DAVIES

155 Wellington Street West
Toronto, ON M5V 3J7 Canada

dwpv.com

June 26, 2020

BY EMAIL

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

c/o

The Secretary
Ontario Securities Commission
Email: comments@osc.gov.on.ca

M^{e} Philippe Lebel
Corporate Secretary and Executive Director, Legal Affairs
Autorité des marchés financiers
Email: consultation-en-cours@lautorite.qc.ca

Dear Sirs/Mesdames:

CSA Second Notice and Request for Comment – Proposed National Instrument 52-112 *Non-GAAP and Other Financial Measures Disclosure*

We are writing in response to CSA Second Notice and Request for Comment – Proposed National Instrument 52-112 *Non-GAAP and Other Financial Measures Disclosure* (the "**Proposed Instrument**") which, together with the related proposed companion policy (the "**Proposed Companion Policy**") and other proposed consequential amendments, is intended to replace CSA Staff Notice 52-306 (Revised) *Non-GAAP Financial Measures* ("**SN 52-306**").

We acknowledge and appreciate that the revised draft of the Proposed Instrument addresses some of the feedback we provided in our first comment letter dated December 5, 2018 (our "**Original Comment Letter**"). However, it still falls short of addressing a number of critical issues identified in our Original Comment Letter. Informing these and our further comments below is the same general principle that we highlighted in our Original Comment Letter. Namely, in establishing a new framework that moves away from a policy-based approach for non-GAAP financial measure disclosure (as was the case in the existing guidance of SN 52-306) to a rules-based approach that governs more than just non-GAAP financial measures, it is critical that the CSA assess whether: (i) all of the additional disclosure that is mandated under the Proposed Instrument is necessary in order to meet the rule's objective (*i.e.*, to ensure clear disclosure such that the reasonable investor in Canadian capital markets is not misled by a "specified financial measure"); and (ii) issuers may have difficulty complying with elements of the new rule, particularly as the scope of the Proposed Instrument encompasses measures not previously addressed in SN 52-306.

Several substantial revisions to the Proposed Instrument remain necessary to ensure that the increased regulatory burden on issuers is not disproportionate to its objective. To be proportionate, the Proposed Instrument should address only those situations where there is a real risk that a reasonable investor would be misled and, in those situations, apply a tailored and flexible approach having regard to the burden imposed on issuers. In our view, the Proposed Instrument fails to do this and, more generally, is out of step with current initiatives of the Canadian securities regulators to reduce the regulatory burden on issuers and apply proportionality in their rule-making.[1] As noted in the OSC Report, regulation is proportionate when it is (i) balanced (ensuring the regulatory burden is commensurate with anticipated benefits), (ii) tailored (avoiding a 'one-size-fits-all' approach where appropriate, taking into account how it may affect entities of different sizes or business models), (iii) flexible (recognizing that there can be multiple ways to achieve regulatory objectives, and incorporating stakeholder input to arrive at an optimal solution), and (iv) responsive (through frequent updates that support innovation and dynamism in capital markets, while still being mindful of investor protection, market efficiency, confidence in the market and financial stability).

The Proposed Instrument fails to achieve proportionality because it:

- represents a return to the burdensome 'catch and release' approach to regulation by requiring extensive disclosure of every potential scenario where any investor (including an unreasonable investor) might be misled, and providing narrow and insufficient carve outs;
- mandates a 'one-size-fits-all' approach for the prescribed disclosure;
- lacks flexibility for circumstances where the regulatory objective could be achieved in an alternate and less burdensome manner; and

---

[1] For example, see OSC report "Reducing Regulatory Burden in Ontario's Capital Markets" distributed in November 2019 (the "**OSC Report**") and see CSA Consultation Paper 51-404 *Considerations for Reducing Regulatory Burden for Non-Investment Fund Reporting Issuers* and the update contained in CSA Staff Notice 51-353.

- is not responsive due to the imposition of rules, rather than providing guidance, in respect of Other Financial Measures (as defined below).

