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BY 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

c/o

The Secretary
Ontario Securities Commission
Email: comments@osc.gov.on.ca

M^{e} Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
Email: consultation-en-cours@lautorite.qc.ca

Dear Sirs/Mesdames:

CSA Notice and Request for Comment – Proposed National Instrument 52-112 *Non-GAAP and Other Financial Measures Disclosure*

We are writing in response to CSA Notice and Request for Comment – Proposed National Instrument 52-112 *Non-GAAP and Other Financial Measures Disclosure* (the "**Proposed Instrument**") which, together with the related proposed companion policy (the "**Proposed Companion Policy**") and other proposed consequential amendments, is intended to replace CSA Staff Notice 52-306 (Revised) *Non-GAAP Financial Measures* ("**SN 52-306**").

We acknowledge that current disclosure practices surrounding non-GAAP financial measures vary among issuers, and support the CSA's overall objective of mandating disclosure requirements to ensure transparency and context in circumstances where it is necessary to prevent disclosure of these measures in a manner that is misleading to investors. However, in establishing a new framework that moves away from a policy-based approach for non-GAAP financial measure disclosure (as was the case in the existing guidance of SN 52-306) to a rules-based approach that governs more than just non-GAAP financial measures, we think it is critical to assess: (i) whether all of the additional disclosure which is mandated under the Proposed Instrument is necessary in order to ensure that the investing public is not misled; and (ii) whether issuers may have difficulty complying with elements of the new rules, particularly as the scope of the Proposed Instrument encompasses measures not previously addressed in SN 52-306.

It is also important that the CSA take a balanced and measured approach to ensure that the new framework does not result in an increased regulatory burden on issuers that is disproportionate to, or otherwise unnecessary to achieve, the objective of that framework. As part of this balance, the CSA should consider whether an alternative and more practical approach could achieve the CSA's objective without the associated burden. We note that the Canadian securities regulators are currently focused on initiatives to reduce burdens on issuers involving disclosure obligations.[1] This objective of streamlining and modernizing Canadian disclosure obligations should be respected in establishing a new regime for the disclosure of non-GAAP financial measures.

Requirement to Present All of the Prescribed Disclosure in the Same Document

As drafted, the Proposed Instrument would apply to all documents that are intended to be, or are reasonably likely to be, made available to the public in Canada[2] with a narrow exception for specified and supporting documents and material contracts. Accordingly, in addition to regularly scheduled (or 'periodic') reports (e.g., Management's Discussion and Analysis) and other "core documents"[3] of an issuer (e.g., prospectuses), the Proposed Instrument would apply to all current disclosures (such as press releases and written transcripts) and other written disclosures (such as investor presentations and other marketing materials) contained in documents whose timely release and focused messaging is critical for efficient markets. We acknowledge that the prescribed disclosures for non-GAAP financial

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1 For example, see CSA Consultation Paper 51-404 *Considerations for Reducing Regulatory Burden for Non-Investment Fund Reporting Issuers* and the update contained in CSA Staff Notice 51-353.

2 We note there is a typographical error, and that the "and" after the word "document" should be deleted since it is the public availability of the document (not the measure) that triggers application of the disclosure required by this rule. For clarity, we suggest defining what constitutes a "document" within the Proposed Instrument. Further, we suggest correcting the Proposed Companion Policy, which has imported the definition of "document" that is used in the Ontario Securities Act's provision governing civil liability for secondary market disclosure (section 138.1). This is inconsistent with subsection 2(2) of the Proposed Instrument, which refers to documents that are reasonably expected to be made available to the public. No policy objective is served by expanding the application of the Proposed Instrument to documents that are simply filed with a governmental authority if there is no intention or expectation that the document will be publicly available to the investors that the prescribed disclosure of the Proposed Instrument is designed to protect.

3 As defined in section 138.1 of the Ontario Securities Act.

measures may be appropriate in many circumstances in order to meet the policy objective of the Proposed Instrument; however, to serve that policy objective, we do not believe it is necessary or appropriate that all of the detailed disclosure prescribed by paragraphs 3(c) and 3(d) of the Proposed Instrument be presented in every document publicly released by an issuer that contains non-GAAP financial measures if such disclosure is already contained in one of the issuer's "core documents".

