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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

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Dear Sirs/Mesdames:

Re: CSA Consultation Paper 51-404 *Considerations for Reducing Regulatory Burden for Non-Investment Fund Reporting Issuers*

We submit the following comments in response to CSA Consultation Paper 51-404 *Considerations for Reducing Regulatory Burden for Non-Investment Fund Reporting Issuers* (the "**Consultation Paper**") published by the Canadian Securities Administrators (the "**CSA**") on April 6, 2017.

Thank you for the opportunity to comment on the Consultation Paper. 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 the specific consultation questions posed in the Consultation Paper. We have also provided additional comments related to the reduction of regulatory burden for non-investment fund reporting issuers following our responses to the consultation questions.

As a preliminary comment, we applaud this effort by the CSA to reduce the regulatory burden that Canadian securities laws may impose on existing and prospective reporting issuers. It is our view that regulatory transparency will lead to a more streamlined system for all issuers and thereby encourage capital markets activity in Canada. Any amendments to Canadian securities law, including the national and multilateral instruments and policy statements, should serve to clarify and modernize current rules in an effort to ensure that issuers are able to assess the cost of undertaking an offering and complying with Canadian securities law up front. We submit that such rules should not be subject to significant CSA Staff discretion and interpretation which effectively reduces the benefit of any transparency and predictability in Canadian capital markets.

In addition, notwithstanding the importance of investor protection, the broad availability of public capital markets is a public good. The indication in some studies that public markets and the number of IPOs are in decline is a concern and we believe that the regulators have a role to play in helping to stem or reverse this trend. Canadian regulators should also aim to ensure that Canadian capital markets remain competitive with their U.S. counterparts.

A. General Consultation Questions

1. *Of the potential options identified in Part 2 [of the Consultation Paper]:*

(a) *Which meaningfully reduce the regulatory burden on reporting issuers while preserving investor protection?*

(b) *Which should be prioritized and why?*

2. *Which of the issues identified in Part 2 [of the Consultation Paper] could be addressed in the short-term or medium-term?*

3. *Are there any other options that are not identified in Part 2 [of the Consultation Paper] which may offer opportunities to meaningfully reduce the regulatory burden on reporting issuers or others while preserving investor protection? If so, please explain the nature and extent of the issues in detail and whether these options should constitute a short-term or medium-term priority for the CSA.*

Based on our experience, we believe that, while all of the options identified in Part 2 of the Consultation Paper could serve to reduce regulatory burden on reporting issuers, addressing the financial statement requirements for initial public offering

("**IPO**") prospectuses and prospectuses generally, and removing or modifying certain of the criteria to file a business acquisition report and/or include acquisition financial statements would meaningfully reduce the regulatory burden on reporting issuers. These options should be prioritized as they would make the Canadian capital markets regime more appealing to issuers considering undertaking an IPO or acquisition while still meeting and even furthering the goals and objectives that underpin their regulatory regimes. In addition, we believe that certain of the proposed options would be easier to implement than others and that those options should be quickly implemented, even if the resultant effect/benefit is incremental. These options would include eliminating overlap in regulatory requirements (2.4) and reducing disclosure requirements in annual and interim filings (2.3(b)).

In addition to those options identified in Part 2 of the Consultation Paper, we think that the regulatory burden on reporting issuers could be reduced by modernizing the rules with respect to the dissemination of information. As an example, issuers are required to publish news releases both on SEDAR and through a wire service. Issuers also generally post news releases on their own websites. In our experience, the filing of press releases in multiple locations can be time consuming and expensive for issuers and increasing the likelihood of errors, particularly given the different formatting required for various outlets. The requirement that issuers pay for and format information to conform to wire release conventions is antiquated and unnecessary. We suggest that the CSA consider a disclosure system similar to that currently used in the United States whereby information may be disclosed by any one of the following methods: a broadly distributed press release, the filing of a Form 8-K with the U.S. Securities and Exchange Commission (the "**SEC**") or a conference call, press conference or webcast with advance notice to the public.