We have set out a number of specific recommendations below that are limited to those that we think would be most meaningful to achieve proportionality and, where appropriate, cross-reference our Original Comment Letter for further detail.

While we recognize that this represents the second round of comments, we encourage the CSA to consider a new round of consultations with accounting firms and market participants before the rule is finalized. The implications of this rule are far-reaching and significant. It is therefore critical that due consideration be given to the views of those who will be most directly affected.

Apply Guidance Rather than Rules to Govern "Other Financial Measures"

Unlike SN 52-306, and despite the concerns listed in our Original Comment Letter, the Proposed Instrument still distinguishes and separately regulates certain other financial measures that are defined as Segment Measures, Capital Management Measures and Supplementary Financial Measures (collectively, the "**Other Financial Measures**"). We agree that these Other Financial Measures should be distinguished from, and should not be subject to, the same degree of disclosure mandated with respect to non-GAAP financial measures. However, given that each of the Other Financial Measures is a novel concept not previously subject to any regulation, any new prescriptive rules to govern them risks confusing issuers and investors with the inevitable consequence that many issuers will fail to comply due only to a lack of understanding of those rules. This risk of confusion and non-compliance is exacerbated by an absence of clarity as to the meaning of these Other Financial Measures, and the prescribed disclosure for them, in the Proposed Instrument and the Proposed Companion Policy.

SN 52-306 has been guiding market participants with respect to the disclosure of non-GAAP financial measures for almost two decades.[2] Over this period, the guidance set out in SN 52-306 has been updated multiple times to refine earlier guidance and adapt it to reflect changing market circumstances.[3] Market participants (including both issuers and investors) have had the opportunity to adapt to the CSA's recommended approach to disclosure of non-GAAP financial measures, and the CSA has had the opportunity to provide direct guidance to issuers on the applicability of this guidance. It is also worth noting that, despite its many iterations over the years, SN 52-306 would not have worked if codified in its earlier iterations. In fact, even with the benefit of a 'test-run' spanning almost two decades to consider and refine this guidance, many changes and new exceptions are still necessary in order to 'get it right' as a rule. This is clearly evidenced by the many differences between

---

2 CSA Staff Notice 52-303 – *Non-GAAP Earnings Measures*, which was a predecessor to SN 52-306, was issued in January 2002.

3 Revised CSA Staff Notice: 52-306 – *Non-GAAP Financial Measures* (November 21, 2003); Revised CSA Staff Notice: 52-306 – *Non-GAAP Financial Measures* (August 4, 2006); Revised CSA Staff Notice: 52-306 – *Non-GAAP Financial Measures and Additional GAAP Measures* (November 9, 2010); Revised CSA Staff Notice: 52-306 – *Non-GAAP Financial Measures and Additional GAAP Measures* (February 17, 2012); and CSA Staff Notice: 52-306 (Revised) – *Non-GAAP Financial Measures* (January 14, 2016).

SN 52-306 and the Proposed Instrument, the amount of feedback provided with respect to the Proposed Instrument, and the many valid concerns markets participants continue to express.

The immediate codification of requirements regarding Other Financial Measures, even with modifications to the current requirements in the Proposed Instrument, would be a marked departure from the CSA's past practice in this area and, in our view, ill-advised without a 'test-run' to assess what does and does not work. Whether implemented as guidance or as a rule, any additional disclosure with respect to Other Financial Measures will necessarily result in increased regulatory burden for issuers (which would be disproportionate if implemented as currently proposed), and would almost certainly result in confusion among all market participants. Further, if implemented as rules, issuers will have no option but to comply even where the required disclosure is meaningless, confusing or impractical – thereby unnecessarily exacerbating the burden for issuers and resulting in unintended or unavoidable non-compliance.

