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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

Our reference
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Comments on CSA Draft Instrument 52-112 respecting Non-GAAP and Other Financial Measures Disclosure and concordant regulations

1 Introduction

This letter is submitted in response to the CSA Second Notice and Request for Comment (the **Notice of Consultation**) regarding Proposed National Instrument 52-112 respecting Non-GAAP and Other Financial Measures Disclosure (the **Draft Instrument**), the Proposed Companion Policy (the **Draft Policy**) and concordant regulations (collectively, the **Proposed Regime**) issued by the Canadian Securities Administrators (the **CSA**) on February 13, 2020. It reflects the views of a working group consisting of issuers having a combined market capitalization of approximately CAD $200 billion (the **Working Group** or **we**).

Members of the Working Group welcome the CSA's effort to reflect multiple comments provided by various stakeholders during the first consultation period ended on December 5, 2018 in relation to the initial draft National Instrument and draft Companion Policy (the **Original Materials**), as published on September 6, 2018. The Working Group also appreciates this second outreach to solicit further comments from market stakeholders. At the outset, the members commend the CSA for proposing to simplify and reduce the scope of the new regulatory framework. With a view to further clarifying and refining the Proposed Regime, we provide herewith additional comments in respect to the Proposed Regime. We thank you for affording us an opportunity to comment on this important matter and we trust that the CSA will consider the views expressed in this letter in finalizing the Proposed Regime.

2 General comments

After studying the Draft Instrument and Draft Policy, we are of the view that, although improvements have been made to the Original Materials, the Proposed Regime remains very complex, will constitute a source of uncertainty for both issuers and investors and create potential exposure for issuers, unless further changes are made. In addition, it will add to the regulatory burden of issuers, which is contradictory to other initiatives of the CSA.

In particular, we would like to emphasize the following observations:

2.1 Application of the Proposed Regime

(a) Document made available to the public "in the local jurisdiction"

We note that the Original Materials made the previous disclosure regime applicable to non-GAAP and other financial measures "disclose[d] in a document [and] that is intended to be, or reasonably likely to be, made available to the public in the local jurisdiction […]" [Our emphasis]. Conversely, the Draft Instrument not only omits the limitation of scope to disclosures made "in the local jurisdiction", but the Draft Policy appears to include disclosures made outside Canada where these are not specifically "required" and their composition not specified by the requiring foreign body:

> *The Instrument also does not apply to a financial measure that is disclosed in accordance with the laws of a jurisdiction of Canada, or jurisdiction outside Canada, including governments, governmental authorities and SROs. This exclusion is, however, only applicable in situations where a financial measure is required to be disclosed and the law specifically specifies its composition; for example, a government payment calculated and disclosed in accordance with the Extractive Sector Transparency Measures Act (Canada).* [Our emphasis]

Accordingly, voluntary disclosures outside Canada could be within the purview of the Proposed Regime. The Working Group is of the view that the Proposed Regime should only apply to the documents filed within the Canadian jurisdictions.

We submit therefore that it would be advisable to include in section 2 of the Draft Instrument the reference to documents intended to be, or reasonably likely to be, made available to "the public in the local jurisdiction", as was the case in the Original Materials, and also to further define "local jurisdiction" as a Canadian province or territory.

(b) Social media and links to third party documents

The Draft Policy indicates that the Draft Instrument applies to disclosures of specified financial measures on social media. We respectfully submit that, given the brief and less formal nature of communications published on social media, these are more akin to oral statements and should therefore be excluded from the scope of the Draft Instrument.

Alternatively, we submit that, given the brief and less formal nature of communications published on social media, links to third-party publications made available through social media should be excluded from the scope of the Draft Instrument due to the impractical nature of including the regulatory disclosures along with such social media posts and due to the lack of control that issuers have over third-party publications.[1]

[1] The Draft Policy states on p. 1319 that "[i]f a reporting issuer uses social media to provide links to publications (e.g., analyst reports), such publications are within the scope of the Instrument." The references to the page numbers of the Notice of Consultation mentioned in this letter come from the Ontario Securities Commission's Bulletin dated February 13, 2020.

