IIACACCVM
INVESTMENT INDUSTRY ASSOCIATION OF CANADA
ASSOCIATION CANADIENNE DU COMMERCE DES VALEURS MOBILIÈRES

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The Secretary
Ontario Securities Commission
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Me Philippe Lebel
Corporate Secretary and Executive Director, Legal Affairs
Autorite des marches financiers
Consultation-en-cours@lautorite@qc.ca

Dear Sir/Madam:

Re: Proposed Amendments to NI 51-102 *Continuous Disclosure Obligations and Proposed Framework for Semi-Annual Reporting – Venture Issuers on a Voluntary Basis (the "Proposals")*

The Investment Industry Association of Canada (the "IIAC" or "Association") appreciates the opportunity to comment on the Proposals.

Summary: The IIAC supports amendments to NI 51-102 and its CP that help investors focus on the salient information needed to make an investment decision and that provide issuers with an efficient process.

Recommendations: Some key recommendations from the IIAC include the following:

- The combination of financial statements, MD&A and AIF to create an "Annual Filing" document and the combination of interim financial reports and MD&A to create an "Interim Filing"
- A focus on material information and the removal of the materiality qualifiers
- The removal of 'seriousness' from risk factor disclosure requirements. Risk factors should be organized logically with relevant headings consistent with SEC amendments so that investors have an 'apples to apples' comparison
- An "access equals delivery" model for relevant documents

- Voluntary semi-annual reporting for venture issuers that are not SEC issuers
- Optional disclosure comparing quarterly results from the previous year, and the previous quarter

In its continued efforts to help investors focus on the material facts for any given issuer, the IIAC does not support certain 'one size fits all' requirements such as mandatory expanded disclosure for all non-venture issuers or proposed reporting requirements for ratios and debt covenants.

These and other recommendations are detailed below.

The Association supports CSA efforts to examine and address areas of regulation that contribute to the regulatory burden without commensurate investor protection benefits.

The IIAC was pleased to see that many of the recommendations contained in the Proposals reflected our feedback in our letter dated July 28, 2017, in respect of the consultation on *Considerations for Reducing Regulatory Burden for Non-Investment Fund Reporting Issuers.*

The Proposals that eliminate duplication and overlap of disclosure and eliminate redundant information will benefit investors by allowing them to focus on the salient information needed to make an investment decision while reducing the regulatory burden on issuers.

Clarifying disclosure requirements will also facilitate a more efficient drafting and review process by reducing the consultation required between the issuers and regulators in the approval process.

The combination of financial statements, MD&A and AIF to create an "Annual Filing" document and interim financial reports and MD&A for an "Interim Filing" will streamline and simplify the filing process and provide a consolidated document that is easier to read and analyze. The similarity to the presentation of these documents to SEC requirements will also benefit issuers undertaking cross border financings.

We support the removal of the materiality qualifiers in favour of an instruction to focus on material information as set out in the general instructions to Form 51-102F1 and Form 51-102F2. These qualifiers introduced uncertainty and did not enhance disclosure to investors.

As noted in our previous submissions, we are supportive of adopting an "access equals delivery" model for relevant documents.

In addition, we agree that the relocation of certain sections from NI 51-102 to form 51-102F1 will improve disclosure by grouping the relevant disclosure in one form.

We do not support the requirement in Section 5.5(b) of Part 2 (MD&A) of proposed Form 51-102F1 to require the actual ratios and amounts for an issuer's debt covenants. While this may be meaningful disclosure in cases where an issuer may have limited capacity to incur further debt, we do not think it is necessary or appropriate to impose a 'one-size-fits-all' requirement to all issuers to provide this qualitative disclosure regardless of their available sources of liquidity and financial condition.

Notably, the calculation of ratios and permitted debt 'baskets' can include adjustments that require estimates and, in some cases, forecasts (e.g., with respect to anticipated synergies). It may also require disclosure of commercially sensitive information. In our view, the better approach is to include an instruction that, in order to disclose all material facts in respect of their liquidity and capital resources, issuers may need to disclose actual (or estimated) ratios and amounts of their debt 'baskets' (e.g., to the extent there are or may become materially constrained in their ability to borrow further funding by virtue of the associated debt covenants and, as a result, may not have sufficient liquidity for their strategic objectives).

In addition, we do not agree with a number of the requirements added within Section 16 (Risk Factors) of proposed Form 51-102F1. Most of our concerns with these requirements are addressed in our responses to Questions 2 and 3 below. In addition, new instruction (3)(d) should be removed. While we agree that disclosure as to how issuer manages risk may be useful to certain investors, we believe the better place for this type of disclosure is within an issuer's enterprise risk management discussion in its MD&A, allowing an issuer to align this risk mitigation disclosure using the risk categories it applies for risk management purposes.

