Blake, Cassels & Graydon LLP
Barristers & Solicitors
Patent & Trademark Agents
855 - 2nd Street S.W.
Suite 3500, Bankers Hall East Tower
Calgary AB T2P 4J8 Canada
Tel: 403-260-9600 Fax: 403-260-9700

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VIA E-MAIL

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

The Secretary
Ontario Securities Commission
20 Queen Street West
19th Floor, Box 55
Toronto ON M5H 3S8
Fax: 416-593-2318
E-mail: comment@osc.gov.on.ca

Me Philippe Lebel
Corporate Secretary and Executive Director, Legal Affairs
Autorité des marchés financiers
Place de la Cité, tour Cominar
2640, boulevard Laurier, bureau 400
Québec (Québec) G1V 5C1
Fax: (514) 864-8381
E-mail: consultation-en-cours@lautorite.qc.ca

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

Dear Sirs/Mesdames:

This letter is submitted in response to the Canadian Securities Administrators ("CSA") second notice and request for comment on the revised version of proposed National Instrument 52-112 *Non-GAAP and Other Financial Measures Disclosure* (the "Proposed Instrument") and the revised version of proposed Companion Policy 52-112 *Non-GAAP and Other Financial Measures Disclosure* (the "Proposed Companion Policy" and together with the Proposed Instrument, the "revised proposal").

This letter is submitted by Blake, Cassels & Graydon LLP on behalf of a certain client, a large issuer publicly traded on the Toronto Stock Exchange and the New York Stock Exchange.

Our client's comments are as follows:

We commend the CSA for its initiative to propose requirements in connection with disclosure of non-GAAP financial measures and other financial measures, based largely on the disclosure guidance in CSA Staff Notice 52-306 (Revised) *Non-GAAP Financial Measures* ("SN 52-306"), with a goal to provide clear, authoritative Canadian securities disclosure requirements.

We consider the revised proposal an improvement from the original proposal and are encouraged by the CSA's efforts to increase alignment with the U.S. Securities and Exchange Commission's ("SEC") rules and regulations on non-GAAP financial measures. Similar to many of our peers, non-GAAP financial measures play a valuable role in our corporate communications, and provide meaningful and valuable insight into information that we consider important to stakeholders' understanding of the performance of our business.

As a Canadian foreign private issuer availing itself of the Multijurisdictional Disclosure System, we are specifically exempt from the SEC rules and regulations regarding the use and disclosure of non-GAAP financial information as long as we comply with Canadian regulations regarding the same. However, as a reporting SEC Issuer, it is important to us that the CSA align its non-GAAP disclosure rules with those of the SEC, and that such rules are applied consistently, so that we are not disadvantaged (either from the perspective of unduly cumbersome disclosure requirements or higher cost of compliance) when compared with our peers that are U.S. domestic filers. We carefully prepare our disclosure documents by following guidance issued by the Office of Investor Education and Assistance of the U.S. Securities and Exchange Commission, A Plain English Handbook; How to create clear SEC disclosure documents (1998). We strive to create clear and informative disclosure documents, without providing obscuring or redundant information and, in this regard, would consider some aspects of the proposed rules identified in this letter inconsistent with this objective and more onerous than requirements imposed upon our peers that are U.S. domestic filers.

With this in mind, we would like to respectfully highlight the following observations with respect to the revised proposal.

Prominence and Usefulness in Supplemental Documents

We respectfully submit that press releases (other than earnings press releases or other press releases otherwise filed on SEDAR), social media, investor relations material and other documents of similar nature ("supplemental documents") that are considered a "document" under the Proposed Instrument should be regulated on a similar basis as the SEC's rules and regulations, which differentiate these types of documents, governed solely by Regulation G, from documents containing non-GAAP financial information that are furnished (e.g. an earnings release in a Form 8-K) or filed with the SEC (e.g. in a Form 8-K, Form 10-K or Form 10-Q), which are governed by both Regulation G and Section 10(e) of the Securities Exchange Act of 1934 ("Section 10(e)"). In particular, Regulation G standing alone does not specifically require registrants to disclose the most directly comparable financial measure calculated and in accordance with GAAP with equal or greater prominence, nor does it require a registrant to include a statement disclosing the reasons why management believes that the non-GAAP measure provides useful information to investors. The SEC only requires these additional disclosures in documents furnished or filed with the SEC that are subject to Section 10(e). In comparison, the Proposed Instrument requires specified financial measures (other than supplementary financial measures) to be presented with no more prominence in all documents, and include a statement of usefulness (except in certain cases where this information can be incorporated by reference).

While we acknowledge that the prominence of non-GAAP financial measures is a concern of regulators, it is our view that these additional prominence and usefulness requirements for supplemental documents will add a significant regulatory burden to comply with in terms of adding additional length to these short documents, especially given the Proposed Companion Policy guidance on prominence. For example, requiring issuers to present dual graphs/charts to represent comparable non-GAAP and GAAP financial measures is unnecessarily repetitive and, in some cases, renders a chart or statement ineffective and confusing. We are concerned that Canadian issuers may be at a competitive disadvantage relative to U.S. counterparts because of the additional Canadian

requirements. We respectfully suggest tailoring the requirements for specific financial measures based on the type of documents made available to the public specifically in filings made on SEDAR, similar to the SEC. We believe that the SEC guidance on non-GAAP financial measures is robust and that aligning the Canadian disclosure requirements with that guidance would not be prejudicial to the public interest.

Incorporating Information by Reference in a News Release – s. 5(3)(b)

"5. (3) Subsection (1) does not apply if the document that contains the specified financial measure is
(a) the MD&A filed by the issuer, or
(b) a news release issued or filed by the issuer."

