POLICY STATEMENT 52-109 TO REGULATION 52-109 *CERTIFICATION OF DISCLOSURE IN COMPANIES' ANNUAL AND INTERIM FILINGS*

Part 1 General

This Policy Statement provides information about how the Canadian securities regulatory authorities interpret Regulation 52-109, and should be read in conjunction with it.

Part 2 Form and Filing of Certificates

The annual and interim certificates must be filed in the exact language prescribed in Forms 52-109F1 and F2. Each certificate must be separately filed on SEDAR under the issuer's profile in the appropriate annual or interim certificate filing type:

Category of Filing - Continuous Disclosure
Folder for Filing Type - General

Filing Type - Annual Certificates
Document Type:
Form 52-109F1 - Certification of Annual Filings - CEO
Form 52-109F1 - Certification of Annual Filings - CFO

or

Filing Type - Interim Certificates
Document Type:
Form 52-109F2 - Certification of Interim Filings - CEO
Form 52-109F2 - Certification of Interim Filings - CFO

An issuer that is in compliance with U.S. federal securities laws implementing the certification requirements in section 302(a) of the Sarbanes-Oxley Act and that uses the exemption in section 4.1 of the Regulation, must file on SEDAR the CEO and CFO certificates that it filed with SEC with respect to the relevant reporting period. Where those certificates are "in" the annual or quarterly report filed with the SEC ("in" as opposed to being attached as "exhibits"), the issuer should file the report containing the certificates in the appropriate filing type described above. Where the officers' certificates are attached as exhibits to the issuer's annual or quarterly report, the issuer should file the report, together with the attached certificates, in the appropriate filing type described above.

An issuer relying on the exemption in section 4.1 of the Regulation need not file the signed paper copies of the reports and certificates that it filed with, or furnished to, the SEC.

Part 3 Internal and Disclosure Controls

The Canadian securities regulatory authorities believe that CEOs and CFOs should be required to certify that their issuers have adequate internal and disclosure controls. We believe that this is an important factor in maintaining integrity in our capital markets and thereby enhancing investor confidence in our capital markets. The Regulation does not, however, formally define those controls nor does it prescribe the degree of complexity or any specific policies or procedures that must make up those controls. This is intentional. In our view, these considerations are best left to management's judgement based on

various factors that may be particular to their issuer, including its size and the nature of its business.

Part 4 Fair Presentation

Pursuant to the third paragraph in each of the annual and interim certificates, the CEO and CFO must each certify that their issuer's financial statements "fairly present" the financial condition of the issuer for the relevant time period. Those representations are not qualified by the phrase "in accordance with generally accepted accounting principles" (GAAP) which Canadian auditors typically include in their financial statement audit reports. This qualification has been specifically excluded from the Regulation to prevent management from relying entirely upon compliance with GAAP procedures in this representation, particularly where the results of a GAAP audit may not reflect the financial condition of a company (since GAAP may not always define all the components of an overall fair presentation).

At page 7 of its adopting release,[13] the SEC states:

> The certification statement regarding fair presentation of financial statements and other financial information is not limited to a representation that the financial statements and other financial information have been presented in accordance with "generally accepted accounting principles" (GAAP) and is not otherwise limited by reference to GAAP. We believe that Congress intended this statement to provide assurances that the financial information disclosed in a report, viewed in its entirety, meets a standard of overall material accuracy and completeness that is broader than financial reporting requirements under GAAP. … Presenting financial information in conformity with generally accepted principles may not necessarily satisfy obligations under the antifraud provisions of the federal securities law.

In our view, fair presentation includes but is not necessarily limited to:

- the selection of appropriate accounting policies
- proper application of appropriate accounting policies
- disclosure of financial information that is informative and reasonably reflects the underlying transactions
- inclusion of additional disclosure necessary to provide investors with a materially accurate and complete picture of financial conditions, results of operations and cash flows

For additional commentary on what constitutes fair presentation we refer you to case law in this area. The leading U.S. case in this area is *U.S. v. Simon* (425 F.2d 796); the leading Canadian case in this area is the B.C. Court of Appeal decision in *Kripps v. Touche Ross and Co.* [1997] B.C.J. No. 968.

[13] SEC Release No. 33-8124 Final Rule: Certification of Disclosure in Companies' Quarterly and Annual Reports dated August 29, 2002.

Part 5 Exemptions

The exemptions in section 4.1 of the Regulation are based on our view that the investor confidence aims of the Regulation do not justify requiring issuers to comply with the certification requirements in the Regulation if such issuers already comply with substantially similar requirements in the U.S.

As a condition to being exempt from the annual certificate and interim certificate requirements in subsections 4.1(1) and (2) respectively, issuers must file on SEDAR the CEO and CFO certificates that they filed with the SEC in compliance with its rules implementing the certification requirements prescribed in section 302(a) of the Sarbanes-Oxley Act.

Pursuant to Regulation 52-107 *Acceptable Accounting Principles, Auditing Standards and Reporting Currency* certain Canadian issuers are able to satisfy their requirements to file financial statements prepared in accordance with Canadian GAAP by filing statements prepared in accordance with U.S. GAAP. However, it is possible that some Canadian companies may still continue to prepare two sets of financial statements and continue to file their Canadian GAAP statements in the applicable jurisdictions. In order to ensure that the Canadian GAAP financial statements are certified (pursuant to either SOX or the Regulation) those issuers will not have recourse to the exemptions in subsections 4.1(1) and (2).

Part 6 Liability for False Certification

An officer providing a false certification potentially could be subject to quasi-criminal, administrative or civil proceedings under securities law.

Officers providing a false certification could also potentially be subject to private actions for damages either at common law or under the *Securities Act* (Ontario) when amendments which create statutory civil liability for misrepresentations in continuous disclosure are proclaimed in force.[14] The liability standard applicable to a document required to be filed with the Ontario Securities Commission, including an annual or interim certificate, will depend on whether the document is a "core" document as defined under Part XXIII.1.[15] Annual and interim certificates are currently not included in the definition of "core document" but would be caught by the definition of "document".

In any action commenced under Part XXIII.1 of the *Securities Act* (Ontario) a court has the discretion to treat multiple misrepresentations having common subject matter or content as a single misrepresentation.[16] This provision would permit a court in appropriate cases to treat a misrepresentation in a company's financial statements and a misrepresentation made by an officer in an annual or interim certificate that relate to the underlying financial statements as a single misrepresentation.

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[14] These amendments were enacted on December 9, 2002.

[15] Where an action is brought for a misrepresentation contained in a non-core document, a defendant is not liable unless the plaintiff proves that the defendant: (i) knew of the misrepresentation; (ii) deliberately avoided acquiring knowledge of the misrepresentation; or (iii) by acting or failing to act, was guilty of gross misconduct in connection with the release of the document containing the misrepresentation. Where an action is brought for a misrepresentation contained in a core document, the onus is on the defendant to show that he or she was duly diligent.

[16] Subsection 138.3(6) of the *Securities Act* (Ontario).