While it may be manageable to include this disclosure in the "Risk Factors" section, there is a real potential for conflict between the proposed "risk mitigation" disclosure required by instruction (3)(d) of Section 16 and the requirement to not de-emphasize risks in the preceding instruction (2). In addition, the inclusion of any risk mitigation disclosure in the Risk Factors section would be out of step with U.S. practice.

In respect of the questions articulated in the Notice, we have the following comments.

CSA Questions

Question relating to additional disclosure for venture issuers without significant revenue

1. **Do you think this requirement should apply more broadly or more narrowly? For example, should we extend this disclosure requirement to non-venture issuers that have significant projects not yet generating revenue as well? Why or why not?**

We do not support a mandatory expanded disclosure requirement for non-venture issues that have significant projects not yet generating revenue. The decision to include such disclosure should be left up to the individual issuers, based on their circumstances and the preferences of their investor base. Issuers are best situated to determine whether this type of disclosure would be helpful to their investors.

Questions relating to risk factors

2. **Would it be beneficial for reporting issuers if we provided further clarity on what "seriousness" means and how to determine the "seriousness" of a risk?**

Instead of focusing on the narrower question of what "seriousness" means, we think consideration should first be given to whether to amend instruction (1) of Section 16, which requires risks to be disclosed in order of seriousness, and to remove the concept of "seriousness" altogether from the risk factor disclosure requirements.

Risk factors are inherently forward-looking. They deal with evolving or uncertain circumstances that are unknown or difficult to quantify. As a result, it is very difficult (and, in many cases, impossible) to assess the impact/probability of a risk factor with any certainty. In addition, the assessed "seriousness" of a risk to an issuer is very likely to shift over time, as the facts and assumptions underpinning the earlier assessment change.

As a result, any requirement for an issuer to assess the impact / probability of its risk factors, and then disclose that assessment, will add burden, increase costs, take time and effort and expose the issuer to potential liability if that assessment is, ultimately, wrong. It also raises problematic questions as to how and when that issuer should be required to keep its disclosed risk assessment current. An issuer's assessment disclosure may be subject to second guessing in hindsight to the extent any of the assessed risks come to fruition, raising the risk of unwarranted liability and reputational harm to the issuer for an assessment that, at the time it made it, was reasonable. To mitigate that risk, issuers may over-disclose the severity of all risks, or may qualify their assessment of those risks with a laundry list of assumption and other factors, all resulting in worse disclosure for investors and a larger disclosure burden on issuers.

On its face, the proposed requirement in instruction (3)(c) to present risk factor disclosure in a manner that "clearly identifies, for each risk factor … your company's impact/probability (i.e., its "seriousness") seems to be asking an issuer to, in effect, make an educated guess as to the impact of an unknowable future. However, because no further detail is provided in proposed Section 16 as to the type of disclosure required by this instruction, it is unclear what level of disclosure would be responsive. It may be that what is expected is only qualitative disclosure, and that very general and caveated conclusions as to probability are acceptable (e.g., "unlikely", "probable"). However, regardless of whether the expected disclosure is to be quantitative or qualitative, or broad or specific, we do not support the addition of this new instruction or any other requirement that an issuer disclose its assessment of the impact / probability (or "seriousness" as defined in the Proposals) of its risk factors for the reasons noted above. At most, issuers should be required to qualitatively disclose how a risk affects it or an investment in the issuer's securities (in line with what is required by the SEC) without addressing quantum or probability. While issuers could always choose to provide a more detailed assessment of the impact or probability of a risk where these are reasonably measurable, this disclosure should not be mandated.

Notably, there is no equivalent U.S. securities law requirement to disclose the impact/probability of a risk factor. In fact, there is not even a U.S. requirement to order risk factors by seriousness. Ordering by seriousness was included in the SEC's initially proposed amendments to the U.S. requirements for risk factor disclosure; however, the SEC ultimately determined to remove this requirement due to, among other things, concerns that it could be difficult to evaluate and rank often equally significant and evolving risk factors .[i] There was also significant concern from those commenting on the SEC's amendments that merely purporting to order risk factors by priority (or seriousness) could result in unwarranted liability. All of the concerns that the SEC and commenters highlighted with respect to ordering by seriousness would have been exacerbated had the SEC gone a step further and proposed specific disclosure as to the assessment of that seriousness. In light of all of the above considerations, consider removing instruction

(1) altogether or replacing instruction (1) with alternate instruction that align with the manner in which risk factors are to be organized pursuant to SEC requirements. See our response to Question 3 below.