(c) Form 51-102F6

Item 2.1(4) *in fine* of Form 51-102F6 (**CD&A**) currently provides that "if the company discloses performance goals or similar conditions that are non-GAAP financial measures, [the company should] explain how [it] calculates these performance goals or similar conditions from its financial statements."

The Draft Policy explains that if no financial amounts are presented, the Proposed Regime would not apply to the CD&A. However, if a non-GAAP or other financial measure within the scope of the Proposed Regime is expressed as an amount, the associated requirements of the Draft Instrument would apply.

The Working Group is of the view that such requirement would add to the burden of disclosure applying to proxy circulars and be too cumbersome. If the requirement under the Proposed Regime is maintained, we are of the view that the future correlation between the requirement as currently set out in item 2.1(4) of the CD&A and the requirements under the Proposed Regime should be better explained and potential consequential clarification amendments made to the CD&A requirements.

(d) Pro forma financial statements

We welcome the exclusion from the scope of the Draft Instrument of pro forma financial statements required to be filed under securities legislation. However, we are of the view that pro forma financial statements the filing of which is not *expressly* required under securities legislation should also be excluded from the scope of the Proposed Regime. Alternatively, the CSA may instead require issuers providing non-required pro forma financial statements to briefly explain why these are provided, instead of subjecting these to the extensive disclosure requirements of the Proposed Regime.

2.2 Definitions, proper categorization of financial measures and related examples in the Draft Policy

(a) Too many categories and significant number of measures in scope

Although improvements have been made in the Proposed Regime, the reference to five different categories of financial measures (six when counting historical and forward-looking non-GAAP financial measures separately) within the scope of the Proposed Regime, each with different disclosure requirements, is still very complex, will result in a significant increase in the number of in-scope measures, will constitute a source of uncertainty for both issuers and investors and will create potential exposure for issuers. Readers of continuous disclosure documents will be faced with multiple levels of detail, based on how each measure was categorized, with regards to a much larger number of in-scope measures which may be confusing and hinder readability. Accordingly, the Working Group is of the view that the CSA should start by providing a roadmap with a general overview of the application process to adequately categorize financial measures, as was done in the Original Materials. Furthermore, concrete examples of how various financial measures, frequently used by reporting issuers, should be categorized, would also be most helpful. This could be provided in tabular format in an appendix to the Draft Policy. However, as per our comment below in section 2.2(b), the CSA would need to specify in its examples whether measures have been presented in an issuer's Notes to its financial statements.

However, the Working Group questions whether this outcome is in line with the intention of the CSA especially given the CSA's objective to reduce the regulatory burden and related costs imposed on reporting issuers. For example, at least one member of the Working Group reported that the number of in-scope measures would more than triple with a significant increase coming from the supplementary financial measures category. This will result in a significant amount of time being consumed by reporting issuers' staff and, in some cases, outside advisors working to determine first how various financial measures should be categorized and second what disclosure wording should be developed and added to documents,

We note that in the Overview section of the Notice of Consultation, the CSA mentions that the Draft Instrument and the Draft Policy result in an overall net reduction in regulatory burden compared to current Staff Notice 52-306, particularly given that they aim, among others, to:

(i) exempt certain disclosures, financial measures and documents;

(ii) reduce and simplify disclosures for certain non-GAAP financial measures;

(iii) reduce uncertainty regarding disclosure obligations; and

(iv) diminish the time and effort investors spend understanding certain financial information.

The Working Group questions the extent to which the above-mentioned objectives will in practice be achieved by the Proposed Regime in its current form. Further, we suggest that prior to finalizing the Proposed Regime, an additional field-testing by reporting issuers be conducted to compare real against anticipated outcomes of the Proposed Regime. This would also serve to test and compare the consistency of categorizing similar financial measures among issuers.

