

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

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

PART 1 GENERAL

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

PART 2 FORM AND FILING OF CERTIFICATES

The annual certificates and interim certificates must be filed in the exact language prescribed in Forms 52-109F1 and 52-109F2 (subject to Part 3 – Form of Certificates during Transition Period). When issued in English, the *Autorité des marchés financiers* will also accept certificates with the mention “*Multilateral Instrument 52-109 Certification of Disclosure in Issuers’ Annual and Interim Filings*” in the first paragraph. Each certificate must be separately filed through SEDAR under the issuer’s profile in the appropriate annual certificate 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
- Form 52-109FT1 - Certification of Annual Filings - CEO
- Form 52-109FT1 - 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
- Form 52-109FT2 - Certification of Interim Filings - CEO
- Form 52-109FT2 - Certification of Interim Filings - CFO

As indicated in Part 11, 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, may be able to rely upon the exemptions from the annual certificate and interim certificate requirements under section 4.1. To avail itself of these exemptions, an issuer must file through SEDAR the certificates of the chief executive officer and chief financial officer that the issuer filed with SEC as exhibits to the annual or quarterly reports with respect to the relevant reporting period. These certificates should be filed in the appropriate filing type described above.

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

PART 3 CERTIFICATES DURING TRANSITION PERIOD

Section 5.2 provides for a transition period for the filing of both annual certificates and interim certificates.

Pursuant to section 2.1, an issuer is required to file its annual certificates in Form 52-109F1. Under subsection 5.2(1)(b), however, an issuer may file annual certificates in Form 52-109FT1 in respect of any financial year ending on or before March 30, 2005. Form 52-109FT1 does not require the certifying officers to make the representations set out in paragraphs 4 and 5 of Form 52-109F1 regarding the design of disclosure controls and procedures and internal control over financial reporting, the evaluation of the effectiveness of disclosure controls and procedures and any changes in the issuer's internal control over financial reporting.

Pursuant to section 3.1, an issuer is required to file its interim certificates in Form 52-109F2. Under subsection 5.2(2)(b), however, an issuer may file interim certificates in Form 52-109FT2 in respect of any interim period that occurs prior to the end of the first financial year in respect of which the issuer is required to file an annual certificate in Form 52-109F1. The representations set out in paragraphs 4 and 5 of Form 52-109F1 will serve as the basis for the corresponding representations set out in paragraphs 4 and 5 of Form 52-109F2.

Upon completion of the transition period, issuers must file annual certificates and interim certificates in Forms 52-109F1 and 52-109F2, respectively, which will include the representations in paragraph 4 of these forms. For further clarification, we do not expect the representations in paragraph 4 to extend to the prior period comparative information included in the annual filings or interim filings if:

- (a) the prior period comparative information was previously the subject of certificates in Forms 52-109FT1 or 52-109FT2; or
- (b) the Regulation did not require an annual certificate or interim certificate in respect of the prior period to be filed.

PART 4 PERSONS PERFORMING FUNCTIONS SIMILAR TO A CHIEF EXECUTIVE OFFICER AND CHIEF FINANCIAL OFFICER

Where an issuer does not have a chief executive officer or chief financial officer, each person who performs similar functions to a chief executive officer or chief financial officer must certify the annual filings and interim filings. It is left to the issuer's discretion to determine who those persons are. In the case of an income trust reporting issuer (as described in Policy Statement 41-201 respecting *Income Trusts and Other Indirect Offerings*) where executive management resides at the underlying business entity level or in an external management company, we would generally consider the chief executive officer or chief financial officer of the underlying business entity or the external management company to be persons performing functions in respect of the income trust similar to a chief executive officer or chief financial officer. In the case of a limited partnership reporting issuer with no chief executive officer or chief financial officer, we would generally consider the chief executive officer or chief financial officer of its general partner to be persons performing functions in respect of the limited partnership reporting issuer similar to a chief executive officer or chief financial officer.