In this regard, we also note that the guidance found in National Policy 51-201 *Disclosure Standards* ("**NP 51-201**") may no longer be reflective of current market reality, particularly as it relates to the disclosure of information. As an example, NP 51-201 states that the use of an issuer's website for the dissemination of information will not, by itself, satisfy the requirement that information be generally disclosed.[1] NP 51-201 also notes that "[i]nvestors' access to the Internet is not yet sufficiently widespread such that a Web site posting alone would be a means of dissemination 'calculated to effectively reach the marketplace'." As a second example, we note that NP 51-201's guidance regarding when information has been "generally disclosed" is also inconsistent with current technology and evolving market practice as it acknowledges that case law with respect to the amount of time required by public investors to analyze information in a press release is dated and inappropriate for modern technology. We respectfully suggest that, as a starting place, the CSA revisit NP 51-201 and reconsider the guidance provided therein.

[1] See NP 51-201, section 3.5(6).

B. Extending the Application of Streamlined Rules to Smaller Reporting Issuers

4. *Would a size-based distinction between categories of reporting issuers be preferable to the current distinction based on exchange listing? Why or why not?*

5. *If we were to adopt a size-based distinction:*

(a) *What metric or criteria should be used and why? What threshold would be appropriate and why?*

(b) *What measures could be used to prevent reporting issuers from being required to report under different regimes from year to year?*

(c) *What measures could be used to ensure that there is sufficient transparency to investors regarding the disclosure regime to which the reporting issuer is subject?*

(d) *How could we assist investors in understanding the distinction made and the requirements applicable to each category of reporting issuer?*

6. *If the current distinction for venture issuers is maintained, should we extend certain less onerous venture issuer regulatory requirements to non-venture issuers? Which ones and why?*

We are of the view that a size-based distinction for issuers may be useful in addition to the current exchange-based distinction, provided that the method of determining size is clear, consistent and easy to apply, providing issuers with a reasonable expectation with respect to their reporting requirements, particularly as they relate to the preparation of financial statements. We respectfully submit that anything other than a simple and easily applicable distinction may be onerous and costly to issuers. Importantly, we would suggest that any new size-based distinction be in addition to and similar to the current exchange-based distinction, so that appropriately situated TSX-listed issuers can enjoy the same benefits as TSX-V listed issuers.

We suggest that the CSA look to the United States' model as providing an example of where a size-based distinction has benefitted issuers; however, additional consideration should be given to the manner in which issuers will enter and exit a particular reporting category/classification. One difficulty of a size-based system is that issuers have to monitor their eligibility as unexpected changes to an issuer's business, including increases in revenue, changes to market cap, and market volatility, could lead to increased or different reporting obligations. If a size-based distinction is to be adopted, we recommend that consideration be given to including an appropriate transition period applicable to issuers who might potentially find themselves in a different category in the middle of a fiscal year so as to avoid issuers moving frequently between different classifications. In the alternative, we recommend that particular consideration be given to the most appropriate point in time or period to apply any size-based test threshold so as to provide issuers with

sufficient time to switch between reporting requirements. We note that one advantage of the current exchange-based classification system is that issuers have the ability to choose which requirements they would like to abide by through selecting the exchange on which they wish to be listed.

We reiterate that any test used to categorize issuers should be transparent and based on a metric that is objective and generally consistent for all issuers. The metric should also be easily calculated by capital markets participants.

C. Reducing the Regulatory Burdens Associated with the Prospectus Rules and Offering Process

Reducing the Audited Financial Statement Requirements in an IPO Prospectus

7. *Is it appropriate to extend the eligibility criteria for the provision of two years of financial statements to issuers that intend to become non-venture issuers? If so:*

(a) *How would this amendment assist in efficient capital raising in the public market?*

(b) *How would having less historical financial information on non-venture issuers impact investors?*

(c) *Should we consider a threshold, such as pre-IPO revenues, in determining whether two years of financial statements are required? Why or why not?*

(d) *If a threshold is appropriate, what threshold should be applied to determine whether two years of financial statements are required, and why?*

8. *How important is the ability to perform a three year trend analysis?*

As a preliminary matter, we suggest that the CSA undertake a cost-benefit analysis to determine whether three years of financial statements provide a meaningful material benefit to investors. Reducing the number of years required to be included in financial statements in an IPO prospectus would significantly reduce the time and cost to issuers seeking to undertake an IPO, as the longer period of financial statements required adds to the resources required by the issuer. We submit that the cost is not offset by the benefit of the additional year of disclosure.

