

December 5, 2018

Delivered via email

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission (New Brunswick)
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island
Nova Scotia Securities Commission
Securities Commission of Newfoundland and Labrador
Registrar of Securities, Northwest Territories
Registrar of Securities, Yukon Territory
Superintendent of Securities, Nunavut

The Secretary
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Me Anne-Marie Beaudoin
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Autorité des marchés financiers
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consultation-en-cours@lautorite.qc.ca

Dear Sirs/Mesdames,

Re: CSA Proposed National Instrument 52-112 *Non-GAAP and Other Financial Measures Disclosure*

The Canadian Bankers Association (CBA)¹ is pleased to provide feedback to the Canadian Securities Administrators (the CSA) on their Proposed National Instrument 52-112 *Non-GAAP and Other Financial Measures Disclosure* (the Proposed Instrument) and the accompanying Proposed Companion Policy 52-112 published on September 6, 2018 (the Proposed Companion Policy, and together with the Proposed Instrument, the Proposal).

We are generally supportive of the Proposal and agree that adopting comprehensive disclosure requirements rather than limits and industry-specific requirements will improve the overall quality of disclosure and be of benefit to investors. We appreciate the clarifications in certain areas and find the

¹ The CBA is the voice of more than 60 domestic and foreign banks that help drive Canada's economic growth and prosperity. The CBA advocates for public policies that contribute to a sound, thriving banking system to ensure Canadians can succeed in their financial goals. www.cba.ca.

examples useful for financial statement preparers to ensure that we are in alignment with the expectations of the CSA.

Improving the quality of information provided to investors can enable them to better analyze financial measures. However, this can only be achieved if communications to investors are clear and concise, avoiding complex disclosures which provide limited benefit to readers. With this in mind, we would like to highlight the following observations with respect to the Proposal for your consideration:

- **Cross-referencing:** The Proposed Companion Policy requires an issuer to present non-GAAP requirements in a separate section within the same document. This implies that cross referencing between documents is not permitted under the Proposal, which we believe would be overly burdensome for issuers, duplicative and inconsistent with the CSA's general assent to cross referencing. For example, if the adjusted efficiency ratio is referenced in multiple documents, requiring a detailed explanation of how the ratio is calculated within the document would not necessarily be more useful in comparison to a cross-reference to a filed securities document, such as an issuer's report to shareholders. We believe cross-referencing should be explicitly allowed between documents in order to avoid duplicative disclosures, and to ensure that the disclosure process is practical for shorter documents (i.e. press releases, investor presentations, etc.). We also note that the CSA specifically allows for cross-referencing in other contexts and documents, including an issuer's annual information form, which is a core disclosure document.
- **Jurisdictions:** The Proposed Instrument is not applicable to "specific financial measures in accordance with a requirement of securities legislation or the laws of a jurisdiction of Canada." As issuers in a highly regulated industry, a number of our disclosures are required or recommended by regulators other than securities regulators and other than through laws or legislation in Canada (ie. Tier-1 capital and liquidity ratios). We believe that the CSA should expand the exception in section 2(2) of the Proposed Instrument to disclosures recommended under any applicable system of regulation regardless of jurisdiction, which would be consistent with other securities regulators' approach to non-GAAP financial measures, including the US Securities and Exchange Commission (SEC).
- **Written transcripts:** Although oral statements are exempted from the Proposed Instrument, the Proposed Companion Policy scopes in written transcripts of oral statements. While oral statements and written transcripts are different forms of communication, they hold the same message and should be treated the same. If issuers are required to comply with the proposed requirements with respect to written transcripts, the Proposal could serve as a disincentive for making transcripts available. Accordingly, we request that the CSA specifically scope out written transcripts from the Proposal. Alternatively, if cross referencing is permitted, the scoping in of written transcripts would be appropriate.
- **Scope:** Section 2(2) of the Proposed Instrument is overly broad and it is not sufficiently clear how section 2(2) of the Proposed Instrument interplays with section 2 of the Proposed Companion Policy. For example, it is not clear whether a non-GAAP financial measure captured by section 2(2) of the Proposed Instrument would be exempted from application if the content presented in the document would not reasonably be expected to affect the market price or value of an issuer's security. We believe that the qualifier in section 2 of the Proposed Companion Policy should exempt a document from application under section 2(2) of the Proposed Instrument, however, we would appreciate confirmation from the CSA. To clarify, if a measure is intended to be made available to the public and is not disclosed in accordance with securities legislation and is also not reasonably expected to affect the market price or value of an issuer's security, then the measure should be explicitly exempted. We also believe that the "market price or value" qualifier is critical and should