To avoid this result, we reiterate our previous recommendation that any regulation of Other Financial Measures be achieved through non-binding guidance[4] and not, at least for the time being, through prescriptive rules in the Proposed Instrument. If implemented as guidance, issues of imbalance and initial confusion stemming from this disclosure could be managed. Guidance allows issuers to take a principled approach in cases where their particular circumstances do not align with the scenarios contemplated by the suggested guidance – thereby avoiding issues associated with a 'one-size-fits-all' approach – while still providing disclosure as necessary to ensure that the relevant measure is not misleading to investors. Consistent with the approach taken by the CSA on regulation of non-GAAP financial measures, starting with guidance allows the CSA and other market participants to monitor issuers' disclosure in respect of these Other Financial Measures in practice. It also affords the CSA an appropriate period of time to evaluate the ability of issuers to comply with the guidance and assess the benefit to investors of this additional disclosure so that the CSA can ultimately develop a more refined and proportionate set of prescriptive rules with respect to some or all of these financial measures. See our Original Comment Letter for our specific recommendations as to the content of guidance for Other Financial Measures.[5]

Incorporating Information by Reference

We recognize that the Proposed Instrument allows for the incorporation by reference of some of the prescribed information with respect to the specified financial measures (the "**Incorporated Disclosure**"). While we are fully supportive of this change, the approach taken is not sufficient to address the primary reason we raised this concern in our Original Comment Letter. Most notably, there is no principled basis for not permitting incorporation of the Incorporated Disclosure in a news release.[6]

---

4 It would be best if any guidance as to the disclosure of Other Financial Measures were addressed exclusively through the Proposed Companion Policy (rather than a separate companion policy) to ensure consistency in approach and, where appropriate, terminology with the proposed rules governing Non-GAAP financial measures.

5 See Original Comment Letter at p. 6.

6 See the exception in subparagraph 5(3)(b) of the Proposed Instrument.

As noted in our Original Comment Letter, issuers are often under significant time pressures to issue a news release containing event driven or other current disclosure in a timely manner. In fact, it is precisely in these instances that the requirement to include detailed reconciliation tables and other prescribed disclosure poses the most significant burden on issuers. We cannot think of any justification for not allowing incorporation of disclosure in all circumstances where that disclosure is already included elsewhere in periodic reports that are easily accessible to the investing public. This is consistent with the principles underpinning incorporation by reference in the short form prospectus regime, as well as the "access equals delivery" model being considered by the CSA[7]. If it is sufficient that reports containing information critical to one's investment are accessible in the context of a prospectus offering, why is this insufficient in the context of an earnings or other news release? If anything, the past few months of physical distancing in the wake of COVID-19 have demonstrated the relative ease with which the public-at-large can easily access and retrieve information from the internet. We therefore reiterate our previously expressed view that timely disclosure that is not delayed or obscured by mandated regulatory disclosure that is easily (and quickly) accessible elsewhere should be the objective of a modern disclosure regime.

Further, while we generally agree with the scope of the Incorporated Disclosure that may be incorporated by reference,[8] we believe that the Incorporated Disclosure should be expanded to include disclosure that "explains the composition" of a non-GAAP financial measure[9] and the equivalent requirement for other specified financial measures.[10] This prescribed 'composition disclosure' is lengthy and detailed, and may obscure the more critical disclosure in the document. Republishing this detail each time a measure is disclosed may also suggest an issuer has changed the measure. Instead, this composition disclosure is more appropriately made only in an issuer's annual MD&A, and updated only if there is an intervening change. We also note that the requirements in the Proposed Instrument relating to labelling of non-GAAP financial measures[11] already provide appropriate protection to mitigate the risk that a reasonable investor may be misled by disclosure and not aware of the composition of a non-GAAP financial measure.

Finally, the Proposed Instrument does not allow incorporation by reference of the Incorporated Disclosure in an issuer's MD&A.[12] While we agree that this incorporation would be inappropriate for an issuer's annual MD&A, an issuer should be permitted to incorporate Incorporated Disclosure (including 'composition disclosure') from an issuer's annual MD&A in its interim MD&A. Not allowing this incorporation is inconsistent with the purpose of interim MD&A, which is to update an issuer's annual

---

7 For our submissions supporting this proposed "access equals delivery" model, please refer to our comment letter dated March 5, 2020 in response to CSA Consultation Paper 51-405 *Consideration of an Access Equals Delivery Model for Non-Investment Fund Reporting Issuers*.