PART 5 “NEW” CHIEF EXECUTIVE OFFICERS AND CHIEF FINANCIAL OFFICERS

Chief executive officers and chief financial officers (or persons performing functions similar to a chief executive officer or chief financial officer) holding such offices at the time that annual certificates and interim certificates are required to be filed are the persons who must sign those certificates. Certifying officers are required to file annual certificates and interim certificates in the specified form (without any amendment) and failure to do so will be a breach of the Regulation.

Pursuant to paragraphs 4(a) and (b) of Forms 52-109F1 and 52-109F2, the certifying officers are required to represent that they have designed (or caused to be designed under their supervision) disclosure controls and procedures and internal control over financial reporting. There may be situations where an issuer’s disclosure controls and procedures and internal control over financial reporting have been designed and implemented prior to the certifying officers assuming their respective offices. We recognize that in these situations the certifying officers may have difficulty in representing that they have designed or caused to be designed these controls and procedures. In our view, where:

- (a) disclosure controls and procedures and internal control over financial reporting have been designed and implemented prior to the certifying officers assuming their respective offices;
- (b) the certifying officers have reviewed the existing controls and procedures upon assuming their respective offices; and
- (c) the certifying officers have designed (or caused to be designed under their supervision) any modifications or enhancements to the existing controls and procedures determined to be necessary following their review,

the certifying officers will have designed (or caused to be designed under their supervision) these controls and procedures for the purposes of paragraphs 4(a) and (b) of Forms 52-109F1 and 52-109F2.

PART 6 INTERNAL CONTROL OVER FINANCIAL REPORTING AND DISCLOSURE CONTROLS AND PROCEDURES

We believe that chief executive officers and chief financial officers should be required to certify that their issuers have adequate internal control over financial reporting and disclosure controls and procedures. 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 defines “disclosure controls and procedures” and “internal control over financial reporting”. The Regulation does not, however, prescribe the degree of complexity or any specific policies or procedures that must make up those controls and procedures. This is intentional. In our view, these considerations are best left to management’s judgement based on various factors that may be particular to an issuer, including its size, the nature of its business and the complexity of its operations.

While there is a substantial overlap between the definition of disclosure controls and procedures and internal control over financial reporting, there are both some elements of disclosure controls and procedures that are not subsumed within the definition of internal control over financial reporting and some elements of internal control over financial reporting that are not subsumed within the definition of disclosure controls and procedures. For example, disclosure controls and procedures may include those

components of internal control over financial reporting that provide reasonable assurances that transactions are recorded as necessary to permit the preparation of financial statements in accordance with the issuer's GAAP. However, some issuers may design their disclosure controls and procedures so that certain components of internal control over financial reporting pertaining to the accurate recording of transactions and disposition of assets or to the safeguarding of assets are not included.

PART 7 EVALUATION OF EFFECTIVENESS OF DISCLOSURE CONTROLS AND PROCEDURES

Paragraph 4(c) of Form 52-109F1 requires the certifying officers to represent that they have evaluated the effectiveness of the issuer's disclosure controls and procedures and have caused the issuer to disclose in the annual MD&A their conclusions about the effectiveness of the disclosure controls and procedures based on such evaluation. The Regulation does not specify the contents of the certifying officers' report on its evaluation of disclosure controls and procedures; however, given that disclosure controls and procedures should be designed to provide, at a minimum, reasonable assurance of achieving their objectives, the report should set forth, at a minimum, the conclusions of the certifying officers as to whether the controls and procedures are, in fact, effective at the "reasonable assurance" level.

PART 8 FAIR PRESENTATION

Pursuant to the third paragraph in each of the annual certificates and interim certificates, the chief executive officer and chief financial officer must each certify that their issuer's financial statements and other financial information "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" 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 the issuer's GAAP in this representation, particularly where the issuer's GAAP financial statements may not reflect the financial condition of an issuer (since the issuer's GAAP does not always define all the components of an overall fair presentation).

The Regulation requires the certifying officers to certify that the financial statements (including prior period comparative financial information) *and the other financial information* included in the annual filings and interim filings fairly present the issuer's financial condition, results of operation and cash flows. The certification statement regarding the fair presentation of financial statements and other information is not limited to a representation that the financial statements and other financial information have been presented in accordance with the issuer's GAAP. We believe that this is appropriate as the certification is intended to provide assurances that the financial information disclosed in the annual filings and interim filings, viewed in their entirety, meets a standard of overall material accuracy and completeness that is broader than financial reporting requirements under GAAP. As a result, issuers are not entitled to limit the representation to Canadian GAAP, US GAAP or any other source of generally accepted accounting principles.