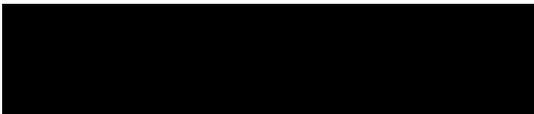
be in the Proposed Instrument rather than the Proposed Companion Policy. We recommend that section 2(2) of the Proposed Instrument be more comprehensive and outline all the qualifiers for application with the Proposed Companion Policy providing examples of documents that could reasonably affect an issuer's market price or value. In addition, the criteria for application set out in the current Proposal do not take into account the purpose of the document, the intended reader or the usefulness of the information required by the Proposal for such reader. We request that the CSA consider limiting the Proposed Instrument to documents that are intended to be used by the investment and/or analyst community as it would be inappropriate to include unrelated documents, such as marketing documents, for which the user of the information would not be expecting the data to be in accordance with IFRS standards.

- **Transition Period:** Given the breadth and scope of the Proposal, issuers will need time to ensure that processes are in place to enable compliance. Accordingly, we ask that the CSA consider a one-year transition period.

Please refer to Appendix I for our responses to the specific questions outlined in the CSA's "Request for Comments".

We would be pleased to elaborate on our comments in more detail if you require.

Sincerely,

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Appendix I

Specific questions raised in the CSA Proposed National Instrument 52-112 Non-GAAP and Other Financial Measures Disclosure

1. Does the proposed definition of a non-GAAP financial measure capture (or fail to capture) specific financial measures that should not (or should) be captured? Please explain using concrete examples.

- Section 2(2) of the Proposed Instrument states “this Instrument applies to any non-GAAP financial measure, segment measure, capital management measure or supplementary financial measure that an issuer discloses in a document and that is intended to be, or reasonably likely to be, made available to the public in the local jurisdiction, whether or not filed under securities legislation, **unless the issuer discloses a specific financial measure in accordance with a requirement of securities legislation or the laws of a jurisdiction of Canada.**” A number of our disclosures, however, are required or recommended by regulators other than securities regulators and other than through laws or legislation in Canada (ie. Tier-1 capital, Risk-weighted assets, leverage ratio, liquid assets). We presume that the Proposal is not intended to apply to financial measures defined by regulations such as the Enhanced Disclosures Task Force (EDTF) and Basel Pillar 3, for example, however, this is unclear. Such disclosures are calculated using complex models which cannot be practically reconciled to a financial statement line item. Similar to the SEC’s regulation S-K, which exempts financial measures required by SEC rules or a system of regulation of a government or government authority or self-regulatory organization, we request that the CSA expand the exception in section 2(2) to (1) requirements from any jurisdiction to which the issue is subject and (2) financial measures required (or recommended) by any applicable system of regulation
- Segment measures within the audited financial statements would be scoped out of the Proposed Instrument, however, there are a number of instances where we may provide more granular financial information to enable analysts and users to better understand certain areas of focus. For example, the residential mortgages of Segment A by geography. We feel that these financial measures should not be scoped in as a non-GAAP measure if amounts are calculated in accordance with the accounting policies used to prepare the financial statements. As such, we request that the CSA consider revising Section 6, Disclosure of segment measures, of the Companion Policy to clarify that financial measures disclosed in accordance with accounting policies used to prepare the financial statements would be not subject to the Section 3 requirements in the Proposed Instrument. We would like to make a similar request for Section 8, Supplemental financial measures, in the Proposed Instrument. Requiring reconciliations to the financial statement line items would also add complexities, which would not necessarily be useful to the reader and may result in confusion of acceptable accounting disclosures.

2. Are there any specific additional disclosures not considered in the Proposed Instrument, that would significantly improve the overall quality of disclosure and be of benefit to investors? Please explain using concrete examples.

We have not identified any additional disclosures.

