TORYS LLP

79 Wellington St. W., 30th Floor
Box 270, TD South Tower
Toronto, Ontario M5K 1N2 Canada
P. 416.865.0040 | F. 416.865.7380
www.torys.com

September 17, 2021

**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
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Yukon
Superintendent of Securities, Nunavut

**Re: Proposed amendments to National Instrument 51-102 *Continuous Disclosure Obligations* (NI 51-102) and related amendments concerning annual and interim filings of non-investment fund reporting issuers**

Dear staff:

**Introduction**

We are writing in response to your request for comment dated May 20, 2021 regarding:

- the proposed repeal of Form 51-102F1 *Management's Discussion and Analysis* (Current MD&A Form) and Form 51-102F2 *Annual Information Form* (Current AIF Form);
- the proposed introduction of Form 51-102F1 *Annual Disclosure Statement* (ADS Form) and Form 51-102F2 *Interim Disclosure Statement* (IDS Form);
- proposed changes to Companion Policy 51-102CP *Continuous Disclosure Obligations* (51-102CP); and
- related changes to existing rules and policies (collectively, the Proposed Amendments).

These comments are provided by the partners and counsel of Torys LLP who are signatories below, in their personal capacities, and not on behalf of the firm or any of its clients.

We appreciate the efforts of the Canadian Securities Administrators (CSA) to reduce the regulatory burdens that reporting issuers face when preparing their annual and interim disclosures and promote disclosure that provides decision-useful information for investors.

**1. Streamlining disclosure requirements**

We support the CSA's proposals to eliminate duplicative, overlapping and/or redundant disclosure requirements, including the proposed elimination of:

- the current MD&A requirement to disclose information regarding critical accounting estimates and the current AIF requirement to disclose cash dividends or distributions declared (as well as restrictions on payment of dividends or distributions);
- the current MD&A requirement to disclose summary information for the eight most recently completed quarters;
- the current MD&A requirement for non-venture issuers to prepare and disclose a contractual obligations table;
- the current AIF requirement to disclose security price ranges and volumes traded on a Canadian marketplace; and
- the current AIF requirement to disclose information about the issuer's transfer agents, registrars and the location of registers of transfers.

**2. Consolidation of periodic disclosures into a single disclosure statement**

We recognize the potential benefits for issuers and investors of consolidating a reporting issuer's annual financial statements, MD&A and AIF, if any, into a single annual disclosure statement (ADS) and consolidating the interim financial statements and interim MD&A into a single interim disclosure statement (IDS). We believe, however, that reporting issuers should be given the option, for their annual filings, to prepare a separate AIF. This is because some issuers file their financial statements and MD&A first, and then take additional time to prepare their AIF, have the relevant AIF disclosures reviewed and obtain the required certifications from their chief executive officer and chief financial officer. Requiring all issuers to prepare a consolidated ADS could, for example, put significant pressure on issuers with fewer resources available to dedicate to the preparation and review of such documents. Requiring all issuers to prepare a consolidated ADS could also have the unintended consequence of creating incentives for issuers to delay reporting their annual results and filing their annual financial statements and MD&A until the information required by the AIF section in the ADS Form is ready.

**3. Materiality qualifiers**

We support the CSA's proposal to remove most of the materiality qualifiers in specific sections of the Proposed ADS Form, except where the materiality qualifier is part of a defined term (such as "significant acquisition") or reflects a term used in the prospectus rules. Instead, all disclosure requirements in the Proposed ADS Form will be subject to the general instruction that issuers are to focus on material information. We believe that these changes will reduce uncertainty resulting from the absence of a materiality qualifier in some sections and the use of a materiality qualifier other than "material" in other sections.

**4. Risk factor disclosure**

Section 5.2 of the Current AIF Form requires an issuer who prepares an AIF to disclose risk factors relating to the issuer and its business, and the instructions to section 5.2 specify that risks must be disclosed in order of seriousness from most to least serious and not be de-emphasized through the use of excessive caveats or conditions. We support the CSA's proposal to incorporate this risk factor disclosure requirement and instructions into the Proposed ADS Form. Also, in our experience, issuers and their advisors do not have much difficulty assessing the relative seriousness of their risk factors and so we do not believe there is demand in the market for additional regulatory guidance on what "seriousness" means.

We have some concerns, however, about the proposed instruction encouraging issuers to consider presenting risk factor disclosure in tabular form or another manner that clearly identifies, for each risk factor (a) the nature of the risk factor, (b) its description, (c) its seriousness for the issuer (in terms of

impact/probability), and (d) the issuer's mitigation strategy for the risk. Although the proposed instruction is framed as a suggestion, we expect that many issuers and their advisors will treat it as a requirement or best practice. We believe that the instruction, if adopted, would increase regulatory burdens for issuers and result in longer disclosure because issuers likely would supplement their existing discussion of risks with the proposed risk table. While we are in favour of encouraging disclosure formats that are easier for investors to understand and digest, we expect that issuers and their advisors are likely to find it challenging to work with a format that requires public disclosure of the impact/probability of risks in tabular form. Risk impact/probability assessments are nuanced, complex and evolving and, as a result, are not easily reduced to snapshot disclosure in a table made as of a fixed date.

We also note that the revised rules on risk factor disclosures recently adopted by the U.S. Securities and Exchange Commission (SEC) do not require or recommend a tabular presentation, and so recommending such an approach for Canadian issuers could result in diverging disclosure practices and increased regulatory burdens for cross-border issuers.