8 As listed in subsection 5(1) of the Proposed Instrument.

9 *i.e.*, subparagraph 6(e)(iii) of the Proposed Instrument.

10 *e.g.*, subparagraph 8(d)(i) for non-GAAP ratios.

11 See subparagraph 6(a) of the Proposed Instrument.

12 See the exception in subparagraph 5(3)(a) of the Proposed Instrument.

disclosure,[13] and the principle that interim MD&A should always be read together with the preceding annual MD&A (together with the corresponding financial statements) for an understanding of the issuer's results and financial condition.

Forward-Looking Information

We agree with the CSA's view, reflected in changes to the Proposed Instrument, that forward-looking non-GAAP financial measures should not be subject to the same disclosure requirements as historical non-GAAP financial measures and, in particular, support the removal of the requirement for a quantitative reconciliation. However, in our view, the proposed framework for forward-looking non-GAAP financial measures still requires disclosure that is not necessary in the circumstances and, as a result, does not achieve the appropriate balance.

Subparagraph 7(2)(b) of the Proposed Instrument requires the disclosure of a historical non-GAAP financial measure whenever a forward-looking non-GAAP financial measure is used. The rationale for this requirement is unclear. Where an issuer believes that it will be helpful to readers to disclose the historical non-GAAP financial measure in the same document or that it would be misleading not to include such measure, it will do so. Making this requirement mandatory serves no identifiable purpose, but will trigger all the attendant disclosure requirements relating to historical non-GAAP financial measures. We also note that there is no similar requirement to disclose historical metrics under existing securities legislation where disclosing other forward-looking information,[14] and we do not see any justification in the context of non-GAAP financial measures to deviate from this principle. In addition, the requirement in subparagraph 7(2)(d) to provide a "description of any significant difference" between the forward-looking non-GAAP financial measure and the historical measure is unclear. We are concerned that, in the absence of clarification, this requirement may be interpreted as mandating disclosure that is tantamount to a qualitative reconciliation. We trust that is not the intent as, from a policy perspective, investors need only to know whether the estimate of the forward-looking non-GAAP financial measure contemplates a different set of components than those used in the calculation of the historical non-GAAP financial measure.[15] Any requirement to provide a qualitative reconciliation of a forward-looking measure would be unduly burdensome for issuers and, in our view, would be of limited value to

---

13 We also note that the instructions to s. 2.2(b) of 51-101F1 specifically indicates that an issuer, in preparing its interim MD&A, may assume the reader has access to the issuer's annual MD&A and that the issuer does not have to duplicate the discussion and analysis of financial condition from its annual MD&A.

14 See, for example, disclosure requirements under Part 4A of National Instrument 51-102 *Continuous Disclosure Obligations* ("**NI 51-102**").

15 For example, an issuer should not be required to describe any significant difference between a historical non-GAAP financial measure and a forward-looking non-GAAP measure where such a difference is the result of an anticipated change in an underlying variable component of the calculation or estimate of the measure. The description of differences between the measures should be required only where the components taken into account in the forward-looking estimate differ significantly from the components used to calculate the historical non-GAAP financial measure most recently disclosed by the issuer.

investors. Requiring such a level of disclosure may also have a significant chilling effect on issuers providing this key forward-looking information to the markets.

Given that the objective of this disclosure is to ensure that the reasonable investor is not misled or confused, we propose that the CSA consider a clearer and more practical framework for non-GAAP financial measures that are forward-looking information, limited to the following requirements:

- the forward-looking non-GAAP financial measure is identified as a non-GAAP financial measure, and explains that it may not be comparable to measures presented by other issuers;[16]

- the composition of the financial measure is explained[17], including any significant differences in the components of the forward-looking non-GAAP financial measure as compared to the historical non-GAAP financial measure;[18] and

- if a historical non-GAAP financial measure was previously disclosed in the issuer's MD&A, the issuer should include a cross-reference to that historical disclosure.

