

CSA Notice of consultation

*Draft Regulation 52-112 respecting Non-GAAP and Other Financial Measures Disclosure**Draft Policy Statement to Regulation 52-112 respecting Non-GAAP and Other Financial Measures Disclosure***Related Draft Consequential Amendments and Changes**

September 6, 2018

Introduction

The Canadian Securities Administrators (the **CSA** or **we**) are publishing for a 90-day comment period the following materials:

- Draft *Regulation 52-112 respecting Non-GAAP and Other Financial Measures Disclosure* (the **Draft Regulation**);
- Draft *Policy Statement to Regulation 52-112 respecting Non-GAAP and Other Financial Measures Disclosure* (the **Draft Policy Statement**);
- Related draft consequential amendments or changes to:
 - *Regulation 45-108 respecting Crowdfunding* (**Regulation 45-108**)¹;
 - *Policy Statement to Regulation 45-108 respecting Crowdfunding* (**Policy Statement 45-108**);
 - *Policy Statement to Regulation 51-102 respecting Continuous Disclosure Obligations* (**Policy Statement 51-102**);
 - *Policy Statement to Regulation 51-105 respecting Issuers Quoted in the U.S. Over-the-Counter Markets* (**Policy Statement 51-105**)²;
 - *Policy Statement to Regulation 52-107 respecting Acceptable Accounting Principles and Auditing Standards* (**Policy Statement 52-107**).

(collectively, the **Draft Materials**).

The Draft Regulation sets out disclosure requirements for non-GAAP financial measures and other financial measures (i.e., segment measures, capital management measures, and supplementary financial measures as defined in the Draft Regulation).

¹ The securities regulatory authorities in British Columbia, Prince Edward Island, Newfoundland and Labrador, Northwest Territories, Yukon Territory and Nunavut are not proposing these consequential amendments or the changes to the related Policy Statement because Regulation 45-108 does not apply in these jurisdictions.

² The Ontario Securities Commission is not proposing this consequential change as *Regulation 51-105 respecting Issuers Quoted in the U.S. Over-the-Counter Markets* and its Policy Statement do not apply in Ontario.

The Draft Policy Statement provides guidance on how we will interpret and apply the Draft Regulation.

The Draft Materials are intended to replace CSA Staff Notice 52-306 (Revised) *Non-GAAP Financial Measures* (SN 52-306) and complement other CSA financial disclosure requirements.

The text of the Draft Materials is published with this Notice and will also be available on the websites of CSA jurisdictions, including:

www.lautorite.qc.ca
www.albertasecurities.com
www.bsc.bc.ca
www.nssc.novascotia.ca
www.fcnb.ca
www.osc.gov.on.ca
www.fcaa.gov.sk.ca
www.msc.gov.mb.ca

Substance and Purpose

The Draft Regulation aims to address the disclosure surrounding non-GAAP financial measures and other financial measures.

The Draft Regulation complements the *Securities Acts* of the various jurisdictions in Canada that make it an offence to provide false or misleading information to investors. The Draft Regulation establishes disclosure requirements that must be met to disclose non-GAAP financial measures and other financial measures.

In some cases, non-GAAP and other financial measures are helpful to investors to assess an issuer's performance.

The Draft Regulation does not contain specific limitations or industry-specific requirements; rather, it includes comprehensive disclosure requirements whose overall goal is to improve the quality of information provided to investors.

We acknowledge that some stakeholders may prefer that we:

- limit, in specific circumstances, the disclosure of certain financial measures, and
- develop industry-specific requirements for certain financial measures.

However, due to the numerous types of ever-evolving financial measures disclosed across a range of industries, we believe that comprehensive disclosure requirements are best suited to respond to investor needs for quality information. These requirements allow investors to better analyze different financial measures within an industry or among different industries.

Although the definition of a non-GAAP financial measure has been updated, the Draft Materials have substantially incorporated the disclosure guidance in SN 52-306 for non-GAAP financial measures.

To ensure investors appreciate the context of other financial measures, the Draft Regulation introduces disclosure requirements if such financial measures are disclosed outside the financial statements.

Background

Many issuers, in all industries, disclose a range of financial measures that may lack standardized meanings under the financial reporting framework used in the preparation of the issuer's financial statements, lack context when disclosed outside of the issuer's financial statements, lack transparency as to their calculation or vary significantly by issuer and industry.