Reconciliations of non-GAAP financial measures can be a detailed and complex process which necessitates the involvement and oversight of key members of an issuer's accounting and finance teams, and can give rise to multiple pages of additional disclosure. In the context of preparing periodic reports, issuers can allocate the necessary time and resources to ensure that these reconciliation calculations are properly prepared to provide meaningful disclosure to investors. In contrast, issuers are often under significant time pressures to issue a press release or other documents containing event driven or other current disclosure in a timely manner. In these cases, the requirement to include detailed reconciliation tables, footnotes and schedules is often a significant burden, and difficult to justify where that disclosure is already included elsewhere in periodic reports that are easily accessible to the investing public. Additionally, management's explanation of why it believes specific non-GAAP financial measures are useful and the purposes for which they are used is also often lengthy and detailed disclosure. The requirement to include all of this detailed disclosure in press releases and other non-core documents can unduly complicate and obscure the more critical disclosure in the document. The end result is that an issuer may have to delay the release of a time sensitive disclosure document in order to include all of the detailed disclosure prescribed by paragraph 3(c) or 3(d) of the Proposed Instrument, or risk having errors in such prescribed disclosure in order to get the more critical disclosure within the document disseminated in a timely manner. In our view, timely disclosure that is not delayed or obscured by mandated regulatory disclosure that is easily (and quickly) accessible elsewhere should be the objective of a modern disclosure regime.

To address these concerns, we propose an accommodation for all documents (other than transcripts which we discuss separately below) that are not "core documents", which clearly and appropriately label non-GAAP financial measures as such (when they first occur in the document). In these circumstances, an issuer should be allowed to satisfy the other disclosure requirements of paragraphs 3(c) and 3(d) of the Proposed Instrument (such as reconciliations and management's explanations of the rationale for using non-GAAP financial measures) through a footnote or endnote that cross-references to the required disclosure in the issuer's existing Management's Discussion and Analysis or another "core document" of the issuer filed on SEDAR, or through a hyperlink to the relevant "core document" posted on the issuer's website. As a practical matter, an investor is almost certain to access a press release through the Internet. It should follow, therefore, that accessing the additional prescribed disclosure (whether from SEDAR or the issuer's website) would require just another 'click'. In any event, given the extremely high levels of Internet penetration in Canada,[4] this disclosure will be readily available to all investors. Canadian short form prospectus rules, which allow

[4] The CIA World Factbook estimated internet penetration in Canada in July 2016 at approximately 89.8%, more than 13% higher than the United States (76.2%), where online disclosure is already considered by the SEC to satisfy the requirement for public dissemination. See: https://www.cia.gov/library/publications/the-world-factbook/fields/2153.html.

the incorporation of documents (and the critical material contained therein) by reference, evidence that the CSA is already comfortable that investors have the ability to, and do in fact, access SEDAR for critical additional information in incorporated documents. Also notable is the CSA's acknowledgment in the Proposed Companion Policy that, in certain circumstances (for example, websites and social media), it is sufficient to provide a link to the required information in paragraph 3(d) (excluding 3(d)(i)). Ultimately, our proposed accommodation simply acknowledges the reality of modern capital markets, and the role played by technology in making disclosure more efficient and accessible, while reducing the regulatory burden without compromising investor protection.

Finally, in respect of transcripts specifically, we believe that requiring compliance with the Proposed Instrument is inconsistent with the underlying purpose of a transcript (to provide an accurate and unaltered transcription of what was said during a call or presentation). By mandating the overlay of the disclosure required by the Proposed Instrument, the transcript would cease to be a true reproduction of what was said, thereby defeating its purpose. In our view, it should be sufficient, where applicable, to include a disclaimer on the cover of any transcript which states that the transcript may contain non-GAAP financial measures and include a reference to the appropriate "core document" where the disclosure mandated by the Proposed Instrument may be found. This preserves the integrity of the transcript while providing the reader with the appropriate warning regarding the treatment of non-GAAP financial measures.

