Notice

Repeal of National Policy No. 48, *Future-Oriented Financial Information*

And

Regulation to amend *Regulation 51-102 respecting Continuous Disclosure Obligations*

And

Related Consequential Amendments

This Notice accompanies the following:

1. the Regulation to amend *Regulation 51-102 respecting Continuous Disclosure Obligations* (Regulation 51-102**)** and Form 51-102F1 *Management's Discussion and Analysis* (Form 51-102F1) in respect of forward-looking information, including future-oriented financial information (FOFI) and financial outlooks such as earnings guidance (the Regulation to amend Regulation 51-102);

2. related consequential amendments to the following regulations (the Consequential Amendments):

- *Regulation 44-101 respecting Short Form Prospectus Distributions*, in Form 44-101F1 *Short Form Prospectus* (Form 44-101F1);

- *Regulation 45-101 respecting Rights Offerings*, in Form 45-101F *Information Required in a Rights Offering Circular* (Form 45-101F);

- *Regulation 45-106 respecting Prospectus and Registration Exemptions*, in Forms 45-106F2 *Offering Memorandum for Non-Qualifying Issuers* (Form 45-106F2) and 45-106F3 *Offering Memorandum for Qualifying Issuers* (Form 45-106F3);

3. amendments to the following Québec instruments (the Québec Amendments):

- the *Securities Regulation*;

- *Regulation Q-28 respecting General Prospectus Requirements*, in Schedule 1, *Information Required in a Prospectus* (Schedule 1 to Regulation Q-28), as well as *Companion Policy Q-28, General Prospectus Requirements* (Companion Policy Q-28);

4. as related amendments to the following policy statements (the Policy Amendments):

- Policy Statement to *Regulation 51-102 respecting Continuous Disclosure Obligations* (Policy Statement 51-102)

- Policy Statement to *Regulation 44-101 respecting Short Form Prospectus Distributions* (Policy Statement 44-101)

- *Policy Statement 41-201 respecting Income Trusts and Other Indirect Offerings* (Policy Statement 41-201)

- *Policy Statement 51-201 respecting Disclosure Standards* (Policy Statement 51-201);

5. the Regulation to repeal National Policy No. 48, *Future-Oriented Financial Information* (NP 48) and the Regulation to repeal *Regulation Q-11 respecting Future-Oriented Financial Information* (Regulation Q-11).

The Regulation to amend Regulation 51-102, the Consequential Amendments and the Policy Amendments (collectively the Amendments) are an initiative of the securities regulatory authorities in each of the provinces and territories.

The Regulation to amend Regulation 52-102 and the Consequential Amendments (collectively the Regulation Amendments) have been made, or are expected to be made, as:

- rules in each of Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, Newfoundland and Labrador, Ontario and Prince Edward Island;

- Commission regulations in Saskatchewan and a regulation in Québec, Nunavut and Northwest Territories; and

- policies in the Yukon.

In Québec, the Regulation Amendments and the Québec Amendments are made under section 331.1 of *The Securities Act* (Québec) and will have to be approved, with or without amendment, by the Minister of Finance. They will come into force on the date of their publication in the *Gazette officielle du Québec* or any later date they specify.

If the required government approval is obtained in British Columbia, the British Columbia Securities Commission intends to make the Regulation Amendments and adopt the Policy Amendments.

In Ontario, the Regulation Amendments were delivered to the Minister responsible for securities regulation on October 12, 2007, along with amendments to Form 41-501F1 *Information Required in a Prospectus* of OSC Rule 41-501 *General Prospectus Requirements*, and OSC Rule 45-501 *Ontario Prospectus and Registration Exemptions* (the Ontario Rule Amendments). The Minister may approve or reject the Regulation Amendments and the Ontario Rule Amendments or return them for further consideration. If the Minister approves the Regulation Amendments or does not take any further action by December 10, 2007, the Regulation Amendments will come into force on December 31, 2007.

The following CSA jurisdictions have obtained commission approval:

Alberta, British Columbia, New Brunswick, Manitoba, Northwest Territories, Nunavut, Ontario, Québec, and Saskatchewan.

We expect to implement the Amendments on December 31, 2007.

