Stikeman Elliott

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Nova Scotia Securities Commission
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The Secretary
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Dear Sirs/Mesdames:

Re: CSA Notice and Request for Comment – Proposed National Instrument 52-112 *Non-GAAP and Other Financial Measures Disclosure* and Proposed Companion Policy 52-112 *Non-GAAP and Other Financial Measures Disclosure* and Related Proposed Consequential Amendments and Changes

A. INTRODUCTION

We submit the following comments in response to the Notice and Request for Comment (the "**Notice**") published by the Canadian Securities Administrators (the "**CSA**") on September 6, 2018 with respect to Proposed National Instrument 52-112 *Non-GAAP and Other Financial Measures Disclosure* ("**Proposed NI 52-112**") and Proposed Companion Policy 52-112 *Non-GAAP and Other Financial Measures Disclosure* ("**Proposed 52-112CP**"). Collectively, Proposed NI 52-112 and Proposed 52-112CP are referred to as the "**Proposed Amendments**".

Thank you for the opportunity to comment on the Proposed Amendments. This letter represents the general comments of certain individual members of our Securities practice group (and not those of the firm generally or any client of the firm) and are submitted without prejudice to any position taken or that may be taken by our firm on its own behalf or on behalf of any client.

We have organized our comments below with reference to general comments on the Proposed Amendments and then to certain specific questions posed in the Notice. Our specific comments on aspects of the Proposed Amendments are included in this latter section. All references to parts and sections are to the relevant parts or sections of the applicable Proposed Amendments.

B. General Comments

While we understand the CSA's desire to attempt to harmonize disclosure of non-GAAP measures to the extent practicable, we believe that the Proposed Amendments are over-reaching in that they apply to all issuers and are not limited in application to "reporting issuers". First, we believe that such a broad application would be very difficult to enforce given that disclosure by non-reporting issuers is not generally subject to submission or review by securities regulators. We also believe that such a proposal to broadly regulate disclosure by non-reporting issuers is counter to a number of the CSA's recent initiatives to ease restrictions in the exempt market, including recent amendments to National Instrument 45-106 *Prospectus Exemptions* ("**NI 45-106**"), which ease reporting requirements in respect of exempt distributions, particularly with respect to foreign issuers undertaking exempt distributions to institutional investors and other non-reporting issuers undertaking exempt distributions to institutional investors in Canada as part of a broader offering outside of Canada. In our view, such an expansive scope will have a restrictive effect on the exempt market with respect to the content of offering memoranda. As the content of offering memoranda is not currently regulated (save for certain mandatory requirements such as statutory rights of actions and similar requirements and outside of the exempt distributions made in reliance upon the offering memorandum exemption in section 2.9 of NI 45-106), we urge the CSA to undertake a careful review of the impact such proposal may have and whether there is any further regulatory concern with respect to the exempt market.

C. Notice Questions

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

We believe that there are certain aspects of the Proposed Amendments that are unclear and have noted those as follows:

Definitions – Section 1

- We believe the definition of "capital management measure" is confusing as the definition requires that the measure be "disclosed in the notes to the financial statements," whereas section 7.1 of the Proposed Amendments only applies to a "capital management measure" that is disclosed in a document "other than the financial statements." We believe section 7.1 of the Proposed Amendments should be revised to provide that the section applies to a "capital management measure" as defined, to the extent it is used in a document other than the notes to the financial statements.

- We believe that subparagraph (b) of the definition of "non-GAAP financial measure" is overly restrictive in referring to "primary financial statements" in that there may be circumstances where a measure is not disclosed in the "primary financial statements", but in the financial statements.

Section 2

- We believe that the standard introduced in Section 2(2) regarding disclosure that is "…intended to be, or reasonably likely to be, made available to the public" is a vague and imprecise standard. We believe that there are similar concepts under applicable securities

laws to refer to publicly available documents and that for consistency and ease of application such existing concepts should be used.

Section 3

- We suggest that section 3(d) be amended to refer to "the first time the non-GAAP financial measure appears in the body of the document" to clarify that the requirement does not apply to primary or secondary headlines or titles.

- We suggest that paragraph 3(d) of Proposed 52-112CP be amended to explicitly state that cross-referencing to previously filed documents that comply with the Proposed Amendments would be permitted in order to satisfy the requirements of the Proposed Amendments.

- We suggest that section 3(d)(v) be amended to clarify that this requirement applies the first time there is a change in the label, composition or calculation etc., from the label, composition or calculation of the same measure disclosed in respect of a comparative period to ensure this is not an open-ended and ongoing obligation.

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

We respectfully submit that it is not clear why the proposed exemption is only available to "SEC foreign issuers" and has not been extended to "designated foreign issuers" as defined in National Instrument 72-102 *Continuous Disclosure and other Exemptions Relating to Foreign Issuers* ("**NI 71-102"**). Furthermore, we believe that the express exemption should also be extended to "SEC issuers" as defined in National Instrument 51-102 *Continuous Disclosure* ("**NI 51-102**").

Under the framework of NI 71-102, SEC foreign issuers and designated foreign issuers are largely exempt from most disclosure and related requirements under Canadian securities laws on the basis of compliance with the local requirements of the designated foreign jurisdictions. As such, we do not believe that such issuers should be subject to a specific and very technical set of requirements with respect to non-GAAP measures, when the vast majority of the their disclosure is exempt from specific form and timing requirements under applicable Canadian securities laws. For example, a designated foreign issuer that is not required to comply with Canadian disclosure requirements relating to management discussion and analysis, should not have its locally compliant financial disclosure subject to one set of technical Canadian requirements. To the extent that the CSA are proposing to exempt SEC foreign issuers only on the basis that such issuers would be subject to similar requirements (under United States federal securities laws), then we believe that "SEC issuers" under NI 51-102 should also be similarly exempt as per exemptions currently available to such issuers under NI 51-102. We also note that "SEC foreign issuers" may not be subject to disclosure requirements under United States federal securities laws to the extent they are "foreign private issuers" for the purposes of such laws. In this respect we note that section 1.4 of the Companion Policy to NI 71-102 also acknowledged this fact, that compliance with a specific aspect of United States federal securities laws includes reliance upon an available exemption from such requirements. As such, we further question whether the exclusion of "SEC foreign issuers" only is appropriate.

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Thank you for the opportunity to comment on the Proposed Amendments. Please do not hesitate to contact any of the undersigned if you have any questions in this regard.

Yours truly,

Ramandeep Grewal
Jeff Hershenfield
Jonah Mann
Billy Rosemberg