McCarthy Tétrault LLP
Box 48, Suite 5300
Toronto Dominion Bank Tower
Toronto ON M5K 1E6
Canada
Tel: 416-362-1812
Fax: 416-868-0673

Michael Eldridge
Counsel
T: 416-601-8979
E: meldridge@mccarthy.ca

Mark McEwan
Associate
T: 416-601-7525
E: cmmcewan@mccarthy.ca

December 4, 2019

Delivered By Email: comment@osc.gov.on.ca, consultation-en-cours@lautorite.qc.ca

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
Superintendent of Securities, Newfoundland and Labrador
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Nunavut

Attention:

The Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor, Box 55
Toronto, ON M5H 3S8

Me Philippe Lebel
Corporate Secretary and Executive Director, Legal Affairs
Autorité des marchés financiers
Place de la Cité, tour Cominar
2640 boulevard Laurier, bureau 400
Québec, QC G1V 5C1

Dear Sirs and Mesdames:

RE: CSA Notice and Request for Comment
Proposed Amendments to National Instrument 51-102 *Continuous Disclosure Obligations* and Changes to Certain Policies Related to the Business Acquisition Report Requirements

We are pleased to provide comments in response to the Proposed Amendments outlined in the CSA Notice and Request for Comment published on September 5, 2019 (the "**Notice**") concerning amendments to NI 51-102 and certain policies related to the BAR requirements.

Capitalized terms used in this letter that are not otherwise defined herein have the meanings given to them in the Notice. In this letter we also refer to CSA Consultation Paper 51-404 *Considerations for Reducing Regulatory Burden for Non-Investment Fund Reporting Issuers* published on April 6, 2017 ("**Consultation Paper 51-404**") and CSA Staff Notice 51-353 *Update on CSA Consultation Paper 51-404 Considerations for Reducing Regulatory Burden for Non-Investment Fund Reporting Issuers* published on March 27, 2018 ("**Staff Notice 51-353**").

This letter is submitted on behalf of and contains comments of certain members of our Capital Markets Practice Group. Our comments are submitted without prejudice to any position that has been or may be taken by our Firm, whether on behalf of any of client of our Firm or otherwise.

Comments on the Proposed Amendments

We welcome the Proposed Amendments and applaud the CSA for undertaking this initiative to reduce some of the regulatory burden facing non-investment fund reporting issuers. We note in particular that Annex E to the Notice sets out estimated cost savings resulting from establishing a two-trigger test with a significance test threshold of 30% in relation to (1) applications for relief from the BAR requirements, where on average 5 of 9 relief applications would no longer be required, and (2) filings of BARs that would no longer be required, where on average 24 of 56 BARs would no longer be required, in each case on an annual basis. This is a commendable outcome.

Opportunities to Further Refine the BAR Requirements

Notwithstanding the anticipated benefits of the Proposed Amendments, we note that the Proposed Amendments do not address a range of comments that were submitted by various stakeholders in response to Consultation Paper 51-404 and that were summarized in Staff Notice 51-353. Consequently, we would like to take this opportunity to express our support for certain comments and to suggest that there are further opportunities to refine the BAR requirements beyond the scope of the Proposed Amendments.

In our experience, there are numerous additional challenges relating to the BAR requirements that are not addressed by the Proposed Amendments, including:

- The lack of alignment between the BAR requirements and the prospectus-level disclosure required under item 14.2 of Form 51-102F5 *Information Circular* (the "**Information Circular Significant Acquisition Requirements**"). We note that the CSA raised and acknowledged comments on this issue in Consultation Paper 51-404 and Staff Notice 51-353. We echo the comments which supported aligning these regimes, as the lack of alignment creates instances where the financial statements to be disclosed in an information circular are subject to more onerous requirements than those required in a BAR. We do not believe there is a clear policy justification for this distinction and would suggest that aligning the Information Circular Significant Acquisition Requirements with the BAR requirements would be consistent with the objectives set out in Consultation Paper 51-404 of reducing regulatory burden without comprising investor protection.

- The inappropriateness of the significance tests to reporting issuers operating in certain industries, particularly issuers that operate in the commercial real estate investment industry. We note the comment letter submitted by the Real Property Association of Canada in response to Consultation Paper 51-404, which in our experience generally

highlights the challenges that real estate investment trusts ("**REITs**") face when navigating the BAR requirements. In particular, we are familiar with concerns relating to:

- Financial and business metrics commonly used by REITs not being available to determine significance under the BAR requirements, and the metrics required under the significance tests being of limited relevance to REITs and their investors. This disconnect between the BAR requirements and the practical realities of the REIT industry leads to situations where issuers are regularly required to seek relief from the BAR requirements and to use alternative disclosure. Although we support the Proposed Amendments, issuers and investors in, for example, the real estate industry, would benefit either from the BAR requirements containing industry-specific rules or from greater clarity as to the circumstances in which exemptive relief can be obtained or as to what constitutes acceptable alternative disclosure.