Substance and Purpose

Currently, our expectations for forward-looking information are found in a number of places:

- NP 48 specifies how FOFI should be prepared, updated and compared to actual, and specifies when an auditor should be involved. Since NP 48 was issued in 1993, there has been confusion in the market as to the applicability of NP 48 to other types of forward-looking information, such as earnings guidance.

- NP 51-201 includes best disclosure practices for earnings guidance and for updating forward-looking information. However, since the introduction of NP 51-201 in 2002, issuers have continued to question the applicability of NP 48 to earnings guidance and other financial outlooks.

- Form 51-102F1 includes instructions to issuers who prepare forward-looking information in management's discussion and analysis (MD&A).

The Amendments:

- streamline and clarify the requirements for preparation and disclosure of all forward-looking information in one location, placing them in Regulation 51-102, with cross-references in the relevant offering document forms to these requirements; and

- apply the same provisions for comparison to actual, updating and withdrawal to both FOFI and financial outlooks such as earnings guidance.

Background

We published the Amendments for comment on December 1, 2006 (the Proposed Amendments).

Summary of Changes to the Proposed Amendments

We have summarized the principal changes to the Proposed Amendments in Appendix A to this Notice.

Summary of Written Comments Received by the CSA

We received submissions from five commenters. We have considered all the comments received and thank all commenters. Our responses to the comments are contained in Appendix B to this Notice.

Questions

Please refer your questions to any of:

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Appendix A

Summary of Principal Changes to the Proposed Amendments

The following is a summary of principal changes to the Proposed Amendments. None of the changes is a material change to the Proposed Amendments.

Regulation to amend Regulation 51-102

- The definitions of "financial outlook" and "FOFI" have been moved to subsection 1.1(1) of Regulation 51-102. The examples of types of financial outlooks have been moved from the definition of "financial outlook" to section 4A.3 of Policy Statement 51-102.

- Subsection 4B.3(a) has been changed to require identification of the date management approved the FOFI or financial outlook only if the document containing the FOFI or financial outlook is undated.

- A new paragraph 5.8(3)(b) has been added to require that a reporting issuer who issues a news release referred to in paragraph 5.8(3)(a) in lieu of the MD&A disclosure required by subsection 5.8(2) also include a cross-reference to the news release in the MD&A or MD&A supplement.

- A new paragraph 5.8(6)(b) has been added to require that a reporting issuer who issues a news release referred to in paragraph 5.8(6)(a) in lieu of the MD&A disclosure required by subsection 5.8(5) also include a cross-reference to the news release in the MD&A or MD&A supplement.

Amendments to Policy Statement 51-102

- Section 4A.3 has been changed to provide more guidance on when forward-looking information is material. It now sets out our view that FOFI and most financial outlooks are material forward-looking information, and provides an example of material forward-looking information that is not a financial outlook or FOFI.

Consequential Amendments and Related Policy Statement Amendments

- Policy Statement 44-101: The previous proposed section 4.14 has been removed. This section previously gave guidance regarding dissemination of forward-looking information during the course of distribution. If information disseminated during a distribution constitutes an act in furtherance of a trade, the guidance in Part 6 of Policy Statement to proposed *Regulation 41-101 respecting General Prospectus Requirements* will apply. A new section 4.14 has been added that states that (if not already discussed in previously-filed MD&A) an issuer should discuss in the short form prospectus events and circumstances that are reasonably likely to cause actual results to differ materially from previously disclosed material forward-looking information for a period that is not complete, as well as the expected differences.

- Form 44-101F1: paragraph (13) has been changed to clarify that section 4A.2, section 4A.3 and Part 4B of Regulation 51-102 apply to any issuer or other entity that the forward-looking information in the short form prospectus relates to, regardless of whether the issuer or other entity is a reporting issuer.

- Form 45-101F: item 17.1 has been changed to clarify that section 4A.2, section 4A.3 and Part 4B of Regulation 51-102 apply to any issuer or other entity that the forward-looking information in the rights offering circular relates to, regardless of whether the issuer or other entity is a reporting issuer.

- Form 45-106F2: item B.12 of the instructions has been changed to clarify that section 4A.2, section 4A.3 and Part 4B of Regulation 51-102 apply as if references to "reporting issuer" were references to "issuer".