Consistent with subparagraph 7(3) of the Proposed Instrument, we support an exception to all SEC issuers from the requirement to comply with this requirement. However, as we note later in this submission, we believe this exception should extend to all the requirements of the Proposed Instrument.

Historical Non-GAAP Financial Measures

Requirement to Present Measures for Comparative Periods

The requirement to provide a measure with the "same composition" for a comparative period is still too rigid. Notably, SN 52-306 currently requires that non GAAP financial measures be presented on a "consistent basis" from period to period. It is our view that the use of the "consistent basis" standard is more appropriate as a principled matter.

While the added exception in cases where it is "impracticable"[19] responds in part to the recommendation in our Original Comment Letter, we believe that an issuer should also be afforded an exception to using the "same" composition for the measure in each of the comparative periods if it has provided sufficient disclosure to clearly identify any substantive difference in constructing that measure

---

16 *i.e.*, mirroring the requirements in subparagraphs 6(e)(i) and 6(e)(ii) with respect to historical information.

17 *i.e.*, mirroring the requirement in subparagraph 6(e)(iii) with respect to historical information.

18 As noted above, the issuer should be required to identify any significant changes in the way it is calculating the forward-looking information as compared to the way it has historically calculated the measure (but should not be required to analyze any changes in the individual components of the calculation or produce disclosure that effectively amounts to a qualitative reconciliation of those measures).

19 See subparagraphs 6(d) and 8(c)(ii) of the Proposed Instrument.

as between the periods. This aligns with the principles of balance and flexibility for proportionate rulemaking (per the OSC Report), and is appropriate for circumstances where the necessary information is not readily available or would be unduly burdensome to produce because it achieves the same regulatory objective through a less burdensome approach.

Further, a clearer and more measured approach is necessary in assessing what is "impracticable" for purposes of the exception to this requirement. The CSA's interpretive guidance in the Proposed Companion Policy as to what would qualify as "impracticable" undermines the intention of the exception. The only example included in the Proposed Companion Policy is a scenario where it would be *impossible* for an issuer to provide comparative period disclosure (because no comparative period exists). To make matters worse, the Proposed Companion Policy still includes a statement that the CSA does not consider the cost or the time involved in preparing comparative period disclosure as being a sufficient rationale for an issuer to assert that it is impracticable to present the disclosure. While cost and time alone should not be determinative, they are certainly important considerations when assessing the implications of the disclosure on the issuer relative to the benefit that would be obtained by the investor from having such disclosure. We therefore encourage the CSA to remove or modify this statement in any final rule to align with the CSA's current burden reduction initiatives. Consistent with the recent pledge for proportionate rulemaking articulated in the OSC Report, the appropriate standard for this disclosure should not be what an issuer could achieve if it had unlimited resources and time; instead, it must be balanced against the objective of the regulatory requirement. To reflect this, the Proposed Companion Policy should be expanded to include additional examples of scenarios where it would be "impracticable" for purposes of the exception to this requirement. We note that our Original Comment Letter included examples of common scenarios where it would not be considered feasible or practical for issuers to present disclosure for comparative periods[20], and recommend that, at a minimum, the CSA add these as examples to its guidance.

Finally, and in addition to the above, we continue to believe that a separate exception from the requirement to provide comparative period disclosure should be available for an issuer that presents a non-GAAP financial measure on an "LTM", or last twelve month, basis. As noted in our Original Comment Letter[21], in these circumstances, an appropriate and useful comparison may be obtained from the issuer's most recent fiscal year and its most recent and comparative interim periods from which the LTM was constructed. It should not be necessary for an issuer to construct a comparative prior twelve-month period. If not an express exception, the CSA should clarify in the Proposed Companion Policy that presenting disclosure of the periods from which the LTM was constructed is sufficient.

