NORTON ROSE FULBRIGHT

Norton Rose Fulbright Canada LLP
1 Place Ville Marie, Suite 2500
Montréal, Quebec H3B 1R1 Canada

F: +1 514.286.5474
nortonrosefulbright.com

September 17, 2021

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
Office of the Superintendent of Securities, Service NL, Newfoundland and Labrador
Northwest Territories Office of the Superintendent of Securities
Office of the Yukon Superintendent of Securities
Superintendent of Securities, Nunavut

**To the attention of:**

The Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor, Box 55
Toronto, Ontario M5H 3S8
Fax: 416-593-2318
Email: 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

# Comments on CSA Draft Regulation to amend Regulation 51-102 respecting Continuous Disclosure Obligations and Other Draft Amendments Relating to Annual and Interim Filings of Non-Investment Fund Reporting Issuers

## 1 INTRODUCTION

This letter is submitted in response to the CSA Notice of Consultation (the **Notice of Consultation**) regarding Draft Regulation to amend Regulation 51-102 respecting Continuous Disclosure Obligations (the **Amending Regulation**) and Other Draft Amendments Relating to Annual and Interim Filings of Non-Investment Fund Reporting Issuers (collectively, the **Draft Amendments**) issued by the Canadian Securities Administrators (the **CSA**) on May 20, 2021. This letter reflects the views of a working group consisting of issuers having a combined market capitalization of more than CAD $250 billion (the **Working Group** or **we**).

Members of the Working Group welcome the CSA's initiative to streamline and clarify certain disclosure requirements in a general effort to lighten the regulatory burden faced by reporting issuers in Canada. With a view to contributing to these efforts, we provide herewith comments in respect to the Draft Amendments and our responses to some of the specific questions asked by the CSA in its Notice of Consultation. We thank you for affording us the opportunity to comment on this important matter, and we trust that the CSA will consider the views expressed in this letter in finalizing the Draft Amendments.

Norton Rose Fulbright Canada LLP is a limited liability partnership established in Canada.

Norton Rose Fulbright Canada LLP, Norton Rose Fulbright LLP, Norton Rose Fulbright Australia, Norton Rose Fulbright South Africa Inc and Norton Rose Fulbright US LLP are separate legal entities and all of them are members of Norton Rose Fulbright Verein, a Swiss verein. Norton Rose Fulbright Verein helps coordinate the activities of the members but does not itself provide legal services to clients. Details of each entity, with certain regulatory information, are at nortonrosefulbright.com.

## 2 GENERAL COMMENTS

After studying the Draft Amendments, we are of the view that the proposed amendments should reduce the reporting issuers' regulatory burden in the long term by providing a more efficient set of continuous disclosure rules. The following comments and suggestions aim at further refining the Draft Amendments so as to contribute to this general effort based on the Working Group members' practical experience.

### 2.1 Possibility for further consolidation

*(a) Overlap between AIF and proxy circular*

Despite the Draft Amendments, certain duplication or overlap remains, especially between the annual information form (**AIF**) and proxy circular requirements. For instance, Sections 23 and 24 of the new AIF form are mostly duplicative of proxy circular requirements in the current Form 51-102F5, Items 7.1 and 7.2 as they relate to directors. We would therefore propose to remove these requirements from the new AIF form. Investors will still be able to find the information in the proxy circular and will benefit from a shorter and more focused AIF.

As for details regarding members of management, we believe that issuers should be given the flexibility to include such information in the proxy circular or the AIF, or the ability to incorporate by reference in the AIF information set out in the proxy circular that has been filed or that will be filed within a reasonable period of time following the AIF. Similarly to SEC practice, issuers should be given latitude to incorporate by reference in the AIF information in the proxy circular, provided that the proxy circular is filed within 180 days following the end of the fiscal year covered by the AIF.[1]

*(b) AIF disclosure required under Form 52-110F1*

Members of the Working Group also believe that relocating general governance-related disclosure items from the AIF to the proxy circular might also contribute to the clarification and simplification effort of the CSA. The proxy circular, which is typically reviewed annually by investors and proxy advisors, is generally the most appropriate document for the centralized disclosure of governance-related matters.

In that respect, we note that certain audit committee-related disclosure in the AIF may be more appropriately located in the proxy circular. While we understand that an in-depth review of the requirements of Regulation 52-110 is currently outside the scope of the Draft Amendments, we would nonetheless respectfully recommend considering the following changes to disclosure required pursuant to Form 52-110F1 as it affects the AIF:

- Removing the requirement to include the text of the Audit Committee Charter in the AIF (as per Item 1) if the text of the charter is available on the issuer's website. Including the text of the Audit Committee Charter lengthens the AIF with information that is usually already otherwise available to investors. We are of the view that including a statement to the effect that the text of the Audit Committee Charter is available on the issuer's website should be sufficient.