The request for comment also sought feedback on whether the CSA should adopt amendments to risk factor disclosure requirements similar to those recently adopted by the SEC. These amendments require issuers to group similar risks together, disclose generic risks under the heading "general risk" and require a summary of risk factor disclosure if the risk factor disclosure exceeds 15 pages. We do not think it is necessary or advisable for the CSA to adopt similar requirements. We believe that the prevailing market practice in Canada is for issuers to group their disclosures about similar risks together and, therefore, mandating this practice is unnecessary. We do not think that requiring disclosure of generic risks under a "general risk" heading would be particularly useful, and could lead to investors disregarding these risks or incorrectly concluding that they are more remote. Instead, if there are concerns that risks are not being appropriately tailored, issuers could be reminded and encouraged not to include generic or boilerplate risks that are not material to their business. We note that some issuers will also disclose a bulleted list of risk factors (typically in their forward-looking statement disclaimers or elsewhere if such disclosure is considered useful), but this practice has not been universally adopted. We believe that issuers who have elected not to provide a bulleted list of risks have concluded that such a presentation format is not meaningful for investors and unnecessarily adds to already lengthy disclosure documents.

### 5. Disclosure about debt covenants

If adopted, paragraph 5(5)(b) of the Proposed ADS Form will require a reporting issuer to discuss how it manages its liquidity risks and provide qualitative and quantitative disclosure of any debt covenants to which it is subject, including the actual ratios or amounts. We note that section 29 of the Proposed ADS Form will require issuers to disclose particulars of material contracts. In addition, if there has been a default or there are arrears on a debt covenant, or there is a risk of default or arrears on a material debt covenant, paragraphs 5(5)(c) and (d) will require disclosure of this information and how the issuer intends to cure the default or arrears or address the risk of such default or arrears, as the case may be. We also are aware that the disclosure requirements above are subject to an overall materiality qualifier.

We believe that requiring issuers to disclose detailed information about debt covenants on a routine basis (beyond what is required in section 29) is unnecessary and could disadvantage issuers by requiring them to disclose competitively sensitive information. As an alternative, we suggest that the disclosure in proposed paragraph 5(5)(b) be required only in the circumstances described in paragraph 5(5)(c).

### 6. Disclosure requirements for investment entities and non-investment entities recording investments at fair value

If the Proposed Amendments are adopted, section 10 of the ADS Form will require any investment entity or non-investment entity recording investments at fair value[1] to disclose in its ADS and IDS[2]:

---

[1] Instruction 2 for section 10 states that if a material portion of a company's business is invested in other operating entities and those investments are recorded on a fair value basis, the issuer is considered to be a "non-investment entity recording investments at fair value".

[2] Subsection 3(1) of the proposed IDS Form provides that an issuer's interim MD&A must update the annual MD&A for all disclosure required under Part 2 of the ADS Form.

- a schedule of investments, including the investee's name, and the cost and fair value for each investment held;
- changes to the composition of the investment portfolio;
- drivers of fair value changes by investment, including a discussion of both unrealized and realized gains and losses; and
- for concentrated holdings, summarized financial information of the investee including the aggregated amount of assets, liabilities, revenue and profit or loss along with a discussion of the results of the investee.

For the following reasons, we question the necessity of proposed section 10 and are concerned about the potential scope, regulatory burden and adverse consequences of introducing such a requirement.

- We believe that existing disclosure requirements incorporated into the proposed ADS Form and IDS Form (including financial statement requirements and disclosure requirements regarding an issuer's performance, business, risk factors, liquidity and capital resources and related party transactions) are sufficient to achieve the objectives of NI 51-102.
- The potential scope of proposed section 10's application to various issuers is unclear. For example, it is unclear how many issuers would be considered to have a material portion of their business invested in other operating entities with such investments recorded on a fair value basis. Accordingly, the potential impact and regulatory burden associated with the proposed requirement has not been assessed.
- We believe more study is needed before introducing a change to the continuous disclosure requirements that, in effect, create a new, significantly lower early warning reporting threshold.
- If an issuer discloses the specific names of privately held entities in its portfolio and its assessment of the fair value of those investments, such disclosure could adversely affect the issuer's relationships with co-investors and the investee if their evaluations of fair value differ from the issuer's assessment.
- Summarized financial information of the investee including the aggregated amount of assets, liabilities, revenue and profit or loss along with a discussion of the results of the investee, particularly for an investment in a private company, may be competitively sensitive and not always available to the issuer (or verifiable by the issuer prior to the deadline for filing its ADS or IDS, as the case might be).

### 7. Permitting issuers to compare the financial performance of their current quarter to the immediately preceding quarter

We support the CSA's proposal, as reflected in subsections 3(3) and (4) of the MD&A section in the Proposed IDS Form, to permit an issuer (other than an issuer whose business is seasonal) to compare the financial performance of its current quarter with the immediately preceding quarter, rather than the corresponding period in the previous year, as long as the issuer discusses its reasons for changing the basis of comparison and indicates where summary information about the corresponding period in the previous year can be found. We agree that it is appropriate to provide issuers with the flexibility to provide the comparative analysis that they believe is most relevant to an understanding of their performance. The CSA may wish to consider adding guidance through the instructions on how frequently an issuer can choose to alter the basis of its comparison.

### 8. Transition

We appreciate the CSA's decision to publish the Proposed Amendments more than two years in advance of the proposed December 2023 effective date for the final amendments to NI 51-102. We note, however, that the CSA expects to publish the final amendments in September 2023, only three months prior to this effective date. We believe that issuers would appreciate having more time between publication of the final amendments and effectiveness to prepare and file their first ADS.

***

Once again, we appreciate the opportunity to comment on the Proposed Amendments and would be happy to discuss any of our comments set out above with you by phone or by email.

Yours truly,

Janet Holmes
Jim S. Hong
Glen R. Johnson
Karrin Powys-Lybbe
Rima Ramchandani
David Seville
Michael Zackheim