We would also suggest that the CSA consider providing additional guidance or revising its requirements regarding the inclusion of financial statements for historic acquisitions. Form 41-101F1 requires that financial statements and interim reports include certain financial statements of any business or businesses acquired by the issuer within three years before the date of the prospectus that a reasonable investor would regard as being the "primary business" of the issuer.[2] Staff of the Ontario Securities Commission have stated that an issuer pursuing an IPO must include in its

[2] Form 41-101F1, section 32.1(1)(b).

prospectus a three-year financial history of the business an investor is investing in, even if this financial history spans multiple legal entities over the three year period.[3]

While the term "primary business" is not defined in Canadian securities law, the CSA have provided guidance in the Companion Policy to National Instrument 41-101 *General Prospectus Requirements* ("**NI 41-101**") as to when a reasonable investor would regard the primary business of the issuer to be the acquired business thereby triggering the requirement that the acquired business' financial information be included in the financial statements in the prospectus. Issuers must consider the facts of each situation to determine whether a reasonable investor would regard the primary business of the issuer to be the acquired business. Examples of such scenarios include a reverse takeover, a qualifying transaction for a Capital Pool Company, or an acquisition that is a "significant acquisition" at the over 100% level.[4] Despite these examples, in July 2015 Staff of the Ontario Securities Commission published guidance that the financial history of acquired businesses that are in the same primary business as the issuer need to be included in the three-year financial history included in an IPO prospectus, with one exception. Furthermore, there is no significance test for acquisitions that fall within the definition of an issuer under item 32.1 of Form 41-101F1 (i.e., a business acquired by an issuer where a reasonable investor reading the prospectus would regard the primary business of the issuer to be the acquired business).[5] We respectfully submit that such an interpretation of the term "primary business" is inconsistent with the policy objectives of NI 41-101, and it has been our experience that staff of certain other major Canadian securities regulators do not share the OSC's interpretation. OSC Staff's position undermines certainty as it contradicts the guidance provided in the Companion Policy which does not interpret a primary business as simply being in the same or similar business in which the issuer operates but rather a business equivalent in size to the issuer or a resulting business. Similarly, an immaterial acquisition of assets or shares in the "same primary business" as the issuer should not require the preparation of audited IFRS financial statements. From a practical perspective, issuers may not typically require target financial statements when negotiating an acquisition, particularly where the acquisition is relatively insignificant. In such cases, the cost of obtaining the target's financial statements may not be justified and the financial statements may not be relevant to the issuer as the issuer may have satisfied itself through diligence and other factors. We respectfully submit that if the issuer itself does not require the target financial statements in order to make the acquisition in the first instance, such information is unlikely to be considered material to investors.

When determining whether an acquisition is one of a "primary business", the OSC has also suggested undertaking a pre-filing. Based on our experience, however, we

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[3] OSC Staff Notice 51-725 *Corporate Finance Branch 2014-2015 Annual Report* (July 14, 2015) ("**Staff Notice 51-725**"), page 13.

[4] Companion Policy to NI 41-101, section 5.3(1).

[5] Staff Notice 51-725, page 14. The only exception to the significance threshold is if the business is over 100% when compared to the primary business of the issuer, in which case, it is important for investors to have the financial history of this business even though it is not the same as that of the primary business of the issuer.

respectively submit that the pre-filing process does not always provide certainty or a timely process for issuers. Importantly, the pre-filing process can be costly and result in transaction delays as it often results in issuers being required to seek exemptive relief. While we understand that the CSA do not consider time or money to be acceptable barriers to compliance with the financial statement requirements, we respectfully submit that that this is inconsistent with the principles and purposes of Canadian securities laws, particularly as it does not foster fair and efficient capital markets. Costs and benefits should always be considered, particularly as there can be a significant financial burden for issuers to comply with these financial statement requirements. We suggest that a cost-benefit analysis be undertaken to determine whether the benefits of primary business financial statements outweigh the burden on the issuer, particularly where such financial statements are backward looking and do not reflect the financial results of the combined company.