We respectfully submit that to avoid undue burden, an issuer that discloses a specified financial measure in a news release issued or filed by the issuer should be able to incorporate by reference the required information pursuant to section 5 of the Proposed Instrument. Accordingly, we suggest removing the requirement proposed in section 5(3)(b). We also note that the current guidance within SN 52-306 permits cross-referencing to reconciliations without a prohibition on news releases, and believe this practice, which is currently commonly used by most issuers, should be permitted to continue.

We believe that concerns that cross referencing is inadequate run contrary to the CSA's initiatives to reduce duplicative disclosures and regulatory burden for issuers where investor protections can be adequately maintained. To be able to utilize section 5 of the Proposed Instrument, the specific financial measures must already be included in the issuer's filed MD&A with full compliance of the requirements within Part 2 of the Proposed Instrument, and would be easily accessible to users. We are concerned that the proposed approach would result in undue compliance costs to issuers and add unnecessary length to news releases with little added benefit to, or protection of, users as there is no new information disclosed.

Companion Policy – s. 6(e) – Proximity to the First Instance

"6(e) To prevent duplicate disclosure, an issuer may provide all the required disclosures for all non-GAAP financial measures in one section of the document that contains the non-GAAP financial measures, and cross-reference that section <u>each time</u> a non-GAAP financial measure is presented in that document." [emphasis added]

The Proposed Companion Policy guidance allows cross-referencing within the document "each time" a non-GAAP financial measure is presented in that document. This suggests that each time a non-GAAP financial measure is presented within a stand-alone document, a footnote or similar notation would be required to cross-reference to the specific section where all of the required disclosures of non-GAAP financial measures are included. This could result in numerous cross-references throughout a document, adding clutter and obscuring more relevant information, and would not be consistent with the CSA initiatives relating to regulatory burden reduction. We respectfully submit that it would be sufficient to include the cross-reference the first time within a document.

Totals of Segments Measure Reconciliation – s. 9(c)

9(c) in proximity to the first instance of the total of segments measure in the document, the document provides, directly or by incorporating it by reference as permitted by section 5, a quantitative reconciliation of the total of segments measure to the most comparable financial measure referred to in paragraph (a);

We believe that the quantitative reconciliation in the Proposed Instrument for totals of segment measures should not be required as it will result in redundant duplicative disclosure between the financial statements and documents other than financial statements. IFRS 8 *Operating Segments* paragraphs 21(c) and 28 require an entity to reconcile the totals of segment revenues, segment profit and loss, assets, liabilities, and for every other material item of information disclosed to the entity's corresponding total of these items. We respectfully suggest allowing the reconciliation requirement to be permitted to be satisfied by the disclosure presented in the notes to the financial

statements, consistent with the disclosure requirements for capital management measures in section 10(a)(ii)(B). The inclusion of the requirement to include identical reconciliations and disclosures in multiple documents within a reporting period contradicts initiatives of the CSA to reduce duplication of disclosures and regulatory burden on issuers.

Comparative Period Information – s. 6(d), 8(c), 9(d) and 10(c)

We generally agree with this requirement in the case of interim and annual MD&As, given the requirements in NI 51-102 to disclose a comparison of the company's financial performance and financial condition in the periods covered by financial statements. However, we believe that extending this requirement to supplemental documents, such as news releases, investor presentations and other similar documents, may cause documents to be unnecessarily lengthy and overly complex for users.

We submit that, in general, information about the comparative period may not be relevant or applicable to the information being disclosed in all documents, or there may be a more useful prior period to use for comparison purposes than the prior year or comparative quarter in the prior year, as the case may be. We believe that a requirement to always include a comparative period may lead to arbitrary inclusions of comparative figures without providing additional useful information. In certain instances, it may be more relevant and informative to users to compare to the company's forecasted guidance or target.

We note that the current guidance within SN 52-306, and SEC rules and regulations on non-GAAP financial measures do not explicitly require comparatives, and instead require the issuer to exercise judgment under antifraud standards as to whether disclosure of comparatives are necessary to not mislead investors. We respectfully suggest that this practice should be permitted to continue in documents other than MD&A, and professional judgment should be able to be applied to the requirements for comparative periods for all specified financial measures. In our view, the concern that non-GAAP financial measures should be prepared on a consistent basis over time is accomplished through the Proposed Instrument in section 6(e)(vi) and the Proposed Companion Policy can include the language to mirror the SEC Compliance & Disclosure Interpretation Question 100.02.[1]

Supplementary Financial Measures – s. 11(b)

(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 agree with the primary concerns expressed by the CSA about transparency of composition of supplementary financial measures. However, we respectfully suggest that a scaled back approach to the disclosure requirement in section 11(b) of the Proposed Instrument could be taken for interim MD&As, news releases, investor presentations and other supplemental documents to cross reference the composition disclosure to the annual MD&A, unless there is a change in the composition during the quarters, similar to how changes in accounting policies are disclosed.

Implementation Timeframe

Given the number of measures and documents to which the Proposed Instrument would apply, we agree with the prior comments and the CSA position that a longer transition period will be appropriate to ensure the Proposed Instrument is implemented as intended. Further, we believe implementation should be consistent with how the CSA implemented IFRS in Canada - i.e., effective for financial reporting periods beginning on or after January 1 of the

[1] SEC Compliance & Disclosure Interpretation Question and Answer 100.02 indicates that a non-GAAP measure may be misleading under Rule 100(b) of Regulation G if it is presented inconsistently between periods and depending on the significance of the change, it may be necessary to recast prior measures to conform to the current presentation and place the disclosure in the appropriate context.

year following the date that the final instrument is published versus having an effective date between quarters, to ensure consistent and comparable reporting over periods within a reporting year.

Sincerely,

Blake, Cassels & Graydon LLP