Amendments to Policy Statement 41-201

A sentence has been added to the first paragraph of section 2.8 to clarify that although securities legislation does not prohibit the use of projections in preparing estimated distributable cash information, we believe that a forecast prepared in accordance with CICA Handbook section 4250 *Future-oriented Financial Information* is more appropriate. This amendment was not included in the December Notice. However, no notice of this amendment is required as the amendment does not make a material substantive change to an existing policy.

Amendments to Policy Statement 51-201

Section 6.4(1), which recommends board and audit committee review of certain financial disclosures, has been amended to replace "earnings guidance" with "financial outlooks and FOFI, as defined in *Regulation 51-102 respecting Continuous Disclosure Obligations*." This amendment was not included in the December Notice. However, no notice of this amendment is required as the amendment does not make a material substantive change to an existing policy.

Appendix B

Summary of Comments and CSA Responses

Summary of Comments and Proposed Responses

A. Removal of Audit Requirement for FOFI (the Audit Requirement)

	Comment	Response
1.	(a) Two commenters do not support removal of the Audit Requirement. One commenter believes that the Audit Requirement should be retained for FOFI included in a prospectus or a takeover bid circular; but supports the removal of the requirement for an audit of FOFI in certain offering memoranda. Reasons cited are:	**We have considered the comments, and continue to believe that the Audit Requirement should be eliminated. Our responses to specific concerns raised are as follows:**
	• Concern that there are insufficient controls and procedures existing for FOFI (in comparison to enhanced disclosure controls and procedures, internal controls over financial reporting processes, and audit committee responsibilities for financial releases applicable to historical financial information).	**Reporting issuers who prepare FOFI are required to have a reasonable basis for the FOFI. One factor an issuer should consider in assessing whether there is a reasonable basis is the process followed in preparing and reviewing forward-looking information – see s. 4A.2 of Policy Statement 51-102. We also have amended s. 6.4 of NP 51-201 to recommend that the audit committee review financial outlooks and FOFI before they are released. Finally, issuers who include FOFI and FOFI-related disclosure in MD&A and press releases filed with securities regulators will also need to consider their obligations under *Regulation 52-109 respecting Certification of Disclosure in Issuers' Annual and Interim Filings*.**
	• Preparation of FOFI in same format as historical financial statements (as required by CICA Handbook s. 4250) suggests a degree of accuracy that may be unwarranted and may lead to inappropriate reliance. Example: assumptions about future revenues and future financing arrangements involving complex financial instruments and multi-element contracts for which contracts/agreements do not exist will gloss over complexities when actual transactions occur.	**This concern can be addressed through additional disclosure as required by s. 4A.3 and 4B.3.**
	• Transition to International Financial Reporting Standards (IFRS) will make preparation of FOFI in accordance with accounting standards that will apply to forecast periods challenging in many cases.	**We acknowledge that the transition to IFRS will be an additional challenge for issuers who prepare FOFI, given that s. 4B.2(2)(b) requires FOFI or a financial outlook to be prepared using the accounting policies a reporting issuer expects to use to prepare its historical financial statements. However, we do not believe that auditor involvement in FOFI is an appropriate response to address the challenges of preparing FOFI in accordance with a new set of accounting standards (IFRS). Reporting issuers who prepare**