Another outcome of interpreting "primary business" in the manner described by the OSC above is that, unlike significant acquisition financial statements and pro forma financial statements included in a BAR, issuers are prohibited from using US GAAP to prepare the primary business financial statements. The result is that a relatively insignificant portion of a business could require an issuer to undertake the very expensive task of translating pre-existing financial statements into IFRS, assuming such financial statements were even available in the first instance. In addition to financial costs related to the translation of financial statements from US GAAP to IFRS, this requirement could also result in divergent disclosure for the same business where a vendor had previously publicly filed financial statements for the acquired business in US GAAP.

In certain instances we would also suggest that alternative disclosure may be a better remedy than the shortening of the financial statement requirements. For example, in the case of REIT issuers, a financial forecast may provide more relevant information than historical financial statements given the nature of a REIT's business.

We also suggest that the CSA consider adopting a process for the confidential filing of prospectuses. We note that this would be consistent with policy changes adopted by the SEC on June 29, 2017 which permit all issuers to confidentially submit draft registration statements for review by the SEC staff in certain circumstances. Prior to this policy change, emerging growth companies under the *Jumpstart Our Business Startups Act of 2012* (the "**JOBS Act**") were eligible to submit draft IPO registration statements on a confidential basis. Notably, Canadian issuers who may file registration statements with the SEC under the multijurisdictional disclosure system are permitted to use the new confidential submission process. A confidential submission process will permit issuers to begin the CSA's review process without publicly disclosing confidential financial and strategic information and would allow issuers to withdraw from the IPO process without making a public filing. As such, a confidential filing process would reduce some of the risk associated with undertaking an IPO and may encourage issuers to enter the public market in Canada.

Streamlining Other Prospectus Requirements

9. *Should auditor review of interim financial statements continue to be required in a prospectus? Why or why not?*

10. *Should other prospectus disclosure requirements be removed or modified, and why?*

As to prospectus disclosure requirements, we respectfully submit that any line items in the form of prospectus (Form 41-101F1, Form 44-101F1, etc.) that are third party facts should not be required to be included in the prospectus. For example, Item 13.2(1) of Form 41-101F1 requires that issuers that are traded or quoted on a Canadian marketplace identify the marketplace and the ranges and volumes traded or quoted on the marketplace on which the greatest volume of trading or quotation for the securities generally occurs. This information is publicly available and can generally be obtained from the applicable marketplace's website without cost. As such, the issuer should not be required to include the information in the prospectus.

We would also suggest that the CSA consider revisions to its rules and guidance related to promoters. Persons who are promoters of an issuer within the meaning of Canadian Securities Laws are required, among other things, to sign an issuer's prospectus in such capacity.[6] Furthermore, the CSA have the discretionary authority to require any promoter of the issuer within the two preceding years of any prospectus filed by the issuer to sign any such prospectuses. As a consequence, those persons assume joint and several liability for prospectus misrepresentations up to a maximum amount equal to the gross proceeds of the offering. In our experience, difficulty arises for issuers in determining whether a founder or another party will be considered by the CSA to be a promoter, particularly in respect of the meaning of "founding, organizing or substantially reorganizing the business of an issuer" in the context of an IPO. Limited guidance has been provided by the CSA in this regard.[7]

It has been our experience in connection with various prospectus offerings that CSA Staff's interpretation of the definition of "promoter" is broader than what is provided for in the legislation, essentially taking the position that most IPOs must have a promoter. In addition, we have experienced instances where CSA Staff have asserted that a promoter will remain a promoter until some intervening event effects the relationship between the promoter and the issuer, including changes in share ownership, board representation and involvement in the management of the issuer. Such facts and circumstances ignore the reference to the "two preceding years" found in securities legislation and may lead to an individual being considered a promoter of an issuer for an indefinite period of time. We respectfully submit that, if Staff's interpretation is inconsistent with or contrary to the current legislation, the

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[6] See e.g., section 58 of the *Securities Act* (Ontario).

[7] See e.g., section 2.7 of the Companion Policy to NI 41-101 in respect of promoters of issuers of asset-backed securities and OSC Staff Notice 45-702 *Frequently Asked Questions Ontario Securities Commission Rule 45-501 – Exempt Distributions* which also provides some guidance as to who is considered to be a promoter for the purpose of paragraph 2.1(1)(b) of Rule 45-501.

legislation be amended or, at the very least, a clear position on this issue be enumerated in a Staff Notice or other policy document.