(b) Location of disclosure will determine a measure's category

Whether or not an issuer discloses a measure in the Notes to its financial statements will determine the categorization of, and required disclosure applicable to, such measure under the Proposed Regime. For example, the decision to include in the Notes a capital management measure would determine whether such measure ends up being categorized as a non-GAAP financial measure or a capital management measure given that, by definition, a non-GAAP financial measure cannot be presented in the financial statements. The same would be true for a total of segments measure. We draw your attention to the fact that this could result in inconsistent disclosures being made by different issuers with regards to the same measure which we believe could result in a source of confusion for investors.

(c) Supplementary financial measures

Section 1 of the Draft Instrument defines a "supplementary financial measure" as meaning "a financial measure presented by an issuer that (a) is, or is intended to be, disclosed on a periodic basis to depict the historical or expected future financial performance, financial position or cash flow of an entity, (b) is not presented in the financial statements of the entity, (c) is not a non-GAAP financial measure, and (d) is not a non-GAAP ratio". Section 11 of the Draft Instrument requires that such financial measures be "(a) […] labelled using a term that, (i) given the measure's composition, describes the measure, and (ii) distinguishes the measure from totals, subtotals and line items presented in the primary financial statements of the issuer; (b) in proximity to the first instance of the supplementary financial measure in the document, the document provides an explanation of the composition of the supplementary financial measure." We submit that the requirements in (a) and (b) are overlapping and that where a supplementary financial measure is appropriately labeled as per (a), the composition of such measure becomes explicit and does not require further explanation pursuant to (b). We therefore respectfully submit that the disclosure requirements applicable to supplementary financial measures should be limited to the appropriate and explicit labeling. This will enhance readability while providing readers with useful information as to the financial measure's composition.

Finally, the definition of "supplementary financial measure" in the Draft Instrument should in our view be amended to include only measures that are disclosed on a periodic basis, removing the intent component. Issuers often may not know, when disclosing a measure for the first time, whether they will reuse such measure in the future, or the measure may cease to be used by the second publication.

(d) Definition of Non-GAAP financial measures

The Draft Instrument defines a "non-GAAP financial measure" as meaning "a financial measure presented by an issuer that (a) depicts the historical or expected future financial performance, financial position or cash flow of an entity, (b) with respect to its composition, excludes an amount that is included in, or includes an amount that is excluded from, the composition of the most comparable financial measure presented in the primary financial statements of the entity, (c) is not presented in the financial statements of the entity, and (d) is not a ratio".

For ease of reference and clarity, the definition should in our view be clarified to specifically add, as indicated in the Draft Policy, that: a) it includes a financial measure calculated by combining financial information that originates from different line items in the primary financial statements, unless that resulting measure is separately presented in the notes to the financial statements (**Notes**); and b) it excludes a component of a line item of the primary financial statements that has been calculated in accordance with the accounting principles used to prepare such line item. In addition, the definition should be clarified to specifically indicate that totals and sub-totals in the primary financial statements are considered line items of the primary financial statements. Further, we submit that the definition should also exclude a component of a financial measure included in the Notes that has been calculated in accordance with the accounting principles used to prepare such measure given that the Notes are an integral part of the financial statements.

(e) Non-GAAP financial measures – reconciliation requirement

We would submit that for the purpose of the requirement set out in section 6(e)(v) of the Draft Instrument to explain reconciling items, the Draft Policy should be modified to clearly state that a detailed explanation is not required to be provided even with respect to a reconciling item that is taken from the Notes as opposed to the primary financial statements. We draw your attention to the fact that the bottom of page 1323 of the Draft Policy seems to contain inconsistent statements on this subject. We would note that some issuers might otherwise decide to add line items in the primary financial statements in order to avoid potentially complex reconciliations, which could increase the length and readability of the primary financial statements.

(f) Total of segments measures / capital management measures reconciliation requirements

In accordance with our view presented above in relation to non-GAAP financial measures, we respectfully submit that a total of segments measure should not need to be reconciled if it constitutes a single component of a line item from the primary financial statements calculated in accordance with the accounting policies used to prepare such line item. For instance, "total product revenues" should not be required to be reconciled to "total operating revenues" in the primary financial statements where it constitutes a single component, without other adjustments, of the "total operating revenues" line item.