- Moving the remaining requirements of Form 52-110F1 to the proxy circular.

### 2.2 Concept of materiality – alignment of terminology

We generally agree with the decision to remove unnecessary and duplicative materiality qualifiers in the relevant instruments and instructions, which might create confusion as to their significance. Aligning the

---

[1] See General Instruction G(3) to Form 10-K. The Working Group believes that although this General Instruction refers to 120 days, in our view, 180 days is more appropriate given the disclosure practices of many Canadian issuers.

terminology with the general requirement to only disclose information that is material is helpful. However, additional guidance as to the regulator's expectations relating to materiality in some instances should be included in the related instructions, similar to Sections 24 and 28 of the new AIF form.

For instance, Section 13(3) of the new AIF form requires issuers to "describe the substance of any amendments to the articles or other constating or establishing documents of your company since the date of your company's incorporation or formation". The corresponding disclosure in the current AIF form (Item 3.1) includes the materiality qualifier. By removing the materiality qualifier and adding the words "since the date of your company's incorporation or formation", the new requirement might be perceived as requiring the description of all amendments, such amendments being automatically considered as material. This could be particularly burdensome for companies formed or incorporated a long time ago, even if the new language allows incorporation of previous disclosure by reference. Moreover, such information would be of limited usefulness to investors. We recommend reinserting the materiality qualifier and that such disclosure be limited to amendments made in the previous financial year only.

Another example relates to Section 27(b) of the new AIF form, which now requires a description of "other penalties or sanctions imposed by a court or regulatory body against your company". The corresponding requirement in Item 12.2(b) of the current AIF Form includes the following materiality qualifier at the end of the requirement: […] "that would likely be considered important to a reasonable investor in making an investment decision". While the new Instruction (1) to Section 27 indicates that no materiality threshold applies to subparagraphs 27(a) and (c) as these are all material, it does not provide guidance as to how subparagraph (b) should be interpreted. In our view, it would be helpful to clarify in the corresponding instruction that Section 27(b) is subject to a materiality qualifier similar to the language included in Item 12.2(b) of the current AIF Form. In that respect, we also suggest that disclosure under Section 27(b) be limited to the last financial year, as this is the case under Section 27(a) and (c).

On a similar note, we would recommend that disclosure on penalties and sanctions under Section 24(4)(a) and (b) of the new AIF form be limited to the previous financial year only. Should a long disclosure period be deemed necessary, we recommend that it be limited to the last 10 years before the date of the AIF, as required for settlement agreements under Item 24(4)(a) of the new AIF form and as it is proposed for promoters in the prospectuses amendments in Item 22.1 of 41-101F1 and Item 16.1 of 44-101F1.

## 2.3 Risk factors

*(a) Disclosure of the issuer's risk mitigation strategy*

We respectfully submit that the disclosure of risk mitigation strategies (Section (3)(d) of Instruction to Section 16 of the new AIF form) should not be mandatory for the following reasons:

- Such requirement could be seen as being inconsistent with Instruction (2), which states: "A risk factor must not be de-emphasized by including, for greater certainty, excessive caveats or conditions". By including mitigation strategies in close proximity to the related risk factors, the issuer could thereby potentially be neutering the disclosure impacts of the risk factor.

- As risk management or mitigation disclosure would de-emphasize the related risk factor, such requirement could expose companies to greater primary or secondary market liability in that it would diminish the protection afforded by the risk factor disclosure, especially as it relates to the safe harbour defence regarding forward-looking statements.

- Such new disclosure will be burdensome for issuers, who we believe will feel the need to describe at length their mitigation strategies. Even if presented in a tabular form, this will add to the regulatory burden.

- Such disclosure is not necessarily useful to investors. Not only might the disclosure of mitigation strategies give investors a false sense of comfort (given that the effects of mitigation strategies are inherently uncertain, and their disclosure may imply that the risk factor disclosed would no longer be a material risk), but mitigation strategies are often dynamic and evolutive such that the disclosure of these strategies in anything but general and boilerplate terms may quickly become obsolete or incomplete.

- Some risks, by their very nature, cannot be controlled or mitigated by issuers such as, for example, the risk that stock prices as reported in the AIF change.