3. **If we adopted similar requirements to the SEC's amendments, what would be the benefits and costs for investors and reporting issuers?**

The SEC's requirement for issuers to group similar or related risk factors and add a summary of their "principal" risk factors to the extent their Risk Factor section exceeds 15 pages may benefit investors by allowing them to more efficiently identify risks that are key to their own investment decision.

Also, a requirement to order risk factors by grouping similar risks may conflict with the existing Canadian requirement to order by seriousness (the same ordering requirement is proposed to be carried forward in instruction 1 to Section 16). To address this conflict, and for the other reasons noted earlier, we think the best approach is to replace instruction (1) with an instruction to the effect that the risk factors "be organized logically with relevant headings" consistent with SEC amendments. Aligning this Canadian risk factor ordering instruction with the equivalent SEC ordering requirement should also be beneficial for investors as it would afford them an 'apples to apples' comparison of risk factors of peer issuers subject to US disclosure regime. Without this alignment, investors might mistakenly assume the ordering of risk factors under Canadian requirements are intended to follow the U.S. approach.

On balance, we do not believe there is sufficient benefit to adopt the SEC requirement to disclose generic risk factors at the end of the Risk Factors section under the caption "General Risk Factors". Some investors might errantly perceive risks under "General Risk Factors" as less important simply due to their different characterization or placement. In addition, it could be difficult for issuers to differentiate which risks are "generic" for this purpose.

Questions relating to the requirement to name authors of technical reports

4. **What challenges, if any, do reporting issuers face in obtaining technical report author consents for short form prospectus offerings?**

Currently, some issuers may experience difficulties in tracking down the technical report author, due to the nature of the work, which often takes such individuals to different international locations, without a consistent employer. This can lead to some issues where deadlines on financings are involved, however, for the most part, issuers are able to manage this situation.

5. **If the requirement to name the technical report authors in the AIF (and as a result, provide consents for short form prospectus offerings) were removed, would reporting issuers continue to obtain approval of prospectus disclosure from technical report authors or would they rely more on internal or external non-author QPs?**

If the requirement to name an obtain consents from the technical report authors were removed, it is likely that many reporting issuers would allow internal or external non-author QPs to minimize time and cost pressures.

6. **If reporting issuers were to rely on internal or external non-author QPs for purposes of providing consents for short form prospectus offerings, in your view, would investor protection be impacted? Would relying on an internal QP for consent purposes (where an external QP authored the original report) raise potential conflict of interest concerns?**

Reliance on an internal QP raises significant due diligence and conflict-of-interest concerns, which would likely result in a perception that Canada has lower standards of due diligence. In particular, this concern would be significant in respect of junior issuers, which may not have appropriate in-house expertise to provide meaningful and trustworthy opinions. Such an approach would also result in Canadian rules not aligning with the US rules as, typically, in the filing of a U.S. registration statement by non-MJDS issuer, the author of a technical report summary in respect of a material property would be required to file a consent and have expert liability.

Question relating to impact of refiling on auditor's report

7. **Considering that the annual disclosure statement will include annual financial statements, MD&A and, where applicable, AIF, do you think there will be an impact, including on auditing requirements, if a reporting issuer amends or re-files only one of these documents, or re-files the annual disclosure statement in its entirety?**

We defer to the expertise of accounting professionals in respect of this question.

Question relating to proposed amendments to Form 41-101F1 Information Required in a Prospectus and Form 44-101F1 Short Form Prospectus

8. **To align the continuous disclosure and prospectus regimes, we are proposing to remove certain prospectus disclosure requirements. Are there any concerns with the removal of this information from a prospectus? Please explain.**

We support the removal of repetitive and unnecessary disclosure from the prospectus requirements as proposed.

Questions relating to semi-annual reporting for certain venture issuers on a voluntary basis

9. **Should we pursue the Proposed Semi-Annual Reporting Framework for voluntary semi-annual reporting for venture issuers that are not SEC issuers? Please explain.**

The IIAC supports the initiative to permit voluntary semi-annual reporting for venture issuers that are not SEC issuers. We reiterate our position, stated in our submission to the Ontario Capital Markets Modernization Taskforce Consultation Report that although semi-annual reporting is not appropriate for senior issuers, it may be advantageous to provide smaller issuers, such as those listed on the TSXV or CSE, with the option of quarterly or semi-annual reporting. Given that fewer smaller companies are accessing public markets for capital, in part due to the reporting demands on time, costs and other resources, the increasing proportion of private versus public companies means investors have access to fewer public companies to invest in.