We do not believe that a formal definition of fair presentation is appropriate as it encompasses a number of qualitative and quantitative factors that may not be applicable to all issuers. In our view, fair presentation includes but is not necessarily limited to:

- 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 condition, results of operations and cash flows

The concept of fair presentation as used in the annual certificates and interim certificates is not limited to compliance with the issuer's GAAP; however, it is not intended to permit an issuer to depart from the issuer's GAAP recognition and measurement principles in the preparation of its financial statements. In the event that an issuer is of the view that there are limitations to the issuer's GAAP based financial statements as an indicator of the issuer's financial condition, the issuer should provide additional disclosure in its MD&A necessary to provide a materially accurate and complete picture of the issuer's financial condition, 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.

PART 9 FINANCIAL CONDITION

Pursuant to the third paragraph in each of the annual certificates and interim certificates, the chief executive officer and chief financial officer must each certify that their issuer's financial statements fairly present the financial condition of the issuer for the relevant time period. The Regulation does not formally define financial condition. The term "financial condition" in the annual certificates and interim certificates is intended to be used in the same manner as the term "financial condition" is used in The Canadian Institute of Chartered Accountants' MD&A Guidelines and Regulation 51-102. In our view, financial condition encompasses a number of qualitative and quantitative factors which would be difficult to enumerate in a comprehensive list applicable to all issuers. Financial condition of an issuer includes, without limitation, considerations such as:

- liquidity
- solvency
- capital resources
- overall financial health of the issuer's business
- current and future considerations, events, risks or uncertainties that might impact the financial health of the issuer's business

PART 10 CONSOLIDATION

Issuers are required to prepare their financial statements on a consolidated basis under the issuer's GAAP. As a result the representations in paragraphs 2 and 3 of the certification will extend to consolidated financial statements. In addition, when the

certifying officers provide these two representations, we expect that these representations will indicate that their issuers' disclosure controls and procedures provide reasonable assurance that material information relating to their issuers *and their consolidated subsidiaries* is made known to them.

We are of the view that regardless of the level of control that an issuer has over a consolidated subsidiary, management of the issuer has an obligation to present consolidated disclosure that includes a fair presentation of the financial condition of the subsidiary. An issuer needs to maintain adequate internal control over financial reporting and disclosure controls and procedures to accomplish this. In the event that a chief executive officer or chief financial officer is not satisfied with his or her issuer's controls and procedures insofar as they relate to consolidated subsidiaries, the chief executive officer or chief financial officer should cause the issuer to disclose in its MD&A his or her concerns regarding such controls and procedures.

An issuer's financial results and MD&A may consolidate those of a subsidiary which is also a reporting issuer. In those circumstances, it is left to the business judgment of the certifying officers of the issuer to determine the level of due diligence required in respect of the consolidated subsidiary in order to provide the issuer's certification.

PART 11 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 under subsections 4.1(1) and (2) respectively, issuers must file through SEDAR the certificates of the chief executive officer and chief financial officer 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 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 US GAAP. However, it is possible that some Canadian issuers 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 the Sarbanes-Oxley Act or the Regulation) those issuers will not have recourse to the exemptions in subsections 4.1(1) and (2).

PART 12 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, in Québec, under civil law, or under the *Securities Act* (Ontario) when amendments which create statutory civil liability for misrepresentations in continuous disclosure are proclaimed in force. The liability standard applicable to a document required to be filed with the Ontario Securities Commission,

including an annual certificate or interim certificate, will depend on whether the document is a “core” document as defined under Part XXIII.1 of the *Securities Act* (Ontario). Annual certificates 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. This provision could permit a court in appropriate cases to treat a misrepresentation in an issuer’s financial statements and a misrepresentation made by an officer in an annual certificate or interim certificate that relate to the underlying financial statements as a single misrepresentation.