Streamlining Public Offerings for Reporting Issuers

Short Form Prospectus Offering System

11. *Is the current short form prospectus system achieving the appropriate balance (i.e., between facilitating efficient capital raising for reporting issuers and investor protection)? If not, please identify potential short form prospectus disclosure requirements which could be eliminated or modified in order to reduce regulatory burden on reporting issuers, without impacting investor protection, including providing specific reasons why such requirements are not necessary.*

12. *Should we extend the availability of the short form prospectus offering system to more reporting issuers? If so, please explain for which issuers, and why this would be appropriate.*

We respectfully submit that consideration be given not only to revising and/or removing certain of the short form prospectus disclosure requirements, but to the capital raising and short form prospectus offering system in its entirety. Based on our experience, we submit that there are a number of requirements that may be superfluous to raising capital in Canada that are not specific disclosure obligations. For example, we question whether the notice of intention to be qualified to file a short form prospectus prescribed by section 2.8 of NI 44-101 serves a useful purpose. While not an overly burdensome filing, it can at times represent a 10 business day delay in accessing Canadian capital markets. Provided that a reporting issuer has a current AIF and is in compliance with its continuous disclosure obligations, such issuer should be permitted to file a short form prospectus. Another example of a procedural requirement which may prevent quick access to Canadian capital markets is the requirement that the issuer file a personal information form (a "**PIF**") for each director, officer and promoter of the issuer at the same time as a preliminary prospectus is filed. Directors and officers will often not have a current PIF on file with the OSC or TSX. As a lengthy questionnaire, the PIF is sometimes difficult to complete, particularly on a short timeline (i.e., in a bought deal context). We suggest that there be alternate ways to obtain PIF information and that the required information could be condensed to only that which is absolutely necessary. For example, all new directors and officers could be required to file a PIF with the securities regulator at the time of joining the board/management team of the issuer. We would also suggest that the number of years for which a PIF remains valid be extended from three years to 5/10 years.

Consideration should also be given to the prospectus receipting process and whether it can be streamlined or automated. Based on our experience, issuers may have difficulty filing a prospectus and all related documents prior to 12:00 p.m., often because of translation requirements or as a result of the issuer being located in a different time zone. There may as a result be challenges to obtaining a receipt on a same day basis for the prospectus.

Finally, we respectfully submit that the current two-business day right of withdrawal provided to investors under a prospectus offering is archaic and inconsistent with a number of different types of offerings, including at-the-market offerings and cross-border offerings. As settlement times are generally being reduced for secondary market trades, we submit that this may be an appropriate time to consider reducing or removing the withdrawal period for treasury offerings. In particular, we believe that the two-business day right of withdrawal creates undue uncertainty for issuers and underwriters as the two-business day period can be difficult to calculate, and in some instances, may give rise to regulatory arbitrage. We further note that this right of withdrawal is rarely, if ever, used.

With regard to specific disclosure requirements that should be considered redundant, and as noted in our response to questions 9 and 10 above, we respectfully submit that line items in the prospectus requirements that are readily attainable facts that are publicly available should not be required to be included in the prospectus.

Facilitating At-The-Market (ATM) Offerings

14. *What rule amendments or other measures could be adopted to further streamline the process for ATM offerings by reporting issuers? Are there any current limitations or requirements imposed on ATM offerings which we could modify or eliminate without compromising investor protection or the integrity of the capital markets?*

15. *Which elements of the exemptive relief granted for ATM offering should be codified in securities legislation to further facilitate such offerings?*

Based on our experience, we respectfully submit that there are a number of amendments to the ATM offering rules that could be adopted in order to streamline ATM offerings in Canada. None of these proposed amendments should compromise investor protection as they would not affect the statutory liability of the issuer or the agent for a misrepresentation in a prospectus. Furthermore, as exemptive relief orders for ATM programs are generally issued as a matter of course, we do not believe that codifying the exemptive relief would cause any harm to Canadian capital markets. When compared to the United States, Canadian ATM offering rules are generally more restrictive. Particularly as the SEC eliminated certain restrictions as far back as 2005 that had previously governed ATM offerings in the United States, including, for example the requirement that the number of securities registered for ATM offerings could not exceed 10% of the existing aggregate market value of the issuer's outstanding voting stock held by non-affiliates. Currently, there is no limit on the number of securities that can be registered on the shelf registration statement for an ATM offering in the United States. However, Canadian ATM rules still impose a 10% cap making cross-border ATM offerings difficult. We suggest that the CSA consider whether this 10% cap remains necessary in light of the changes to the system and experience in the United States.