Overall, moving from quarterly to semi-annual reporting should not significantly reduce the transparency of information, and may convince more smaller companies to go public to access capital.

It is essential that the initiative be voluntary, to allow such issuers to balance the time and resources that are required for issuers to report on a quarterly basis, with the fact that any change to a less frequent reporting cycle would be a departure from best practices in the capital markets and may make the issuer less attractive to global investors that are used to quarterly reporting that is typical in North America, South America and Asia. The success of similar initiatives in Australia, the UK and certain EU countries (albeit on an expanded basis) provide a degree of comfort that this accommodation will not put Canada in a position where its standards out-of-step internationally.

Given that a considerable number of these issuers are not at a revenue-generation stage, they may view the cost concerns of quarterly reporting as a higher priority issue. Granting these issuers an option to report on a semi-annual basis may provide cost benefits that would allow them to grow to a stage where it would be appropriate to adopt quarterly reporting, whether due to investor interest, or when they reach a stage where they are a candidate to graduate to a senior exchange.

Small issuers that opt to report on a semi-annual basis should, where otherwise eligible, continue to have access to the short-form prospectus system. However, in order to ensure that their disclosure meets the “full, true and plain” standard, they may, depending on their circumstances, be required to supplement their disclosure if more than a quarter has passed since their most recent financial statements, including any related MD&A. Alternatively, the reporting regime could require that issuers that wish to avail themselves of the short form prospectus system to include interim financial statements (and associated MD&A) for a quarter, if the issuer would otherwise have been required to include interim quarterly financial information if it were reporting quarterly. However, in order to preserve the integrity and availability of the U.S. (or ‘southbound’) multi-jurisdictional disclosure system (“US MJDS”), issuers filing a prospectus without the quarterly financial information that would otherwise be required to be included should not be able to have any prospectus cleared by Canadian securities regulators that purports to qualify securities that will be sold through US MJDS.

10. Are there specific types of venture issuers for which semi-annual reporting would not be appropriate? For instance, should semi-annual reporting be limited to venture issuers below a certain market capitalization or those not generating significant revenue? Please explain.

For simplicity sake, it is appropriate that venture issuers be defined as those listed on the TSXV or CSE. The TSX Venture Exchange and the CSE provide investors a clear means of distinguishing the types of issuers in which they are investing, while providing those issuers with an environment tailored to their specific needs, and a path to graduation. Creating further categorizations, such as sized-based or market-capitalization based thresholds for small issuers would create confusion, and would dilute the benefits of having specific marketplaces serving junior issuers and their investors. For instance, the significant fluctuation in smaller companies' market capitalizations could have the effect of moving between disclosure regimes, even with the creation of a grace period.

11. **Would the proposed alternative disclosure requirements under the Proposed Semi-Annual Reporting Framework provide adequate disclosure to investors? Would any additional disclosure be required? Is any of the proposed disclosure unnecessary given the existing requirements for material change reporting and the timely disclosure requirements of the venture exchanges? Please explain.**

The proposed alternative disclosure requirements would provide adequate disclosure to investors.

12. **Do you have any other feedback relating to the Proposed Semi-Annual Reporting Framework?**

Our response above articulates our position

Questions relating to transition provisions

13. **Do you think the proposed transition provisions are sufficiently clear? If not, how can we make them clearer?**

The proposed transition provisions are clear.

14. **Do you think the transition provisions in the amending instrument for NI 51-102 would provide reporting issuers with sufficient time to review the Proposed Amendments and prepare and file an annual disclosure statement for a financial year ending on, for example, December 31, 2023 if the final amendments are published in September 2023? Do you think more time should be afforded to smaller reporting issuers (such as venture issuers)?**

The transition provisions, which amount to a 3-month transition, would not provide reporting issuers with sufficient time to review the Proposed Amendments, prepare and file the annual disclosure statement. There is a material amount of time required to prepare and file such statements, and the time needed to review, understand and implement the process and disclosure changes to produce a revamped disclosure statement is more than one quarter. In addition, it is important that investors be adequately informed so that the changes are consistent with their expectations. We suggest that at least 6 months be provided prior to the implementation date.

Other issues

In addition to the items addressed in the Proposals, we believe it would be beneficial to provide issuers with an option to provide disclosure comparing quarterly results from the previous year, in addition to the previous quarter. This would provide investors with a broader viewpoint of the performance of an issuer, particularly where there have been material differences in short term performance.

Thank you for considering our comments. If you have any questions, please don’t hesitate to contact me.

Yours sincerely,

[redacted]

Susan Copland