Requirement to Present the "Same" Measure for Comparative Periods

We note that paragraph 3(c) of the Proposed Instrument requires that the "same" non-GAAP financial measures be presented for the comparative period. In contrast, SN 52-306 currently requires that non-GAAP financial measures be presented on a "consistent basis" from period to period. It is our view that the use of the "consistent basis" standard is more appropriate, and that the instrument should contain a general exception from this requirement to the extent that it is impractical to comply and the issuer has included sufficient disclosure to clearly identify any substantive difference in constructing that measure as between comparative periods. Disclosure of the same non-GAAP financial measure in a prior period may even be impossible in certain circumstances (such as in an issuer's first period of operations where no comparative period exists), in which case the Proposed Instrument should provide that no comparative period disclosure is required pursuant to paragraph 3(c). Absent exceptions for circumstances where it is either impractical or impossible to comply, an issuer could be in breach of paragraph 3(c) of the Proposed Instrument in circumstances where the issuer should be exempt from compliance. Requiring the issuer to apply for exemptive relief in these circumstances is an unnecessary administrative burden and may also have unintended timing implications, particularly in the context of event driven or other current disclosure.

We disagree with the CSA's observation in the Proposed Companion Policy that the disclosure required by paragraph 3(c) of the Proposed Instrument "would not be feasible only in rare circumstances". In our experience, there are a number of common scenarios where it would not be considered feasible or practical for issuers to present disclosure on exactly the same basis for comparative periods. For example, following a material acquisition (or series of acquisitions that, in the aggregate, are material), an issuer may choose to present financial measures (both GAAP and non-GAAP) on a pro forma basis that gives effect to the acquisition(s) in both the current and comparative period in

order to help investors understand other changes in the issuer's results on a comparable (or 'apples to apples') basis. However, it is often the case that the acquired entity's historical financial information is not sufficient to construct a non-GAAP measure on exactly the same basis as the issuer's presentation of that measure, because the acquired entity did not account for certain reconciling items in the same way as the issuer (or at all), or the accounting record of the acquired entity that is available to the issuer is otherwise insufficient. Similarly, in order to reflect changes in its business or industry, an issuer may replace a non-GAAP financial measure that it had historically reported with a new non-GAAP financial measure that is more relevant or otherwise more appropriate for understanding the issuer's performance. In these circumstances, the issuer may not have the necessary historical data to present the new non-GAAP financial measure for a prior period on exactly the same basis. Notably, the Proposed Instrument[5] and SN 52-306[6] both expressly contemplate circumstances where an issuer might change a previously reported non-GAAP financial measure.

Finally, and in addition to the above, we believe that a separate exception from paragraph 3(c) of the Proposed Instrument should be available for an issuer that presents a non-GAAP measure on a "LTM", or last twelve month, basis. In these circumstances, an appropriate and useful comparison may be obtained from the issuer's most recent fiscal year and its most recent and comparative interim periods from which the LTM was constructed. It should not be necessary for an issuer to construct a comparative prior twelve-month period. In the context of a prospectus offering, preparing such a prior twelve-month period would require the use of financial information that predates the financial statements included in the prospectus. This would give rise to administrative burden for which there is no corresponding investor benefit.

Requirement to Explain Quantitative Reconciliation of Non-GAAP Measure

We suggest deleting the requirement in clause (C) of subparagraph 3(d)(iv) of the Proposed Instrument. The Proposed Instrument already requires an issuer to disaggregate the reconciliation in a manner that "provides a reasonable person an understanding of the reconciling items." We also suggest deleting the guidance in the Proposed Companion Policy that an issuer should include, for each reconciling item that is not extracted directly from an issuer's primary financial statements, an explanation of how that item is calculated and the line item of the primary financial statements from which it originates. In our view, this proposed disclosure would impose an unnecessary burden in the absence of any reasonable concern that an investor may be misled without the disclosure. In practice, there are many reconciling items that are clear on their face without further explanation despite not being extracted directly from an issuer's primary financial statements. Requiring disclosure for each of these items will not benefit investors and may in fact have the opposite effect of obscuring critical detail in respect of items where further explanation is warranted (for example, the significant judgments or estimates, if any, that management has made in developing the item).

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5 See subparagraph 3(d)(v) of the Proposed Instrument.

6 See item #7 of paragraph III of SN 52-306.

As an alternative, we would suggest modifying paragraph (C) of subparagraph 3(d)(iv) of the Proposed Instrument as follows (and applying corresponding changes to the Proposed Companion Policy) to be clear that this clause does not require an explanation of a reconciling item where a reasonable investor would not otherwise be misled in the absence of the explanation:

> "[…] is explained in such a way that it provides a reasonable person an understanding of each reconciling item where, absent such explanation, there is a reasonable likelihood that the investor would be misled as to its nature or source."