We also suggest that, consistent with the exemptive relief typically granted, the following amendments to the ATM rules be adopted:

- Remove the requirement to physically deliver a prospectus to a purchaser in an ATM offering, as purchasers on the TSX (or other marketplaces) are unknown;

- Modify the statement in a prospectus supplement describing statutory rights, as ATM purchasers have (i) no two day right of withdrawal from purchase after delivery of prospectus, and (ii) no right of action for rescission or damages against the agent for non-delivery of prospectus (in each case, given no actual delivery);

- Modify the forms of certificates for the issuer and agent in the prospectus supplement (and/or the base shelf prospectus for the issuer) to refer to disclosure "as of the date of a particular distribution of securities"; and

- Modify the legends in the base shelf prospectus for an ATM to refer to the exemption from the delivery requirement.

We submit that there should not be daily limits on the number of securities that may be sold on a marketplace in Canada and that issuers should not be required to file duplicative reports disclosing the number, average price, proceeds and commissions for ATM sales in a particular month. Historically, exemptive relief has required that the issuer file a monthly report on SEDAR to this effect and include similar information in annual and interim financial statements and MD&A. In an effort to simplify ATM offerings, reporting of ATM sales should only be required in a single disclosure document.

Other Potential Areas

16. *Are there rule amendments and/or processes we could adopt to further streamline the process for cross-border prospectus offerings, without compromising investor protection, by (i) Canadian issuers and (ii) foreign issuers?*

17. *As noted in Appendix B [to the Consultation Paper], in 2013 a number of amendments were made to liberalize the pre-marketing/marketing regime in Canada. Are there rule amendments and/or processes we could adopt to further liberalize the prospectus pre-marketing and marketing regime in Canada, without compromising investor protection, for: (i) existing reporting issuers and (ii) issuers planning an IPO, and if so in what way?*

With respect to pre-marketing and marketing rules, we submit that the rules governing "standard term sheets" and "marketing materials" are too strict and difficult to comply with, especially where more complex products are being offered (i.e., the three line rule for standard term sheets does not facilitate innovation in Canadian capital markets). We also note the requirement that "standard term sheets" and "marketing materials" only include information concerning the issuer, the securities or the offering that is disclosed in, or derived from, the prospectus. We respectfully submit that a materiality standard should be included in this

requirement to provide that only material information need be disclosed in, or derived from, the prospectus.

In connection with a shelf prospectus offering, we respectfully submit that issuers should not have to file marketing materials until the filing of their prospectus supplement. Requiring issuers to file marketing materials prior to filing a prospectus supplement denies the issuer the ability to confidentially solicit interest before a deal is certain.

We also submit that the "testing the waters" exemption for IPO issuers should be amended. As is the case under Multilateral Instrument 51-105 *Issuers Quoted in the U.S. Over-the-Counter Market* ("**MI 51-105**"), the regulators have clarified that having only listed debt will not result in an issuer being an "OTC issuer", which was required due to the reference to an issuer having a FINRA ticker symbol. Such clarifications and other amendments made under blanket orders addressing issues raised by MI 51-105 need to also be reflected in this definition.

D. Reducing Ongoing Disclosure Requirements

Removing or Modifying the Criteria to File a BAR

18. *Does the BAR disclosure, in particular the financial statements of the business acquired and the pro forma financial statements, provide relevant and timely information for an investor to make an investment decision? In what situations does the BAR not provide relevant and timely information?*

19. *Are there certain BAR requirements that are more onerous or problematic than others?*

20. *If the BAR provides relevant and timely information to investors:*

(a) Are each of the current significance tests required to ensure that significant acquisitions are captured by the BAR requirements?

(b) To what level could the significance thresholds be increased for non-venture issuers while still providing an investor with sufficient information with which to make an investment decision?

(c) What alternative tests would be most relevant for a particular industry and why?

(d) Do you think that the disclosure requirements for a significant acquisition under Item 14.2 of 51-102F5 (information circular) should be modified to align with those required in a BAR, instead of prospectus-level disclosure? Why or why not?