	Comment	Response
		FOFI or a financial outlook will need to satisfy themselves that they have appropriately applied the new accounting standards, once adopted, in considering whether they have met the reasonable basis requirement of s. 4A.2 and the reasonable assumptions requirement of s. 4B.2.
	• Prospectus liability provisions will not adequately protect investors – see overly optimistic prospectus financial forecasts in late 1980s and early 1990s that were that were identified by the OSC in a published comparison of forecast and actual results.	**OSC staff did express concern about overly optimistic prospectus financial forecasts in the late 1980s and early 1990s. However, these forecasts were audited, and as such, there is no indication that audits increased the reliability of FOFI during that time. See also our first response to the second commenter.**
	• An auditor's report on a profit forecast or profit estimate is required under the EU Prospectus Regulation.	**Item 13.2 of Annex I to the EU Commission Regulation (EC) No. 809/2004 implementing Directive 2003/71/EC, *Minimum Disclosure Requirements for the Share Registration Document*, provides that a profit forecast or estimate in a share registration document must be accompanied by: "A report prepared by independent accountants or auditors stating that in the opinion of the independent accountants or auditors the forecast or estimate has been properly compiled on the basis stated, and that the basis of accounting used for the profit forecast or estimate is consistent with the accounting policies of the issuer." Appendix 6 to the SIR 3000 (Standards for Investment Reporting 3000 - dated January 2006) states: "The report must also state whether anything has come to their attention that indicates that any of the material assumptions have not been disclosed or whether any material assumption is unrealistic." This report is not equivalent to the audit report contemplated by CICA Assurance and Related Services Guideline 6.**
	• The topic of FOFI most often arises in circumstances where the issuer's track record of historical earnings is insufficient. The Audit Requirement has, over the years, resulted in the exclusion of much FOFI supported by little more than "hopes and good intentions".	**See our response below to the comment regarding TSXV issuers.**
	One commenter believes that the Audit Requirement should be retained for any FOFI in a prospectus, information circular or offering memorandum. Reasons cited are:	
	• The absence of problems with FOFI in recent years has been the result of the existence of the	**The Audit Requirement was introduced in 1989 in OSC Policy 5.8. Soon after, the OSC published**

	Comment	Response
	audit requirement.	**a study showing that forecasted results were rarely achieved (13 OSCB 707). This study was one of the bases of NP 48. A follow-up study was conducted in 1994 that indicated the addition of an audit report did not have a significant impact on the accuracy of forecasts (17 OSCB 6). Our greater concern is that an audit report may cause less sophisticated investors to misunderstand the inherent limitations of FOFI , and believe it is as reliable as audited historical financial statements.**
	• TSXV issuers are at an early stage of development and do not have a sufficient history of operations upon which to prepare credible FOFI. Without an audit requirement, issuers may not base their FOFI on supportable assumptions. The Proposal's requirement for a reasonable basis for assumptions will not impose sufficient discipline on FOFI.	**Each reporting issuer who wishes to prepare FOFI must determine whether it has adequate resources and information to prepare FOFI that has a reasonable basis. See our response to the first comment above. Section 4B.2 requires a reporting issuer preparing FOFI to use assumptions that are reasonable in the circumstances. Such assumptions may include supportable assumptions or hypotheses, as those terms are used in CICA Handbook s. 4250. Reporting issuers may be civilly liable if they do not prepare FOFI appropriately.**
	(b) Two commenters support removal of the Audit Requirement for FOFI. Reasons cited include: • There is sufficient protection in the requirements imposed on senior financial officers and (in respect of reporting issuers in Ontario), the provisions imposing civil liability for secondary market disclosure.	
2.	**One commenter stated that if the Audit Requirement does not apply to FOFI in a prospectus or takeover bid circular, proposed s. 4A3 of Regulation 51-102 should require inclusion of a statement by the issuer that the FOFI has not been audited and that the issuer's auditors have not expressed any assurance, positive or negative, on it. It noted that cautionary language of this nature is acceptable in SEC registration statements containing unaudited FOFI.**	**We do not believe that it is necessary to require this type of cautionary language. In our view, it will be apparent to readers that FOFI not accompanied by an auditor's report is unaudited. Other types of unaudited financial information such as distributable cash estimates are not required to be labelled unaudited.**

B. Proposed subsections 5.8(3) and 5.8(6) of Regulation 51-102 - updates and withdrawals not required to be incorporated into the next MD&A filing if the reporting issuer has included the information in a news release issued and filed prior to the filing of the MD&A or MD&A supplement for the relevant period.

	Comment	Response
1.	One commenter would prefer to eliminate the exemptions provided under proposed s. 5.8(3) and 5.8(6) from discussing in MD&A events and circumstances: (i) that are reasonably like to cause actual results to differ materially from forward-looking information previously released (proposed s. 5.8(2)), or (ii) (ii) that led the reporting issuer to withdraw previously released forward-looking information (proposed s. 5.8(5)), where the issuer has issued and filed a news release that includes that information. While the need for timely disclosure may require use of a news release (or material change report), this type of information should be incorporated into the next MD&A filing. MD&A is the most appropriate continuous disclosure document for discussing forward-looking information.	We do not think it is necessary to require issuers to repeat the discussion contained in a previously issued and filed news release in the MD&A. Investors have already been provided with this information and have had the opportunity to absorb it. However, we believe it is appropriate to require a cross-reference in the MD&A to the relevant news release, and have provided so in subsections 5.8(3) and 5.8(6). We note that a reporting issuer can choose to include the information from the news release in the MD&A if it chooses.

