

December 5, 2018

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

Attention:

The Secretary
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Me Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
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Ladies and Gentlemen:

Re: CSA Notice and Request for Comment Re: Proposed National Instrument 52-112 Non-GAAP and Other Financial Measures Disclosures and related documents (the "Proposed Instrument")

*We are writing in response to your request for comment dated September 6, 2018 (the "**Request**") regarding the Proposed Materials (as defined in the Request). Capitalized terms used in this letter have the meaning given to them in the Request.*

Please note that the comments provided herein are those of certain members of our firm and should not be taken to represent the position of the firm generally or any of our clients. Subject to any comments below, we believe the guidance and examples provided in the Proposed Materials will be useful in assisting issuers in complying with the Proposed Instrument.

1. Definitions

Given that NI 52-112 will be a rule, we believe it essential that the definition of non-GAAP financial measure and other critical definitions be clear and that appropriate guidance be provided in the Companion Policy to remove any doubt about what is included. For instance, we understand that certain performance measures used by oil and gas issuers are not non-GAAP financial measures such as finding and development costs, which, while regulated by NI 51-101 as an oil and gas metric if disclosed, will continue to not be considered a non-GAAP financial measure. Current CSA Staff Notice 52-306 is instructive in this regard as it provides as follows:

Some issuers disclose performance measures that are calculated without using financial measures (for example, number of units or number of subscribers). Some issuers disclose performance measures that are calculated using financial information presented in the financial statements (for example, sales per square foot, where the sales figure is extracted directly from the financial statements). In both of the preceding scenarios, such performance measures are not considered to be non-GAAP financial measures.

We note that in the Companion Policy to the Proposed Instrument, the definition of non-GAAP financial measure is not intended to include non-financial information such as: number of units, number of subscribers, etc.(bottom of p. 18 of Request). We note, however, that the list provided does not include any performance measures calculated using financial information and it does not include the above guidance specifically related to calculation of measures that include financial information which we consider appropriate and helpful. We would suggest this be included as it clarifies this issue.

We suggest the Proposed Instrument or Companion Policy clarify exactly what a "financial measure" is given that the concept forms the starting point for all the critical definitions used in the Proposed Instrument. For example, the first box used in Annex C suggests that a financial measure is "...a financial measure (dollar or ratio)". If any disclosed dollar or ratio is a "financial measure" and is not presented or disclosed in the financial statements, then such characterization or interpretation would, in our view, have broad and unintended consequences. Some examples for oil and gas and other issuers that would be treated as financial measures under this interpretation include cash costs, drill and complete costs, finding and developments costs, capital expenditures, property acquisition costs, recycle ratio, enterprise value, and total capitalization to name just a few.

As a further example, we note that Section 2 of the Companion Policy lists Net Present Value of Future Net Revenue as an example of a "specific financial measure" which would be excluded from the application of the Proposed Instrument because it is required to be calculated in accordance with prescribed requirements under applicable securities legislation. The implication of this is that if not calculated in accordance with applicable securities legislation it would be a financial measure subject to the Proposed Instrument. We are unclear why this is would be characterized as a financial measure subject to the Proposed Instrument in any event given it is only a calculation of the net present value of an oil and gas issuer's reserves and not a financial measure of financial performance, financial position or cash flow. A similar comment would apply to the inclusion of reference to Net Asset Value in this section. Again, the guidance as applied to these examples implies that a numerical measure is a "financial measure" of financial performance, financial position or cash flow under the Proposed Instrument simply because it has a dollar sign in front of it."

Whether our interpretation is correct or not, it would be of assistance to provide a definition of "financial measure" or provide guidance as to the interpretation thereof.

2. Application

(a) Private Issuers

We would encourage the CSA to reconsider the application of the Proposed Instrument to private issuers, which appears to be inconsistent with policy decisions made regarding other disclosure requirements. We note that many disclosure obligations imposed on reporting issuers are not extended to private issuers and would question the rationale for doing so in this case. For example, disclosure obligations and standards under NI 51-101 in the case of oil and gas issuers only apply to reporting issuers, including disclosure requirements for oil and gas metrics. Disclosure requirements under NI 51-102, including those relating to disclosure of forward looking information, financial outlooks and FOFI, only apply to reporting issuers. In fact, liability for misrepresentations under the secondary market liability provisions do not apply to private issuers.

Furthermore, the application of the Proposed Instrument to private issuers would likely have a disproportionate impact on private issuers who tend to have less resources and processes dedicated to financial reporting functions compared to reporting issuers.