Common terms used to label non-GAAP financial measures may include "adjusted earnings", "adjusted EBITDA", "free cash flow", "pro forma earnings", "cash earnings", "distributable cash", "cost per ounce", "adjusted funds from operations" and "earnings before non-recurring items".

In Canada, SN 52-306 is intended to help ensure that non-GAAP financial measures do not mislead investors. Although we have updated SN 52-306 several times to respond to changing circumstances and published various staff notices and reports that comment on the topic, we continue to find that disclosure practices surrounding non-GAAP financial measures vary. Our findings are consistent with those of other stakeholders (particularly investors) who share our desire for quality disclosure.

Over the years, we have also found that other financial measures that do not meet the definition of a non-GAAP financial measure in SN 52-306 may be equally problematic if not accompanied by appropriate disclosure. Such financial measures include those disclosed in the notes to the financial statements that lack context when disclosed outside the financial statements.

Replacing SN 52-306 with the Draft Regulation will provide CSA Staff with a stronger tool to take appropriate regulatory action as needed.

We are aware that some accounting standards boards, such as the International Accounting Standards Board (IASB), are currently examining, among other things, the structure and content of financial statements. This work may potentially lead to certain changes in the types of information to be included in financial statements. If necessary in the future, we may update the Draft Regulation (or other securities legislative requirements) to respond to these and other marketplace changes (if any).

We are aware that commentary continues to be issued by certain industry groups, professional bodies, and standard setters on the topic of non-GAAP financial measures and other financial measures disclosed outside the financial statements. This has, in some cases, created confusion with stakeholders as to requirements under Canadian securities law versus suggested non-authoritative guidance. When implemented, the Draft Regulation will provide authoritative Canadian securities legislative requirements for all issuers when they disclose non-GAAP financial measures and other financial measures.

With the issuance of the Draft Regulation, we join other securities regulators, including the International Organization of Securities Commissions (IOSCO), the European Securities and Markets Authority (ESMA), and the U.S. Securities and Exchange Commission (SEC), that have recently strengthened their efforts to regulate the disclosure of certain financial measures.

Summary of the Draft Regulation

The Draft Regulation:

- applies to all issuers (including investment funds), except for SEC foreign issuers, and all documents (e.g., Management's Discussion and Analysis, press releases, the Annual Information Form, prospectuses etc.) including other written communications in websites or social media;
- pertains to the disclosure of financial measures (including ratios) that are non-GAAP financial measures, segment measures, capital management measures, and supplementary financial measures as defined in the Draft Regulation;
- includes an updated definition of a non-GAAP financial measure which builds upon and incorporates the disclosure guidance in SN 52-306, and
- introduces the concept of segment measures, capital management measures, and supplementary financial measures, together with associated disclosure requirements.

Annex A provides a general overview of the application process for the Draft Regulation.

Anticipated Costs and Benefits of the Draft Regulation

Benefits

Issuers

The Draft Regulation does not limit an issuer's ability to disclose non-GAAP financial measures or other financial measures provided the disclosure is not misleading. If an issuer chooses to disclose these financial measures, the Draft Regulation contains clear and formalized disclosure requirements that we anticipate will reduce the uncertainty regarding an issuer's disclosure obligations.

Investors

Investors have identified to us several problematic disclosure practices surrounding non-GAAP financial measures and other financial measures, such as a lack of transparency regarding the nature of these financial measures, including calculation, as well as a lack of consistency of disclosures among issuers. The Draft Regulation addresses these investor concerns by requiring comprehensive disclosures, including disclosure regarding a financial measure's method of calculation and usefulness. Such disclosures are intended to help investors better analyze different financial measures within an industry or among different industries.

Costs

Since the disclosure requirements for non-GAAP financial measures are substantially aligned with the current guidance in SN 52-306, we do not expect issuers to incur increased costs to comply with these disclosure requirements.

We expect issuers will initially incur some immaterial administrative costs to comply with the new disclosure requirements relating to segment measures, capital management measures, and supplementary financial measures in the first reporting period after the Draft Regulation comes into force, if issuers choose to disclose these financial measures.

Summary of the Draft Policy Statement

The Draft Policy Statement provides guidance on how we will interpret and apply the Draft Regulation and includes, among other things, interpretations of various terms and provisions in the Draft Regulation as well as selected illustrative examples.