C. Role of audit committee

	Comment	Response
1.	One commenter suggested that we should consider: (i) a requirement in *Regulation 52-110 respecting Audit Committees* (Regulation 52-110) that an audit committee review FOFI before it is released, or at a minimum, a "best disclosure practice" under NP 51-201; and (ii) a requirement that an audit committee be satisfied that adequate procedures are in place for the preparation of FOFI. Reasons cited are: • Re. proposal (i): FOFI is required to be prepared in the format of historical financial statements, and MD&A will contain (where applicable) disclosure of material differences between actual results and previously released FOFI. Therefore, FOFI and the discussion thereof should be treated the same as financial statements, MD&A and annual and interim earnings press releases which s. 2.3(5) of Regulation 52-110 require an audit committee review before the information is publicly disclosed. • Re. proposal (ii): An audit committee should expect management to prepare for it a plan for the development of FOFI that provides the same information that a public accountant would expect to see pursuant to Appendix A to CICA Assurance and Related Services Guideline 6.	We have amended s. 6.4 of NP 51-201 to recommend that the audit committee review financial outlooks and FOFI before they are released. The issue of whether Regulation 52-110 should require an audit committee to review FOFI before it is released will be considered at such time as other amendments to the audit committee's responsibilities set out in Regulation 52-110 are being considered. We also note that MD&A disclosure relating to FOFI or a financial outlook will be subject to board (or audit committee, in the case of interim MD&A) approval under s. 5.5 of Regulation 51-102.

D. Issues relating to financial outlooks and FOFI in a prospectus

	Comment	Response
1.	One commenter asked us to consider requiring that where an issuer files a short form prospectus and has previously disseminated FOFI that (i) covers a period for which historical results have not yet been released at the date of a short form prospectus, and (ii) is not discussed in the most recent MD&A incorporated by reference, the short form prospectus be required to contain at least an updated "financial outlook" for the remaining portion of the forecast period, if not the FOFI itself.	**We do not believe it is necessary to require an updated "financial outlook" for the remaining forecast period in the absence of an event that is reasonably likely to cause the actual results to differ materially from previously-disclosed FOFI. We have amended, however, Policy Statement 44-101 to state our view that if an issuer, at the time it files a short form prospectus,** **1. has previously disclosed to the public material forward-looking information for a period that is not yet complete;** **2. is aware of events and circumstances that are reasonably likely to cause actual results to differ materially from the material forward-looking information; and** **3. has not filed an MD&A or MD&A supplement with the securities regulatory authorities that discusses those events and circumstances and expected differences from the material forward-looking information, as provided by s. 5.8 of Regulation 51-102,** **the issuer should discuss those events and circumstances, and the expected difference from the material forward-looking information, in the short form prospectus.**
2.	One commenter asked us to consider clarifying that para. 4 of s. 11.1(1) of Form 44-101F1 (which requires incorporation by reference of financial information about the issuer for a financial period more recent than the period for which financial statements are otherwise required, and that is publicly disseminated through news release or otherwise) is not intended to cover FOFI that relates to a period that is more recent than the period for which financial statements are required under paras. 2 and 3.	**We agree that this provision is not intended to cover FOFI. However, we are not amending Regulation 44-101 at this time and will address this comment as part of the larger CSA initiative to adopt a national prospectus rule (proposed *Regulation 41-101 respecting General Prospectus Requirements*) and make related amendments to the various prospectus regulations.**
3.	**One commenter asked us to consider clarifying that s. 4.3 of Regulation 44-101, which mandates that any unaudited financial statements of the issuer or an acquired business included in or incorporated by reference into a short form prospectus be reviewed by an auditor, does not apply to FOFI.**	**We believe that it is sufficiently clear that s. 4.3 of Regulation 44-101 does not apply to FOFI, given that FOFI is not considered "financial statements" under GAAP.**