3. Is specific content in the Proposed Companion Policy unclear or inconsistent with the Proposed Instrument?

- Section 3(c) of the Proposed Instrument requires issuers to present the same non-GAAP financial measure for the comparative period yet the Proposed Companion Policy implies that compliance is not required where it would not be feasible, noting that this would be “only in rare circumstances, such as in the first period of operations where no comparative period exists.” There are a number of other instances, however, where a comparative period would not be appropriate, such as a non-GAAP financial measure that excludes specified items like a gain on a sale of a business. These instances would not necessarily be “rare”. Accordingly, we request that the CSA delete the reference to “rare circumstances” as feasibility is a sufficient qualifier. Alternatively, we request that the CSA provide further examples of when it would not be feasible or appropriate to present the same non-GAAP financial measure for a comparative period.
- We note that the CSA has adopted the concept of "reasonable person" under section 3(d) and 7(2) of the Proposed Instrument. However, in the Proposed Companion Policy, the CSA refers to the concept of "investors" in addition to "reasonable person". We note that the previous CSA guidance on non-GAAP measures referred to "investors" which is consistent with the non-GAAP rules and guidance issued by the SEC. While it is not clear if the CSA intended to make a distinction between an "investor" and a "reasonable person", in our view, the adoption of the latter could cause confusion as to how issuers think about their disclosure obligations as it deviates from the previous standard (this is especially true in light of the fact that the "reasonable person" standard is prevalent in common law tort cases as opposed to securities law matters). We request that the CSA revert to the concept of “investors” to be consistent with previous CSA and SEC guidance.

4. *Is the proposed exemption for SEC foreign issuers appropriate? If not, please explain.*

- The exemption for SEC foreign issuers is appropriate. Similarly, SEC Regulation G and Item 10(e) do not apply to filers that use Form 40-F under the Multi-Jurisdictional Disclosure System (which applies to eligible Canadian issuers).

5. *Is the proposed exclusion of oral statements to the application appropriate? If not, please explain.*

- Yes, we consider that the proposed exclusion of oral statements is appropriate. Although oral statements are exempted from the Proposed Instrument, Section 2 of the Proposed Companion Policy scopes in written transcripts of oral statements. While oral statements and written transcripts are different forms of communication they hold the same message and should be treated the same. In addition, written transcripts are typically posted shortly after oral statements are made and allow the investors and analysts to review management’s statements in greater detail. This could not be achieved efficiently or expediently if issuers are required to comply with the Proposal requirements, which could serve as a disincentive for making transcripts available to investors. We request that the CSA specifically scope out written transcripts from the Proposed Instrument and Proposed Companion Policy. Alternatively, if cross referencing is permitted, the scoping in of written transcripts would be appropriate.

6. *Is the proposed inclusion of all documents to the application appropriate? If not, for which documents should an exclusion be made available? Please explain.*

- The inclusion of the documents in Section 2(2) of the Proposed Companion Policy is too broad and insufficiently clear, particularly with respect to those that are not required to be filed with the securities regulatory authority (i.e., any other communication, including information presented on websites and social media) the content of which would be reasonably expected to affect the market price or value of a security of the issuer. It will be very difficult to determine whether a particular

document would reasonably be expected to affect the market price or value of a security of the issuer. For example, information related to the launch of new products, peer analysis (issued by third parties), market studies, and employee communications would be particularly difficult to assess. In addition, the criteria for application set out in the current Proposal does not take into account the purpose of the document, the intended reader or the usefulness of the information required by the Proposal for such reader. We request that the CSA consider limiting the Proposal to documents that are intended to be used by the investment and/or analyst community (i.e. IR material, external reporting material, prospectuses and other regulatory filings) as it would be inappropriate to include unrelated documents, such as marketing documents, the users of which would not be expecting the data to be in accordance with generally accepted accounting standards. We note that if the Proposal's scope is too broad, this could create issues with respect to ensuring compliance. Practically speaking, issuers will have to significantly broaden their disclosure controls, which will be overly burdensome and costly.

- Furthermore, executive compensation disclosures are scoped into the Proposal because they are filed with the securities regulatory authority, however, we ask that executive compensation disclosures be explicitly scoped out as the non-GAAP disclosure requirements would not be useful to a reader and compliance would be overly burdensome for issuers.