Based upon our experience, we submit that the BAR requirement can often limit an issuer's ability to access Canadian capital markets to raise acquisition financing. With this in mind, we support an increase to the significance test thresholds for non-venture issuers to 50%, particularly given the 2015 increase to the thresholds for venture issuers to 100%.

We respectfully suggest that the BAR requirements be amended to provide an exemption from BAR level financial statement disclosure where historical financial statements for the acquired business or portion thereof are not reasonably available. In such circumstances, issuers should be permitted to omit historical financial information about an acquired business without seeking relief provided that the business being acquired (or portion thereof) is under a particular threshold or alternative disclosure is provided.

We support the CSA reconsidering the current significance tests, in particular the "profit or loss test", which can be difficult to apply. Notably, the application of the profit or loss test can sometimes lead to confusing results when using the absolute value of the loss from continuing operations of the target as required by section 8.3(7) of NI 51-102. Based on our experience, there is some question as to how this rule should be applied. Under section 8.3(7) the question is whether absolute value should be read to mean that a loss of $10 million, for example, is a positive $10 million for the purpose of the calculation or if it should mean zero. While it likely makes sense to use both absolute numbers where an acquirer and a target both suffered a loss, it may otherwise make more sense to use zero. However, unlike in other sections of NI 51-102[8], this section does not permit the use of zero and as such, the application may lead to some confusing results.

We also respectfully suggest that the CSA provide additional clarity as to what is considered to be a "business" for the purpose of the significant acquisition tests. It is not clear to us that the acquisition of assets should constitute a business, thereby requiring the issuer to create financial statements that have not previously been prepared or seek relief from the BAR requirements.

Finally, we note that is some instances the CSA have imposed a "super significance test" on issuers which has resulted in additional financial statement requirements. This "super significance test" is not currently found in NI 51-102 and its use results in uncertainty for issuers. We respectfully submit that to the extent members of the CSA have unwritten significance tests such tests either be formalized or abandoned.

Reducing Disclosure Requirements in Annual and Interim Filings

21. *Are there disclosure requirements for annual and interim filing documents that are overly burdensome for reporting issuers to prepare? Would the removal of these requirements deprive investors of any relevant information required to make an investment decision? Why or why not?*

22. *Are there disclosure requirements for which we could provide more guidance or clarity? For example, we could clarify that discussion of only significant trends and risks is required, or that the filing of immaterial amendments to material contracts is not required under NI 51-102.*

[8] See e.g., section 8.3(1) of NI 51-102.

We respectfully submit that issuers should not be required to provide the same disclosure in two documents. As long as an issuer's interim filings clearly identify the annual filing (or the portions thereof) which an investor should review, removal of duplicative requirements would not deprive and actually facilitate an investor's access to relevant information.

Any clarification of the current rules is generally appreciated. As noted above, we are of the view that an increase in certainty and predictability for issuers will have a positive effect of Canadian capital markets.

Permitting Semi-Annual Reporting

23. *What are the benefits of quarterly reporting for reporting issuers? What are the potential problems, concerns or burdens associated with quarterly reporting?*

24. *Should semi-annual reporting be an option provided to reporting issuers and if so under what circumstances? Should this option be limited to smaller reporting issuers?*

25. *Would semi-annual reporting provide sufficiently frequent disclosure to investors and analysts who may prefer to receive more timely information?*

26. *Similar to venture issuers, should non-venture issuers have the option to replace interim MD&A with quarterly highlights*?

We submit that issuers should be required to report semi-annually with the ability to provide quarterly financial statements, filings, updates or highlights as desired. This would promote less short-termism in issuers' filings. Issuers would still be required to disclose material changes in a timely manner.

E. Eliminating Overlap in Regulatory Requirements

27. *Would modifying any of the above areas in the MD&A form requirements result in a loss of significant information to an investor? Why or why not?*

28. *Are there other areas where the MD&A form requirements overlap with existing IFRS requirements?*

29. *Should we consolidate the MD&A, AIF (if applicable) and financial statements into one document? Why or why not?*

30. *Are there other areas of overlap in continuous disclosure rules? Please indicate how we could remove overlap while ensuring that disclosure is complete, relevant, clear and understandable for investors.*

