unanimous shareholder agreement who are given that power to manage or supervise the management of the business and affairs of the corporation have all the rights, powers, duties and liabilities of a director of the corporation**, whether they arise under this Act or otherwise, including any defences available to the directors, and **the directors are relieved of their rights, powers, duties and liabilities**, including their liabilities under section 119, to the same extent." (Emphasis added.)

A draft of the proposed USA between CDS Ltd. and CDS Clearing, including as parties also the five office incorporators as directors, is attached. The USA gives the shareholder, CDS Ltd., all of the rights, powers, duties and liabilities of the directors of CDS Clearing. Following execution of the USA on November 1, 2006, the CDS Clearing directors will be nominal directors to satisfy corporate law requirements, but all power to manage or supervise the management of the business and affairs of CDS Clearing will be vested in CDS Ltd.

**C. Original Application Letter**

It is noted that the original Application letter was drafted in a general way such that the following governance-related statements remain correct as written:

"Until such time as the outstanding corporate governance issues are resolved, CDS Ltd. will maintain its current board structure and the existing arrangements with its shareholders including any pooling agreement(s) between its shareholders." (p. 2)

"The responsibilities of the CDS Ltd. Board will be to govern the affairs of CDS Ltd. as an owner of three wholly-owned, separate and independent subsidiaries." (p. 2)

"Separate management teams will be responsible for the day-to-day operations of each of the subsidiaries." (p. 2)

"The responsibilities of the CDS Ltd. Board of Directors will be to govern the affairs of CDS Ltd. as the owner of three separate and independent operating companies." (p. 3)

The only reference to mirror boards is under the heading of "Governance" on p. 5:

"The board of directors of CDS Clearing will mirror the board of directors of its parent company, CDS Ltd. and, as such, the governance structure will be identical."

It is our respectful submission that the USA satisfies the same intent as the appointment of mirror boards in that the power to manage or supervise the management of CDS Clearing will be in the hands of the same directors.

**D. Recognition Order**

The Recognition Order published upon September 8, 2006, does not mandate mirror boards, although it was prepared in contemplation of such. The Commission may wish to consider an additional recital in the Recognition Order as follows:

"**AND WHEREAS** CDS Ltd. will enter into an Unanimous Shareholder Agreement with CDS Clearing whereby all the powers to manage or supervise the management of the business and affairs of CDS Clearing will be transferred to CDS Ltd. on a temporary basis."

**E. Conclusion**

We thank you for your attention to this matter which will assist in the Restructuring of CDS without impacting the intent of the Governance provisions therein.

Sincerely,

"Toomas Marley"

Toomas Marley  
Chief Legal Officer  
CDS Ltd.

**APPENDIX "B"**

**IN THE MATTER OF  
THE SECURITIES ACT,  
R.S.O. 1990, CHAPTER S.5, AS AMENDED ("Act")**

**AND**

**IN THE MATTER OF  
THE BUSINESS CORPORATIONS ACT,  
R.S.O. 1990, CHAPTER B.16, AS AMENDED ("OBCA")**

**AND**

**IN THE MATTER OF  
THE CANADIAN DEPOSITORY FOR SECURITIES LIMITED**

**AND**

**CDS CLEARING AND DEPOSITORY SERVICES INC.**

**AMENDMENT TO RECOGNITION AND DESIGNATION ORDER  
(Subsection 21.2(1) and Section 144 of the Act and Part VI of the OBCA)**

**WHEREAS** the Ontario Securities Commission ("Commission") issued an order dated February 25, 1997 ("1997 Order"), which became effective on March 1, 1997, recognizing The Canadian Depository for Securities Limited ("CDS Ltd.") as a clearing agency pursuant to subsection 21.2(1) of the Act and designating CDS Ltd. as a recognized clearing agency pursuant to Part VI of the OBCA;

**AND WHEREAS** the Commission issued an order dated July 12, 2005 ("2005 Order") varying and restating the 1997 Order;

**AND WHEREAS** the Commission issued an order dated January 9, 2006 ("2006 Order") varying the 2005 Order (the 2005 Order, as amended by the 2006 Order, referred to as the "Current Recognition Order");

**AND WHEREAS** CDS Ltd. has applied for an order pursuant to section 144 of the Act to vary the Current Recognition Order;

**AND WHEREAS** CDS Ltd. plans to restructure its businesses on or after November 1, 2006 ("Restructuring Date") into separate operating subsidiaries, one of which will be CDS Clearing and Depository Services Inc. ("CDS Clearing");

**AND WHEREAS** CDS Clearing shall assume responsibility for all of the existing securities clearing, settlement, and depository services ("Settlement Services") and necessary assets and liabilities from CDS Ltd.;

**AND WHEREAS** CDS Ltd., pursuant to unanimous shareholder agreement ("USA"), will be given the power to manage or supervise the management of CDS Clearing and will acquire all the rights, powers, duties and liabilities of the directors of CDS Clearing, and the directors of CDS Clearing are relieved of their rights, powers, duties and liabilities to the same extent;

**AND WHEREAS** CDS Ltd. shall provide certain support functions to CDS Clearing, including information technology development, maintenance and operations, legal services, risk management, financial management and support, human resources, internal audit, facilities management, and executive governance and communications, and such provision of support functions shall be governed by a services agreement between CDS Ltd. and CDS Clearing;

**AND WHEREAS** the Commission has received certain other representations and undertakings from CDS Ltd. and CDS Clearing in connection with the application of CDS Ltd. to vary the Current Recognition Order;

**AND WHEREAS** the Commission considers it appropriate to set out in the order terms and conditions for the recognition of each of CDS Ltd. and CDS Clearing as a clearing agency under the Act, which terms and conditions are set out in Schedule "A" attached;

**AND WHEREAS** the Commission considers that, for the purposes of the terms and conditions set out in Schedule "A", and for the duration of the USA, the board of directors of CDS Ltd. shall be considered to be the board of directors of CDS Clearing;

**AND WHEREAS** CDS Ltd. and CDS Clearing have each agreed to the respective terms and conditions as set out in Schedule "A";

**AND WHEREAS** the terms and conditions set out in Schedule "A" may be varied or waived by the Commission;

**AND UPON** the Commission being of the opinion that it is not prejudicial to the public interest to vary the Current Recognition Order;

**AND UPON** the Commission being satisfied that it is in the public interest to continue to recognize CDS Ltd. as a clearing agency pursuant to subsection 21.2(1) of the Act;

**AND UPON** the Commission wishing to continue to designate CDS Ltd. as a recognized clearing agency for the purposes of Part VI of the OBCA;

**AND UPON** the Commission being satisfied that it is in the public interest to recognize CDS Clearing as a clearing agency pursuant to subsection 21.2(1) of the Act;

**AND UPON** the Commission wishing to designate CDS Clearing as a recognized clearing agency for the purposes of Part VI of the OBCA;

**IT IS ORDERED** pursuant to section 144 of the Act that the Current Recognition Order be varied and restated in the form of this order;

**THE COMMISSION HEREBY RECOGNIZES** each of CDS Ltd. and CDS Clearing as a clearing agency pursuant to subsection 21.2(1) of the Act, subject to the terms and conditions set out in Schedule "A";

**AND THE COMMISSION HEREBY DESIGNATES** each of CDS Ltd. and CDS Clearing as a recognized clearing agency for the purposes of Part VI of the OBCA.

DATED \_\_\_\_\_, 2006, to be effective on the Restructuring Date.