Labelling Requirements

The previous iteration of the Proposed Instrument required that non-GAAP financial measures be labelled "appropriately" given their composition. This has been modified to require a label that, among

---

20 See Original Comment Letter at pp. 4-5.

21 See Original Comment Letter at p. 5.

other things, “describes the measure”.[22] This change is confusing and ambiguous as it suggests additional disclosure is necessary when labelling a measure above and beyond all of the other disclosure already required by the rule. We trust this is not the intent and, if it is, we caution against this approach. It is not clear how a label can be descriptive and, even if it could be, why this would be necessary. The primary policy concern should be to ensure that non-GAAP financial measures are labelled in a manner that distinguishes them from their GAAP equivalent, which is already reflected in the requirements of the Proposed Instrument.[23] In addition, the other required disclosures[24] are sufficient to ensure that the composition of the non-GAAP financial measure is described. Accordingly, subparagraph 6(a)(i) of the Proposed Instrument is an unnecessary (and, we assume, unintended) burden, and should be deleted. In the alternative, the CSA could modify subparagraph 6(a)(i) of the Proposed Instrument to require that a non-GAAP financial measure be labelled using a term that “is not misleading”[25] or “is not inconsistent” with the measure’s composition. We do not endorse a reversion to the “appropriate” standard reflected in the previous iteration of the Proposed Instrument as “appropriate” is (ironically) an inappropriate standard for purposes of a black-letter rule as it is vague and fails to provide sufficient specificity to issuers required to comply with the rule.

Explanation of Reconciling Items

Subparagraph 6(e)(v)(B) of the Proposed Instrument requires that the quantitative reconciling prepared by an issuer include disclosure that “explains each reconciling item”. In our experience, reconciling items are often self-explanatory. Accordingly, we recommend that subparagraph 6(e)(v)(B) be modified to only require this disclosure in circumstances where it is necessary.[26]

Proximity Requirement

The Proposed Companion Policy suggests that the proximity requirements of subparagraph 6(e) of the Proposed Instrument can be satisfied by identifying a non-GAAP financial measure as such when it is first used in a document and then referencing a separate section within the same document that contains the disclosure required under subparagraph 6(e). We agree with the CSA that cross-referencing is an appropriate way for an issuer to satisfy these disclosure requirements. However, we recommend that the CSA explicitly provide in the Proposed Instrument that cross-referencing is permitted (or alternatively, add a definition for “proximate” that includes cross-referencing), rather than only discussing this in the Proposed Companion Policy.

---

22 See subparagraph 6(a)(i) of the Proposed Instrument. Our recommendation applies equally to the equivalent requirement for non-GAAP ratios in subparagraph 8(a) of the Proposed Instrument.

23 Specifically, subparagraph 6(a)(ii).

24 Including the requirements of subparagraph 6(e)(iii).

25 This is the current standard of CSA Staff Notice 52-306.

26 For example, the revised language could read: “if necessary, explains each reconciling item…”.

We also note that the Proposed Companion Policy only addresses the proximity requirements for historical non-GAAP financial measures.[27] Cross-referencing should be permitted to satisfy all of the proximity requirements of the Proposed Instrument, including in respect of forward-looking information, non-GAAP ratios and other measures.[28] In our view, the Proposed Companion Policy (or, as noted above, Proposed Instrument) should be modified to clarify that this is the case.

Requirement to present "similar" measure

Subparagraph 8(b) of the Proposed Instrument requires that whenever a non-GAAP ratio is disclosed, an issuer must make equally prominent disclosure of "similar" financial measures in the issuer's primary financial statements. What is "similar" for this purpose is highly subjective and a vague standard that is inappropriate for a prescriptive rule. This will inevitably lead to inconsistent disclosure practices, and it may be difficult for issuers to determine with any certainty whether they comply with this requirement. In our view, the other requirements of the Proposed Instrument already provide for a sufficient level of disclosure in respect of non-GAAP ratios (particularly, the disclosure already required for the non-GAAP financial measure component(s)) and, accordingly, we recommend that subparagraph 8(b) be removed.