As noted above, we support the removal of duplicative information between the various NI 51-102 disclosure documents. We believe that the consolidation of the MD&A, AIF and financial statements into one document would be an efficient way to achieve this goal and would be more reader-friendly for investors. The current

requirement to issue annual and quarterly MD&A and financial statements already imposes a meaningful burden on issuers that the AIF requirement exacerbates. One consolidated document would also serve to assist issuers with compliance and consistent disclosure. Alternatively, merging the AIF into an issuer's annual MD&A and removing duplicative content could also reduce regulatory burden for issuers. Under this approach, any current MD&A disclosure that is already included in the issuers financial statements should be removed. Potential examples of duplicative disclosure include risk factor disclosure and details regarding share capital, legal proceedings, credit facilities and dividends.

F. Enhancing Electronic Delivery of Documents

31. *Are there any aspects of the guidance provided in NP 11-201 which are unclear or misaligned with market practice?*

32. *The following consultation questions pertain to the "notice-and-access" model under securities legislation and consideration of potential change to this model:*

(a) Since the adoption of the "notice-and-access" amendments, what aspects of delivering paper copies represent a significant burden for issuers, if any? Are there a significant number of investors that continue to prefer paper delivery of proxy materials, financial statements and MD&A?

(b) Do you think it is appropriate for a reporting issuer to satisfy the delivery requirements under securities legislation by making proxy materials, financial statements and MD&A publicly available electronically without prior notice or consent and only deliver paper copies of these documents if an investor specifically requests paper delivery? If so, for which of the documents required to be delivered to beneficial owners should this option be made available?

(c) Would changes to the "notice-and-access" model described in question (b) above pose a significant risk of undermining the protection of investors under securities legislation, even though an investor may request to receive paper copies?

(d) Are there other rule amendments that could be made in NI 54-101 or NI 51-102 to improve the current "notice-and-access" options available for reporting issuers?

33. *Are there other ways electronic delivery of documents could be further enhanced through securities legislation?*

Based on our experience, issuers and underwriters/dealers generally want to be able to deliver prospectuses and other disclosure documents electronically by email. We generally support the electronic delivery of prospectus and other disclosure documents and submit that deemed delivery will facilitate the use of electronic methods of delivery.

We also submit that it is appropriate for a reporting issuer to satisfy the delivery requirements under securities legislation by making proxy materials, financial

statements and MD&A electronically available without prior consent but with a short notice in the case of special meetings, directors' circulars and take-over bid circulars. We support electronic delivery of all continuous disclosure documents with an annual notice to investors indicating that documents will be available on SEDAR unless paper copies are requested. We note that the electronic delivery of disclosure documents is beneficial to the environment and particularly timely given the increased focus on environmental related disclosure and governance in Canadian capital markets.

G. Additional Comments

In addition to our responses to the consultation questions above, we respectfully submit the following:

- As noted above, the guidance provided in NP 51-201 regarding the meaning of "generally disclosed" is inconsistent with current market reality. We suggest that the CSA consider eliminating duplicative dissemination of information. For example, in the case of material change reports ("MCRs"), the disclosure of a material change can be disseminated by the filing of an MCR or the filing of a press release. Both methods should not be required.

- We also suggest that the list of "designated foreign jurisdictions" included in National Instrument 71-102 *Continuous Disclosure and Other Exemptions Relating to Foreign Issuers* ("**NI 71-102**") be expanded so that a greater number of issuers can take advantage of the alternative disclosure requirements found in NI 71-102. The limited number of jurisdictions named therein risks excluding countries that have the same or substantially similar requirements for prospectuses or similar offering or disclosure documents as those countries that are listed. For example, in the European Economic Area (being all 28 members of the European Union, Norway, Lichtenstein and Iceland) (the "**EEA**"), the requirements for prospectus approval and the contents of prospectuses have been harmonized under Directive 2003/71/EC, as amended. However, only a limited number of those EEA states are considered to be "designated foreign jurisdictions". As well, there is a mutual recognition system in place across the EEA whereby prospectuses that are approved by regulators in any EEA country can be "passported" to any other EEA country for the purpose of making offers of securities in those countries. We respectfully submit that the limited list of European countries is outdated and created without a clear set of criteria, and does not take into account either the harmonization or the mutual recognition with respect to prospectuses in Europe.

* * * * *

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

Yours truly,

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on my own behalf and on behalf of

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