In addition, where quantitative reconciliations are required, we note that the Draft Instrument does not indicate how to perform such quantitative reconciliation for total of segments measures and capital management measures, while the quantitative reconciliation requirements for non-GAAP financial measures are very detailed. The CSA should clarify the level of details required when performing quantitative reconciliations for total of segments measures and capital management measures in order to adequately comply with the requirements set out in section 9(c) and section 10(a)(ii)(B), respectively, of the Draft Instrument. Furthermore, as mentioned above in section 2.2(d) with regards to the reconciliation of non-GAAP financial measures, we would submit that, should the rules concerning the reconciliation of total of segments measures and capital management measures also require to explain each reconciling item, then no detailed explanation should be required in the case where the reconciling item is taken from the Notes (i.e., it should not be limited to reconciling items taken from the primary financial statements).

(g) Total of segments measures versus individual segment measures

An issuer may individually disclose a financial measure for one or several of its reportable segments either together with, or without, the related total for all of its reportable segments. Such individual segmented measure would not be captured by the definition of total of segment measures given that it would not constitute a subtotal or total of financial measures of two or more reportable segments. The CSA should clarify that in either case, a financial measure of a reportable segment is not intended to be captured by the Draft Instrument. We understand that this outcome would be justified by the difficulties in meeting the new disclosure requirements with respect to segmented measures. For example, reconciliations of segmented measures could not be performed on a segmented basis given the impossibility of allocating total corporate costs, such as borrowing costs and taxes, among segments.

2.3 IASB Exposure Draft – General Presentation and Disclosures

We note that on page 1293 of the Notice of Consultation, the CSA indicates that it is aware of the International Accounting Standards Board's (IASB) Exposure Draft entitled "General Presentation and Disclosures" (the "Exposure Draft") with respect to which comments must be submitted by September 30, 2020. The Exposure Draft is expected to result in an increasing number of financial measures being disclosed in issuers' financial statements which, in turn, would result in a decreasing number of measures being categorized as non-GAAP financial measures under the Proposed Regime since, by definition, a non-GAAP financial measure cannot be presented in an issuer's financial statements. Given the important impact that the Exposure Draft could have on the categorization of financial measures, we would submit that the CSA should either, for example through discussions with the IASB, seek to minimize potential inconsistencies between the Proposed Regime and the Exposure Draft or, alternatively, delay the coming into force of the Proposed Regime until the Exposure Draft is sufficiently advanced to properly assess its implications.

2.4 Disclosure

(a) Ratios' non-GAAP components

The CSA should clarify that the numerator and/or denominator of non-GAAP ratios that constitute non-GAAP financial measures, and that are not otherwise referred to in an issuer's disclosure document on a standalone basis, do not need to be reconciled on the basis that ratios do not constitute financial measures to the same extent as standalone measures and that the proposed composition explanation and other disclosure requirements set out in the Draft Instrument would provide a sufficient explanation.

(b) Capital management measures' non-GAAP components

Similarly, components of capital management measures that are non-GAAP financial measures, and that are not otherwise referred to in an issuer's disclosure document on a standalone basis, should not be required to be reconciled and the portion of page 1327 of the Draft Policy, indicating that components of capital management measures that are non-GAAP financial measures should be subject to the full requirements applicable to non-GAAP financial measures which would include reconciliation, should be deleted. As mentioned above with respect to non-GAAP ratios, the proposed composition and other disclosure requirements set out in the Draft Instrument would in our view provide a sufficient explanation.

(c) "Significant difference"

When presenting non-GAAP financial measures that are forward-looking information, issuers are, among other things, required to provide a description of any "significant difference" between the non-GAAP financial measure that is forward-looking information and the historical non-GAAP financial measure. We are of the view that concrete examples and additional explanations should be provided so as to enable the issuers to comply with this requirement.