E. Specific requirements or guidelines on the preparation and disclosure of forward-looking information or FOFI

	Comment	Response
1.	One commenter asked that we consider changing the proposed guidance on hypotheses in proposed s. 4.A 9 of Policy Statement 51-102 to the cautionary language expressed in NP 48, i.e. that when many hypotheses are used, a projection becomes less reliable and therefore is more likely to be challenged by securities regulatory authorities. Furthermore, the language should be moved from policy statement to the actual regulation.	**We are not adopting this proposal. While some CSA jurisdictions disclose the general criteria that we use to select filings for review, we do not believe it is appropriate to provide this level of specificity about our file selection criteria.**
2.	One commenter stated that s. 4A.8 of Policy Statement 51-102 is unduly restrictive in stating that in most cases FOFI or financial outlooks should not extend beyond the next fiscal year. The policy statement should discuss factors which issuers should consider in determining the period of time over which quantitative forward-looking information may be reasonably estimated. Factors include both the nature of the business and the type of information (for example, issuers with longer business cycles, research and development costs, and capital expenditures). Furthermore, it may be confusing to include this guidance in the policy statement when this issue is already discussed in CICA Handbook s. 4250.	**We believe the proposed guidance does discuss factors which issuers should consider in determining the period of time covered by FOFI or financial outlooks, namely the ability to make appropriate assumptions, the nature of the industry, and the operating cycle. We have provided this proposed guidance in the policy statement in part to cover financial outlooks, which are not addressed by CICA Handbook s. 4250.**
3.	**One commenter noted that requiring disclosure of:** **(i) the purpose of FOFI and financial outlooks, and** **(ii) the date that FOFI or a financial outlook was approved by management, has questionable value.** **Reasons cited were:** • **The cumulative effect of these requirements will be to act as a disincentive to forward-looking disclosure that will outweigh any benefits.** • **MD&A must already take into account information available up to the disclosed date of the MD&A; CICA Handbook s. 4250 requires disclosure of the date of management's FOFI assumptions.** **Another commenter also noted that it does not understand the requirement to disclose when management approved the FOFI or financial outlook. It is the date of the disclosure that is relevant and management must approve of the disclosure on the date of the disclosure, as required by general disclosure obligations.**	**We believe that disclosure of the purpose of a financial outlook or FOFI is not onerous. We agree that where FOFI or a financial outlook is disclosed in a document issued and dated as of a specific date such as a press release, prospectus or other offering document, the date of the disclosure is the relevant date. Therefore, we have amended s. 4B.3(a) to state that FOFI or a financial outlook need only be dated if it is contained in an undated document (such as an undated website).**

F. Classification of forward-looking information

	Comment	Response
1.	One commenter stated that classifying forward-looking information into three types including FOFI and financial outlooks is inappropriate. It proposed that a distinction be made between quantitative and qualitative forward-looking information. Material quantitative forward-looking information (such as customer subscriptions, sales order backlog) that is disclosed in MD&A should be based on the best information available, supportable, and accompanied by appropriate disclosures. Material quantitative forward-looking information may be precisely the information most material to investor decision-making and should be subject to the same requirements as financial outlooks or FOFI, including comparison to actual results.	**Our response addresses the two aspects of this comment:** ***1. Classification of forward-looking information into forward-looking information, financial outlooks and FOFI:*** **We believe that it is appropriate to draw a distinction between financial forward-looking information (FOFI or financial outlooks), and other types of forward-looking information. The specific preparation and**

	Comment	Response
		disclosure requirements for FOFI and financial outlooks are intended to help investors understand the nature of the information, and compare it to actual results. **2. *Bases of material forward-looking information:* We believe that the preparation and disclosure requirements for material forward-looking information provide an appropriate level of regulation. Material forward-looking information must have a reasonable basis, and must include disclosure about the material factors or assumptions used to develop the forward-looking information. These requirements are intended to cause issuers to obtain appropriate information and develop appropriate assumptions for material-forward looking information they disseminate. In the case of projections, s. 4250 of the CICA Handbook permits projections to include hypotheses (which are plausible, but not supportable assumptions). Therefore, we do not require that all assumptions for forward-looking information be supportable assumptions. Finally, we note that in certain jurisdictions, the safe harbour provisions for forward-looking information will encourage issuers to take appropriate steps in preparing forward-looking information to avoid liability.**
2.	**One commenter requested clarification in Policy Statement 51-102 about what might constitute forward-looking information that is neither FOFI nor a financial outlook.**	**We agree with this comment, and have redrafted Policy Statement 51-102 to give an example of forward-looking information that is neither FOFI nor a financial outlook – see the amended s. 4A.3.**

