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**Without Prejudice**
**By E-mail**

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

The Secretary
Ontario Securities Commission
20 Queen Street West, 22nd Floor
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Me Philippe Lebel
Corporate Secretary and Executive Director,
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Dear Sirs/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**

## A. INTRODUCTION

We submit the following comments in response to the Notice and Request for Comment (the "**Notice**") published by the Canadian Securities Administrators (the "**CSA**") on September 5, 2019 with respect to proposed amendments to National Instrument 51-102 *Continuous Disclosure Obligations* ("**NI 51-102**") and changes to certain policies related to the business acquisition report ("**BAR**") requirements. Collectively, the proposed amendments to NI 51-102 and the proposed amendments to policies related to BAR requirements are referred to herein as the "**Proposed Amendments**").

Thank you for the opportunity to comment on the Proposed Amendments. 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 specific sections of the Proposed Amendments. All references to parts and sections are to the relevant parts or sections of the applicable Proposed Amendments.

## B. COMMENTS

### a. Two-Trigger Significance Test

We are supportive of relaxing the tests to determine significance of business acquisitions for non-venture reporting issuers such that an acquisition of a business or related businesses is a significant acquisition only if two of the three significance thresholds are surpassed.

We respectfully submit that triggering of only one of the significance tests may not, in many cases, represent a correlation with the actual significance of an acquisition from a commercial, business or financial perspective. Based on our experience, where an acquisition triggers only one of the three existing significance tests in NI 51-102, the result is often anomalous rather than indicative of significance. In these examples the issuer generally does not consider the acquisition to be "significant" or material. In addition, it is often the case that the result of two of the tests is significantly below the 20% threshold as compared to the third test which is above the 20% threshold. The result of the current single-trigger requirement is that the issuer is either required to comply with the BAR requirements, or where viable, expend significant time and resources to pursue exemptive relief. Each of these options can be costly to the issuer, without providing additional meaningful benefit to investors. In our view, moving to a two-trigger significance test would reduce the number of anomalous results and therefore significantly reduce the burden for issuers undertaking acquisitions that should not otherwise be treated as significant.

The Notice states that specific criticism was expressed regarding the profit or loss test for reasons including that it produces anomalous results. We agree, and further suggest that the CSA should consider whether there may be a suitable replacement to the profit or lost test, or provide for alternatives that may be acceptable in the appropriate circumstances, such as EBITDA. Pursuant to subsection 8.1(14) of NI 51-102, the significance of an acquisition is permitted, rightfully, to be calculated using unaudited financial statements. As such, given that unaudited profit or loss can be relied upon for the purposes of testing significance, in our view, it would be appropriate to permit calculation based on EBITDA or other similar and standardized measures. Profit or loss in many contexts, including acquisitions of private enterprises that do not produce audited financial statements, is often not the relevant measure of the historical performance of a business, nor the relevant measure relied upon when making acquisition determinations.

With respect to acquisitions of related businesses, we suggest that subsection 8.3(12) of NI 51-102 be amended to clarify the specific time-frame that applies to consider acquisitions of related businesses on a combined basis. Subsection 8.3(12), in our view, lacks clarity in contrast to subsection 8.3(11) of NI 51-102, which specifically applies to acquisitions made "during the same financial year." We further suggest that subsection (a) of the definition of "acquisition of a related business" is overly broad in that acquisitions of different businesses that are not otherwise connected should not be required to be considered on a combined basis in all circumstances, solely due to having been under common control or management at some prior point in time. Examples include distinct and separate real estate asset portfolios or resource assets, that may have no other connection other than common control or management with a previously acquired portfolio or asset.

### b. Increased Significance Threshold

We are supportive of the increased significance threshold of 30% in the Proposed Amendments. Referring again to the instances where there have been anomalous results, we note than in many

examples the one test that is triggered results in a significance percentage of between 20% to 30%. Increasing the significance threshold would not only reduce the regulatory burden on issuers but also allow for greater flexibility to pursue growth strategies and financing. The additional delay required to prepare audited financial statements for business acquisitions adds a great deal of uncertainty and market risk where the issuer must also pursue acquisition financing in connection with an investment. The requirement also puts reporting issuers at a competitive disadvantage when competing for viable acquisition targets, particularly in the context of auctions or other similar circumstances where target businesses may not have any incentive and/or ability to produce or assist in the production of audited financial statements. These requirements also create challenges in the context of foreign acquisitions, acquisitions in specific industries, or of discrete assets or parts of businesses, where appropriate records required to prepare audited financial statements may not be readily available or accessible

**c. Subsection 8.1(4) of Companion Policy 51-102CP *Continuous Disclosure Obligations***

We urge the CSA to consider whether it is necessary or helpful to add the proposed guidance to Companion Policy 51-102CP *Continuous Disclosure Obligations* ("**51-102CP**") with respect to an acquisition constituting an acquisition of a business for securities law purposes even where such an acquisition would not meet the definition of a "business" for accounting purposes. . If a proposed acquisition was not historically reported as a standalone business under IFRS nor historically considered a business for accounting purposes, we suggest the CSA should consider whether it is appropriate in all cases to require an issuer to have to prepare such financial statements for these purposes.

International Financial Reporting Standard 3, "Business Combinations" ("**IFRS 3**") provides guidance that defines a business as an "integrated set of activities and assets that is capable of being conducted and managed for the purpose of providing a return in the form of dividends, lower costs or other economic benefits directly to investors or other owners, members or participants." Paragraph B8 of IFRS 3 states that "to be capable of being conducted and managed for the purpose identified in the definition of a business, an integrated set of activities and assets requires two essential elements – inputs and process applied to those inputs".

Paragraph B8 of IFRS 3 provides that "to be considered a business, an integrated set of activities and assets must include, at a minimum, an output and a substantive process that together significantly contribute to the ability to create output." Under paragraph B12B, it states: "If a set of activities and assets does not have outputs at the acquisition date, an acquired process (or group of processes) shall be considered substantive only if: (a) it is critical to the ability to develop or convert an acquired input or inputs into outputs; and (b) the inputs acquired include both an organized workforce that has the necessary skills, knowledge, or experience to perform that process (or group of processes) and other inputs that the organized workforce could develop or convert into outputs. Those other inputs could include: (i) intellectual property that could be used to develop a good or service; (ii) other economic resources that could be developed to create outputs; or (iii) rights to obtain access to necessary materials or rights that enable the creation of future outputs. Examples of the inputs mentioned in subparagraphs (b)(i) - (iii) include technology, in-process research and development projects, real estate and mineral interests." We believe that the foregoing and other guidance provided in IFRS 3 can be relevant in applicable circumstance to determine whether or not an acquisition of assets or rights, etc., should be considered a business. As such, we believe the proposed 51-102CP amendments will add ambiguity for issuers in determining whether or not an acquisition would be considered a business.

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

Yours truly,

"*Laura Levine*"

"*Ramandeep K. Grewal*"