(d) "Single column approach"

The CSA should provide clarity on their concerns around the presentation of non-GAAP financial measures pursuant to the "single column approach" or in a format resembling primary financial statements. Such presentation should in our view be permitted if the Draft Instrument's disclosure requirements are otherwise complied with in respect of such non-GAAP financial measures, given that such approach assists in presenting the corresponding GAAP measures with equal prominence and in proximity to the non-GAAP financial measures.

(e) Adjustments

We are of the view that the Draft Instrument should clarify whether: a) the adjustment of (i.e. addition to or subtraction from) a total of segments measure, and b) a ratio using a total of segments measure as a numerator or denominator, result in the creation of a non-GAAP financial measure or supplementary financial measure. For example, should an issuer disclose Adjusted EBITDA as a total of segments measure in the Notes, present an Adjusted EBITDA measure further adjusted to add or subtract an amount, and also present an Adjusted EBITDA margin ratio, these three measures could potentially be classified in three distinct categories (namely: (i) Adjusted EBITDA (in total of segments measures); (ii) Adjusted EBITDA measure further adjusted (in non-GAAP financial measures); and (iii) Adjusted EBITDA margin (in supplementary financial measures)). This scenario could result in increased confusion for investors, who would be provided with different levels of disclosures for measures that are all based upon the same underlying financial information (Adjusted EBITDA).

(f) Period-over-period percentage variations

It should in our view be further clarified that the presentation of period-over-period percentage growth or decline of a non-GAAP financial measure, with respect to which the Draft Instrument's disclosure requirements are otherwise satisfied in an issuer's disclosure document, does not constitute a non-GAAP ratio. The same should also be true for the presentation of period-over-period percentage growth or decline of a line item taken from the primary financial statements or of a financial measure set out in the Notes, which should not constitute a supplementary financial measure.

2.5 Cross-referencing

(a) News Releases

We note that pursuant to section 5(3)(b) of the Draft Instrument, cross-references to the MD&A are not permitted in news releases issued or filed by the issuer. While we acknowledge that it may be problematic if the MD&A and the news release are not concurrent, the exclusion is not warranted in our view in the case of earnings releases and should either be removed or the policy reasons behind this choice explained. The purpose of issuing news releases is to promptly and clearly inform stakeholders of new information. Readability is key in news releases and would, in our view, be hindered by lengthy disclosures, while a cross reference to a concurrent MD&A may provide readers with additional information they wish to access in order to better understand the financial measures disclosed. In addition, the need to comply with lengthy disclosure requirements could delay the issue of news releases, which would be problematic in situations where new information must be disclosed promptly.

(b) MD&A

We are of the view that cross-referencing to the MD&A should be permitted for all of the Draft Instrument's disclosure requirements except for: a) identification as a non-GAAP financial measure; and b) mention that the measure is not a standardized financial measure and that it might not be comparable to similar financial measures presented by other issuers. For example, we do not see why the explanation of the composition of non-GAAP financial measures, non-GAAP ratios, supplementary financial measures or capital management measures would absolutely need to be included where such measures are

disclosed in a document as opposed to being satisfied by means of cross-reference to the MD&A. We submit that this would adversely affect the flow and readability of disclosure documents and that such disclosure would more appropriately belong in the section of the MD&A providing detailed disclosure about the relevant measures.

3 Conclusion

While we note multiple improvements in the Proposed Regime, we are of the view that further simplification and clarification of the requirements is warranted in order to fulfill the ultimate purpose of providing investors with clear, readable and useful information and not to further add to issuers' regulatory burden. As indicated above, we consider that the creation of multiple financial measures categories, each with different disclosure requirements, will create confusion for both readers and issuers. Certain limitations such as those related to cross-referencing in press releases and disclosure on social media should in our view be further revised in light of the nature of such communications. We are of the view that the CSA should provide concrete examples on categorization of the most commonly used financial measures so as to illustrate the differences and help issuers complete the category determination in a consistent manner. Finally, we submit that the CSA should carry out field-testing with issuers to compare real against anticipated outcomes of the Proposed Regime.

Yours very truly,

(signed) Norton Rose Fulbright Canada LLP