G. Oral Statements

	Comment	Response
1.	**One commenter asked why forward-looking information in oral statements should not be covered by the proposals.**	**We have retained the proposed exclusion for oral statements. Material forward-looking information in oral statements is usually subsequently included in a document such as a press release. Furthermore, oral statements are a distinct type of disclosure; we note, for example, that the safe harbours for forward-looking information in the secondary market civil liability provisions of local securities legislation prescribe specific**

	Comment	Response
		methods by which oral statements can comply with the safe harbour.

H. The Supreme Court of Canada decision in Danier

	Comment	Response
1.	**One commenter suggested waiting until the Supreme Court of Canada releases its decision in the Danier Leather case before finalizing changes to rules for forward-looking information in continuous disclosure requirements. The ruling could deal with matters such as requirements for updating, the standard to be applied in determining whether an assumption is "reasonable", and what implied representations may be imbedded in forecasts.**	**The Ontario Court of Appeal addressed three issues in the Danier decision (*Kerr v. Danier Leather* [2005] O.J. No. 5388 (C.A.)):** **1. Whether s. 130(1) of the *Securities Act* (Ontario) (the "Securities Act") creates a duty to disclose material facts that arise after a prospectus has been receipted but before an offering has closed, in order to avoid liability for misrepresentation (a pre-closing duty to update);** **2. Whether a forecast contains an implied representation that the forecast is objectively reasonable; and** **3. Assuming that a forecast does have to be objectively reasonable, whether the business judgment rule applies when a court is trying to determine whether management's assessment of a forecast's achievability is objectively reasonable. The business judgment rule requires courts to defer to management's judgment in making business decisions, and not to substitute their own opinions as long as the decision is within a range of reasonableness.** **We do not think that we need to wait for the Supreme Court of Canada's decision on these matters for the following reasons:** **1. *Pre-closing duty to update*: This issue involves the larger issue of interpreting s. 130(1) of the Securities Act, and is distinct from the substance of our amendments. The Ontario Court of Appeal did refer to NP 48 as an example of regulatory policy statements with obligations going beyond those in securities legislation, and concluded that as a policy statement it did not have the force of law. However, as we are rescinding NP 48, any position taken by the Supreme Court of Canada on the status of NP 48 will not be an issue going forward. The new update requirements in s. 5.8(2) of Regulation 51-102 are requirements in securities legislation, as Regulation 51-102 is a rule in Ontario.** **2. *Whether a forecast contains an***

	Comment	Response
		***implied representation that the forecast is objectively reasonable*: Our amendments will clarify that it is a requirement under Regulation 51-102 (and associated prospectus, rights offering and prospectus exemption rules) that all forward-looking information (including forecasts) must have a reasonable basis.** **3. *Application of the business judgment rule:* The standard of review applicable in an action for civil liability for misrepresentation in a prospectus forecast is not within the scope of our amendments.**

I. Whether requirements regarding FOFI and financial outlooks are qualified by materiality.

	Comment	Response
1.	**One commenter raised a concern that the requirements regarding FOFI and financial outlooks are not qualified as applying only if the FOFI or financial outlooks are material. Therefore, issuers are imposed with requirements regarding assumptions and disclosure regarding information that is potentially not material.**	**We consider FOFI and most financial outlooks to be material. Therefore, we do not believe it is necessary to qualify the requirements regarding FOFI and financial outlooks in Regulation 51-102. We have amended s. 4A.3 to Policy Statement 51-102 to set out our view.**

J. Whether proposed s. 5.8(2) applies only to "material forward-looking information".

	Comment	Response
1.	**One commenter requested that s. 5.8(2) be amended to clarify that it applies only to "material forward-looking information" to avoid requiring issuers to make disclosure about immaterial disclosure that may nevertheless be considered to be forward-looking information.**	**We have made the requested change; and have also made similar changes to s. 5.8(5) of Regulation 51-102 and s. 5.5 of Policy Statement 51-102.**