For the same reasons we recommend that subparagraph 10(b) of the Proposed Instrument in respect of capital management measures also be removed.

Requirement to present most comparable GAAP measure

We believe that there is inherent overlap between the requirement that a non-GAAP financial measure be presented with no more prominence than the most comparable GAAP measure (as reflected in subparagraph 6(c) of the Proposed Instrument) and the separate requirement that the document present the most comparable GAAP measure (as reflected in subparagraph 6(b)). Although this redundancy is not a material issue, per se, we believe that the Proposed Instrument would be clearer if the requirements of subparagraphs 6(b) and 6(c) were combined.[29]

Application – Exceptions

As outlined in our Original Comment Letter, the scope of issuers and documents that are subject to the Proposed Instrument is unnecessarily broad. Further consideration should be given to ways to narrow the scope of the Proposed Instrument so that it is tailored for its objective. The following are a few examples.

---

27 See subparagraph 6(e) of the Proposed Instrument.

28 *e.g.*, see subparagraphs 7(2)(d), 8(d), 9(d), 10(a) and 11(b).

29 For example, the combined language could read: "…the document presents the most comparable financial measure that is presented in the primary financial statements of the entity to which the measure relates, and the non-GAAP financial measure is presented with no more prominence in the document than such measure;".

SEC Issuers

We continue to believe that the exception in subparagraph 4(b) of the Proposed Instrument should be broadened to include any SEC issuer. As noted in our Original Comment Letter, we do not believe it is necessary or appropriate to require any SEC issuer to comply with the Proposed Instrument if they are already otherwise in compliance with the disclosure requirements prescribed by the SEC. This will result in a duplication of efforts and unnecessary burden, and can result in inconsistent, and sometimes conflicting, disclosure that confuses analysts, investors and other market participants. In our view, affording cross-listed issuers the option to provide disclosure that is comparable to their U.S. peers should be an important objective in modernizing Canada's capital markets where it can achieved while still meeting Canadian regulatory objectives. Notably, the Proposed Instrument does extend an exception to all SEC issuers from the requirement to comply with the requirement in respect of forward-looking non-GAAP financial measures. Absent an exception for all SEC issuers, an expansion of the exception in clause (iii) of subparagraph 4(c) of the Proposed Instrument will be necessary to exclude documents (including exhibits) filed or furnished with the SEC that are filed on SEDAR pursuant to section 11.1 of NI 51-102.

Third Party Reports and Valuations

It is not clear to us why the exception in subparagraph 4(d)(i) of the Proposed Instrument is limited to reports and valuations referred to in a prospectus[30] and prior valuations required to be disclosed in a business acquisition report.[31] For example, a formal valuation obtained in accordance with the requirements of Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions* may include disclosure of non-GAAP financial measures that do not otherwise comply with all of the requirements of the Proposed Instrument (and the issuer will inherently have no ability to address this issue given the requirement that the formal valuation be prepared by an independent valuator). In our view, the exception in subparagraph 4(d)(i) should be expanded to include any third party report or valuation that is filed with the CSA (or incorporated in a document filed with the CSA).

---

30 *i.e.*, filings under subparagraph 9.1(1)(a)(vi) or 9.2(a)(v) of National Instrument 41-101 *General Prospectus Requirements*.

31 *i.e.*, filings under section 2.5 of Form 51-102F4 *Business Acquisition Report*.

****

The following lawyers at our firm participated in the preparation of this comment letter.

Richard Fridman
416.367.7483
rfridman@dwpv.com

David Wilson
416.863.5517
dwilson@dwpv.com

Jared Solinger
416.367.7562
jsolinger@dwpv.com

Jennifer F. Longhurst
416.367.7453
jlonghurst@dwpv.com

Robert S. Murphy
416.863.5537
rmurphy@dwpv.com

Robin Upshall
416.367.6981
rupshall@dwpv.com

Stuart Berger
416.367.7586
sberger@dwpv.com

Yours very truly,

DAVIES WARD PHILLIPS & VINEBERG LLP