Overall, the goal of the guidance provided in the Draft Policy Statement is to assist issuers in applying the provisions of the Draft Regulation so as to help ensure non-GAAP financial measures and other financial measures do not mislead investors. For example, the Draft Policy Statement contains useful examples and guidance in the following key areas:

- definition of a non-GAAP financial measure, including the terms “disaggregation” and “equivalent financial measure”;
- definition of a supplementary financial measure, including the “periodic basis” attribute;
- requirements for a non-GAAP financial measure on labelling, prominence, consistency, location, identification, and usefulness;
- reconciliation requirements for a non-GAAP financial measure, including guidance on the determination of the most directly comparable measure;
- prominence requirement for a non-GAAP financial measure that is a ratio
- reconciliation requirement for a non-GAAP financial measure that is a financial outlook, and
- disclosure requirements for a segment measure and a capital management measure.

The expanded detail set out in the Draft Policy Statement is intended to clarify the four defined types of financial measure subject to the Draft Regulation and to explain how we expect the disclosure requirements in the Draft Regulation to be satisfied.

Consequential Amendments and Changes

We, except the securities regulatory authorities listed in footnote 1 of this Notice, propose consequential amendments or changes to the instructions of Schedule A of Form 45-108F1 *Crowdfunding Offering Document* of Regulation 45-108 and section 16 of Policy Statement 45-108. We also propose changes to section 4.2 of Policy Statement 51-102 and section 2.10 of Policy Statement 52-107. These draft amendments and changes replace the references to the guidance provided in SN 52-306 with references to the requirements set out in the Draft Regulation.

We, except the Ontario Securities Commission, also propose a consequential change to section 5 of Policy Statement 51-105 to add a reference to the requirements set out in the Draft Regulation.

Alternatives Considered

To address stakeholder concerns regarding the quality of disclosure surrounding non-GAAP financial measures and other financial measures, we considered updating SN 52-306 or developing a staff bulletin to supplement SN 52-306. After careful consideration, we concluded that the development of the Draft Materials would be more effective in addressing stakeholder concerns and reducing uncertainty regarding an issuer’s disclosure obligations.

Reliance on Unpublished Studies

In developing the Draft Regulation, we are not relying on any significant unpublished study, report or other written material.

Request for Comments

We welcome your comments on the Draft Materials.

We particularly appreciate comments that are specific and accompanied by concrete examples.

In addition to any general comments, we also invite comments on the following specific questions:

1. Does the proposed definition of a non-GAAP financial measure capture (or fail to capture) specific financial measures that should not (or should) be captured? Please explain using concrete examples.
2. Are there any specific additional disclosures not considered in the Draft Regulation, that would significantly improve the overall quality of disclosure and be of benefit to investors? Please explain using concrete examples.
3. Is specific content in the Draft Policy Statement unclear or inconsistent with the Draft Regulation?
4. Is the proposed exemption for SEC foreign issuers appropriate? If not, please explain.
5. Is the proposed exclusion of oral statements to the application appropriate? If not, please explain.
6. Is the proposed inclusion of all documents to the application appropriate? If not, for which documents should an exclusion be made available? Please explain.

Please submit your comments in writing on or before December 5, 2018. If you are not sending your comments by email, please send us an electronic file containing submissions provided (in Microsoft Word format).

Address your submission to all of the CSA as follows:

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
Securities Commission of Newfoundland and Labrador
Registrar of Securities, Northwest Territories
Registrar of Securities, Yukon Territory

Superintendent of Securities, Nunavut

Deliver your comments only to the addresses below. Your comments will be distributed to the other participating CSA.

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The Secretary
Ontario Securities Commission
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Toronto ON M5H 3S8
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comment@osc.gov.on.ca

Please refer your questions to any of the following:

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We cannot keep submissions confidential because securities legislation in certain provinces requires publication of the written comments received during the comment period. All comments received will be posted on the websites of each of the Alberta Securities Commission at www.albertasecurities.com, the Autorité des marchés financiers at www.lautorite.qc.ca and the Ontario Securities Commission at www.osc.gov.on.ca. Therefore, you should not include personal information directly in comments to be published. It is important that you state on whose behalf you are making the submission.

Annex A

General Overview of the Application Process for the Draft Regulation