(b) Exclusions for disclosures required by law

*We note that disclosure of a non-GAAP financial measure, segment measure, capital management measure or supplementary financial measure in accordance with a requirement of securities legislation or the laws of a jurisdiction of Canada would not fall within the scope of the Proposed Instrument. That rule would exclude the application of the Proposed Instrument to many of the disclosures that oil and gas issuers are required to make under National Instrument 51-101 – Standards of Disclosure for Oil and Gas Activities and Form 51-101F1 – Statement of Reserves Data and Other Oil and Gas Information ("**Form 51-101F1**"), such as operating costs, development costs, abandonment and reclamation costs, and quarterly disclosure for prices received, royalties paid, production costs and the resulting netback. However, many oil and gas issuers choose to disclose such measures and other similar measures on a periodic basis in documents other than their Form 51-101F1 or Annual Information Form on a voluntary basis and not because they are required to do so under securities legislation or the laws of a jurisdiction of Canada. When they choose to make voluntary disclosures of such measures, and, in doing so, calculate such measures in accordance with the applicable securities legislation or the laws of a jurisdiction of Canada, we believe that such disclosures should be excluded from the application of the Proposed Instrument under this rule even though such disclosures are not "required" by law. We would suggest that the Proposed Companion Policy be revised as it is confusing and unclear on this matter.*

3. Usefulness

Section 3(d) of the Proposed Instrument requires an explanation of how the non-GAAP financial measure provides useful information to a reasonable person and explains the additional purposes, if any, for which management uses the non-GAAP financial measure. We note that the Companion Policy in fact states that the term "useful" is intended to reflect how management believes that presentation of the non-GAAP financial measure provides incremental information to investors regarding the issuer's financial position, financial performance or cash flows. In other words, it is management's beliefs, not an objective standard, that is relevant for these purposes and combining the subjective and objective elements in this manner only creates confusion. We suggest this be addressed.

Furthermore, we suggest it should not be necessary to meet an objective test for the usefulness of the information, which may simply give rise to unproductive disagreements between the regulators and the issuers; which has been our experience. If the purpose of providing the measure is stated, the reader can judge the usefulness to him or her. This is similar to the approach taken in Section 4B.3 of NI 51-102 with respect to disclosure of FOFI or a financial outlook, where disclosure of the purpose of the FOFI or financial outlook is required to be disclosed without any requirement to satisfy a reasonable person test.

4. Cross Referencing

To avoid undue burden, an issuer that discloses a non-GAAP financial measure in a press release or other document should be able to cross reference to the required reconciliation in another document that is publicly filed on SEDAR. This would be in line with the cross referencing permitted for disclosures in Section 5.9(3) of NI 51-101 and we believe it should be adequate for this purpose. Concern that cross referencing is inadequate runs contrary to the entire current system of disclosure. For example, while more involved than mere cross referencing, incorporation by reference of the issuer's public record, as required by Item 11 of NI 41-101, is sufficient for a short form prospectus filing.

5. Bank Covenants

The Proposed Instrument is clear that it does not apply to material contracts that are filed on SEDAR, including credit agreements or similar documents. However, as drafted, the definition of a Non-GAAP Financial Measure in the Proposed Instrument would capture disclosure of financial covenants mandated by a credit agreement if they were disclosed in a document other than the credit agreement or similar document.

We agree, as the Proposed Companion Policy states, that disclosure of financial covenants from material contracts should include appropriate labelling to identify them as such. We do not feel that a reconciliation should be required nor that it is relevant. This is disclosure of a contractual term which just happens to be in numerical form. Such financial covenants are included by issuers to provide investors with information concerning, among other things, the issuer's liquidity and capital resources and to comply with disclosure obligations. The disclosure is not being provided to highlight results, where comparability to other issuers and standardized measures is a concern. We think that a reconciliation to the financial statements would more likely confuse the issue and make it appear to be more like a financial metric, which it is not.

6. Is the proposed exclusion of oral statements to the application appropriate?

We believe that the inclusion of oral statements would be impractical and we note that the secondary market liability provisions regarding misrepresentations would still apply to any "public oral statements". Consider whether an explicit statement to this effect should be included.

7. Cost/Benefit Considerations

We understand that the CSA, in proposing new regulatory initiatives, considers the cost and benefit of application of the new initiative and that various initiatives are underway to reduce regulatory burden. In the case of the Proposed Instrument, we would similarly hope that consideration be given to the scope and quantum of administrative costs that issuers will incur in complying with the new disclosure requirements relating to segment measures and capital management measures, costs that we believe will extend well beyond the first reporting period and continue, albeit to a lesser extent, on an ongoing basis in the future. For example, we believe that implementation of the Proposed Instrument will require more detailed understanding and involvement of legal counsel of the detail of the financial statements, including segment measures and supplementary measures, in order to properly advise an issuer on compliance.

Thank you for the opportunity to provide comments on the Proposed Materials. If you have any questions on our comments or if we can clarify any of them, please feel free to contact Shannon Gangl, Kelsey Clark, Bronwyn Inkster or Riley O'Brien of our office.

Yours truly,

BURNET, DUCKWORTH & PALMER LLP

(Signed) "Burnet, Duckworth & Palmer LLP"