K. Civil liability for secondary market disclosure

	Comment	Response
1.	One commenter suggested that it would be helpful for the Policy Statement 51-102 to note that reporting issuers in ON continue to be subject to the secondary market disclosure civil liability provisions.	**We do not think it is necessary to provide this guidance. There is no ambiguity that reporting issuers in Ontario are subject to the secondary market civil liability provisions.**
2.	**One commenter requested we consider modifying the language in s. 4A.3 of Regulation 51-102 to track more closely the FLI disclaimer language in the civil liability rules. Alternatively, we should consider providing an exception to proposed section 4A.3 which allows compliance with that section if the reporting issuer has complied with the forward looking disclaimer language requirements in applicable civil liability rules.**	**We are not adopting this proposal. In our view, the key elements of s. 4A.3 track the existing civil liability safe harbours. We provide guidance in s. 4A.4, 4A.5 and 4A.6 of Policy Statement 51-102 in interpreting s. 4A.3. The safe harbours are defences against civil liability, whereas s. 4A.3 contains regulatory requirements intended to enhance a user's understanding of the nature and purpose of material forward-looking information. Therefore, we believe it is appropriate for s. 4A.3 to contain**

	Comment	Response
		additional requirements, i.e. cautionary language that actual results may vary, and identification of any policy for updating forward-looking information.

L. Treatment of performance goals or targets

	Comment	Response
1.	**One commenter asked for clarification that performance goals or targets do not constitute "financial outlooks". Some reporting issuers, in the context of describing their strategy and objectives in CD documents, may set out specific financial targets for the upcoming year such as earnings per share growth, sales growth, financial ratios, etc. This information is intended to provide investors with information about how management measures success in achieving its strategic objectives, not to disclose an issuer's expectations for future financial results. Issuers who provide financial target information typically discuss in subsequent continuous disclosure documents whether the financial targets were achieved.**	**We believe that depending on the particular circumstances, a "target" or "goal" could be in substance a financial outlook. Therefore, whether this type of information is a financial outlook should be determined on a case-by-case basis.**

M. MD&A

	Comment	Response
1.	One commenter noted that the proposed amendments may result in a reduction of forward-looking information provided to capital markets in continuous disclosures. It asked us to expressly communicate our expectation that reporting issuers adopt a forward-looking orientation in their MD&A disclosure and provide appropriate forward-looking information. It noted the SEC's December 2003 *Interpretation: Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations*, which (i) notes that forward-looking information is required to be disclosed particularly when addressing known material trends and uncertainties; and (ii) encourages companies to voluntarily discuss prospective matters and include forward-looking information where it will provide useful material information for investors that promotes understanding.	**We believe that item (a) of Part 1 of Form 51-102F1 *Management's Discussion and Analysis* already sets out our expectation that MD&A adopt a forward-looking orientation. The following are specific statements to this effect:** **"MD&A is a narrative explanation, through the eyes of management, of how your company performed during the period covered by the financial statements, and of your company's financial condition and future prospects.** **…** **Your MD&A should…** • **discuss important trends and risks that have affected the financial statements, and trends and risks that are reasonably likely to affect them in the future; and** • **provide information about the quality, and potential variability, of your company's earnings and cash flow, to assist investors in determining if past performance is indicative of future performance."** **These provisions do not require reporting issuers to prepare FOFI or financial outlooks as part of their MD&A.**

N. General Comments

	Comment	Response
1.	**One commenter queried whether (a) the existing requirements to disclose material changes (and for TSX-listed issuers, to disclose material information); (b) the discipline imposed by financial markets (which will react negatively if material forward looking information is not updated or withdrawn appropriately); and (c) civil liability for secondary market disclosure, are sufficient to motivate reporting issuers to update, compare and withdraw forward looking information where it is believed necessary.**	**We believe that establishing clear requirements in securities legislation regarding the preparation and disclosure of material forward-looking information will enhance investor understanding of the nature and purpose of such information, and facilitate consistency in issuer practices.**