Apply Guidance Rather than Rules to Govern "Other Financial Measures"

Unlike SN 52-306, the Proposed Instrument distinguishes and separately regulates certain other financial measures which are defined as Segment Measures, Capital Management Measures and Supplementary Financial Measures (collectively, the "**Other Financial Measures**"). We agree that these Other Financial Measures should be distinguished from, and should not be subject to, the same degree of disclosure mandated with respect to non-GAAP financial measures. However, given that there is not currently a separate regulatory framework for these Other Financial Measures, there is a significant risk that introducing prescriptive rules will lead to confusion among investors as to their meaning and non-compliance by issuers. This risk is exacerbated by an absence of clarity in respect of these Other Financial Measures in the Proposed Instrument and the Proposed Companion Policy.

To avoid this result, we believe that the regulation of these Other Financial Measures would benefit from further consideration by the CSA and recommend that they be removed from the Proposed Instrument and instead be addressed exclusively through guidance in the Proposed Companion Policy. This approach would allow the CSA and market participants to monitor issuers' disclosure in respect of these Other Financial Measures in practice, thus allowing the CSA to gather more information before establishing a formal set of prescriptive rules.

With respect to such guidance, the Proposed Companion Policy should suggest that where an issuer elects to disclose any Other Financial Measure, the issuer should include any additional disclosure necessary to ensure that it is not misleading to investors. This additional disclosure could include: (i) the disclosure required by section 8 of the Proposed Instrument; and (ii) in the case of Capital Management Measures, a statement that GAAP does not specify how to calculate such Other Financial Measure. Such guidance could also indicate that in certain scenarios it may be appropriate for an issuer to include a reconciliation (as currently provided by section 6(a) and 7(b)(iv) of the Proposed Instrument), but only where such a reconciliation is necessary to ensure that disclosure of these Other Financial Measures does not mislead investors. Finally, the guidance could also state that, where applicable, the Other Financial Measure should not feature more prominently than its directly comparable GAAP financial measure or similar financial measure contained within the issuer's financial statements.

Application to SEC Issuers and SEC Foreign Issuers

As drafted, the exception in the subsection 2(1) of the Proposed Instrument does not include "SEC issuers"[7] that are not "SEC foreign issuers"[8]. We believe that this exception should be broadened so that the Proposed Instrument does not apply to any SEC issuer, provided that such issuer complies with prescribed U.S. disclosure requirements in respect of non-GAAP financial measures. In the U.S., there is a well-established framework for non-GAAP financial disclosure pursuant to Regulation G[9] and Regulation S-K[10]. Although the regulation of non-GAAP financial measures in the U.S. under Regulation G and Regulation S-K is similar to the current approach under SN 52-306 (as well as the new approach under the Proposed Instrument), the regimes are not identical. To avoid duplication of efforts, and the associated administrative burden and cost, we do not believe it is necessary or appropriate to require any SEC issuers to comply with the Proposed Instrument if they are already otherwise in compliance with the disclosure requirements prescribed by the SEC. This is consistent with other Canadian disclosure obligations which may already be satisfied by SEC issuers who comply with the equivalent U.S. disclosure requirement. For example, "MD&A" is defined in National Instrument 51-102 *Continuous Disclosure Obligations* to include an SEC issuer's MD&A prepared in accordance with Item 303 of Regulation S-K. Further, exemptions are available to SEC issuers from the requirements of National Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings* by complying with the equivalent U.S. requirements.

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7 As defined in both National Instrument 51-102 *Continuous Disclosure Obligations* and National Instrument 52-107 *Acceptable Accounting Principles and Auditing Standards*.

8 As defined in National Instrument 71-102 *Continuous Disclosure and Other Exemptions Relating to Foreign Issuers*.

9 Specifically, §244.100 of Regulation G, adopted by the U.S. Securities and Exchange Commission ("**SEC**") under the *Sarbanes-Oxley Act of 2002*.

10 Specifically, §229.10 (Item 10(e)) of Regulation S-K, adopted by the SEC under the *Securities Act of 1933*, as amended, and the *Securities Exchange Act of 1934*, as amended.

The following lawyers at our firm participated in the preparation of this comment letter and may be contacted directly should you have any questions regarding our submissions.

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Yours very truly,

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