- The ability of an issuer to file a BAR varying as a function of the size and sophistication of the target of an acquisition and the length of time for which the target has owned the applicable assets. This can create unintended distinctions between potential transactions, potentially with unfavourable consequences for sellers of certain assets.

- We note that some of the comments provided to the CSA on Consultation Paper 51-404 and summarized in Staff Notice 51-353 highlighted the challenges related to the Profit or Loss Test. We appreciate and acknowledge that the new two-trigger test included in the Proposed Amendments may help alleviate certain concerns regarding this test, but we would expect the interpretation and application of the test to remain challenging and potentially problematic notwithstanding the Proposed Amendments.

We acknowledge that the Proposed Amendments address these concerns, among others, indirectly; the thresholds which are required to be met are both higher (given the threshold change from 20% to 30% in each of the Asset, Investment and Profit or Loss tests) and less numerous (given the two-trigger test) under the Proposed Amendments. However, we are of the view that certain underlying challenges relating to the BAR requirements, including those highlighted in previous comment letters and summarized in Staff Notice 51-353, will persist despite the Proposed Amendments until they are addressed directly in substantive amendments. We believe that there are additional opportunities to modernize the BAR requirements to further reduce regulatory burden without materially compromising the protection of investors in Canadian capital markets.

For example, we note that the Proposed Amendments apply a double-trigger standard to the Required Significance Tests and the Optional Significance Tests, such that an acquisition which is significant under any two of the Required Significance Tests and under any two of the Optional Significance Tests would be a significant acquisition. This structure requires issuers to determine significance under each of the Required and Optional Significance Tests in respect of multiple time periods. We query whether the CSA has considered, or would in the future consider, treating the Required Significance Tests as a filtering mechanism for the Optional Significance Tests, such that if an acquisition satisfied two of the three Required Significance Tests, then the issuer would be obliged to determine whether the acquisition satisfied only the two Optional Significance Tests that correspond to the Required Significance Tests which were initially satisfied. This would allow issuers to disregard one of the Optional Significance Tests and potentially create an opportunity for the CSA to consider further streamline the BAR

requirements by not requiring a BAR if the acquisition satisfied only one of the two remaining optional tests.

In addition, we are aware of recent reforms proposed in the United States by the Securities and Exchange Commission (the "**SEC**"). We understand that the framework in effect in the United States generally requires greater levels of disclosure for acquisitions that are relatively more significant, and less disclosure for acquisitions that are relatively less significant. This approach contrasts with the BAR requirements and the Proposed Amendments, which, when triggered, apply as a whole irrespective of the degree of significance of an acquisition. We also understand that the changes proposed by the SEC include:

- Provisions intended to reduce the burdens of disclosure for even the most significant acquisitions by shortening the period in respect of which audited financial statements of the acquired business must be provided.

- Amendments to address anomalies that resulted from the investment and income tests used by the SEC to determine significance.

We acknowledge and appreciate that the SEC is responsible for a distinct regulatory environment and that cross-border comparisons can be misleading and unhelpful. We believe that Canada's existing securities legislation, coupled with the ongoing efforts of the CSA to streamline regulation, generally succeed in balancing the overarching policy considerations of investor protection and market efficiency. That being said, it is our view that the complex and onerous nature of the BAR requirements should continue to be examined and refined in ways which reduce undue burden on Canadian reporting issuers while still protecting investors. We would therefore encourage the CSA to continue to engage in meaningful dialogue with investors and stakeholders, and, in addition to the approach taken with the Proposed Amendments, which adjust the circumstances in which disclosure is required, to consider alternative approaches which address concerns related to the substance of the significance tests, industry specific concerns, and the circumstances in which prospectus-level disclosure is required and when less disclosure might be more appropriate.

* * * * * * * * *

Thank you for the opportunity to comment on the Proposed Amendments. We would be happy to discuss any of the above with you further. If you have any questions, please do not hesitate to contact the undersigned at the contact information above or either of Andrew Parker (T: 416-601-7939; E: aparker@mccarthy.ca) or Patrick Boucher (T: 514-397-4237; E: pboucher@mccarthy.ca).

Yours truly,

McCarthy Tétrault LLP

Per:

(Signed) "Michael Eldridge" *(Signed) "Mark McEwan"*