The Working Group is of the view that including such risk mitigation strategies often offers little tangible benefit to an investor's understanding of the material risk factors. Moreover, given that such disclosure may be inconsistent with the underlying principles outlined hereinabove, we are of the view that the disclosure of risk mitigation strategies should be excluded from the mandatory continuous disclosure requirements of Regulation 51-102 and should be left to the discretion of issuers to decide whether or not, and to what extent, to provide risk mitigation strategies disclosure on a voluntary basis. This approach would keep Canadian disclosure practices closer to those in the U.S., where the SEC has explicitly stated that mitigation language should be avoided, including clauses that begin with "while", "although" or "however".[2]

*(b) Impact / probability assessment*

Furthermore, we are strongly of the view that issuers should not be required to disclose the impact/probability assessment for each risk factor because of the potential for legal exposure related to such disclosure. Such assessment is subjective and could potentially be held against the issuer with the benefit of hindsight should an issuer's assessment of the impact/probability assessment turn out to be incorrect. However, if the CSA decide to nonetheless require such disclosure, guidance on the manner of establishing such assessment and how to disclose it should be provided (i.e., Should disclosure be limited to high, medium or low impact/probability or is a more substantial assessment required? Should the assessment put a greater emphasis on short-term or long-term impact/probability? Should the assessment be weighted against the other risk factors being disclosed?). In addition, if this disclosure requirement is maintained, the CSA should clarify that there would be no requirement to quantify the impact/probability or to provide a sensitivity analysis. Such quantification would be impracticable for many risks, and therefore not meaningful or helpful to investors, considering the level of assumptions issuers would have to make.

**2.4 Order in Annual Disclosure Statement**

We agree with the decision to combine the financial statements, MD&A and, where applicable, AIF into a single annual disclosure statement so as to streamline disclosure. However, we do not agree with the ordering of these documents as presented in Part 3A and by General Instruction 1, which seems to mandate that Part I contain the financial statements, Part II contain the MD&A and, where applicable, Part III contain the AIF. Unless the order of these documents is left to the issuer's discretion, we would suggest that the required organization of the annual disclosure statement be the AIF (where applicable), MD&A and financial statements, in that order. This would allow general alignment with prevailing practice in the U.S., notably annual report Forms 10-K and 20-F. While we acknowledge that the contemporary electronic form of disclosure presents extensive and accessible hyperlinks and tagging, meaning that the sequencing of any particular section is less relevant than in a time when the printed document prevailed, we nevertheless believe that the sequencing that we have suggested is more consistent with market participant's expectations in North America. The order we propose would also allow issuers to present

---

[2] See, for example, "*Staff Observations in the Review of Smaller Reporting Company IPOs*" available at https://www.sec.gov/divisions/corpfin/guidance/cfsmallcompanyregistration.htm

explanations of their operations and financial results before presenting the financial statements themselves, which would give investors and other stakeholders useful information for a meaningful understanding of the financial statements.

**2.5 MD&A Quantitative Discussion (Instruction (1) to Section 3):**

We generally agree that issuers should provide both a quantitative and qualitative analysis of the business of their company and its overall performance. However, in the spirit of CSA's initiative to lighten the regulatory burden faced by reporting issuers in Canada, mandatory quantitative disclosure should be limited to what is already required from issuers under the International Financial Reporting Standards (**IFRS**). That said, issuers should not be required to duplicate in the MD&A what is already disclosed in their interim and annual financial statements in accordance with the IFRS. After all, the purpose of the MD&A is to provide a narrative explanation to accompany and give investors context when reading financial statements. Moreover, we wish to confirm that issuers will not be subject to said quantitative disclosure unless the information is material for the company as a whole, whether or not the disclosure pertains to the issuer or a particular reportable segment.

In our view, it should generally be sufficient to provide a narrative explanation of overall performance, and mandatory quantitative disclosure should be limited to only what is material for the issuer. Otherwise, issuers may be discouraged from volunteering qualitative analysis with respect to useful but not material information to avoid lengthening the disclosure by being required to provide a corresponding quantitative analysis.

**2.6 Other comments – MD&A form**

We respectfully submit that the requirement under Section 5(5)(b) of the new MD&A form that requires issuers to provide qualitative and quantitative disclosure of any debt covenants to which the issuer is subject should be removed. We believe that the current disclosure requirements and financial statement requirements result in sufficient and appropriate disclosure. Additional disclosure on debt covenants, which are often heavily-negotiated and nuanced, may necessarily be lengthy and complex in the abstract, with limited utility for investors. In addition, such incremental requirements may force issuers to make disclosures that are commercially or strategically sensitive or adverse, and may open unintended road-maps for opportunistic and hostile activity against Canadian issuers. Finally, debt covenants to which issuers are subject are often calculated based on non-IFRS measures that may differ from otherwise disclosed non-IFRS measures upon which Regulation 52-112 disclosure is based. The proposed quantitative disclosure required under this section could therefore be misleading and create confusion for investors consulting an issuer's disclosures.

As regards the proposed disclosures in Section 5(5)(c) regarding risk of default on debt covenants, we would submit that the existing disclosure requirements – which are set at the "significant risk of default" threshold – are appropriate and the disclosure threshold should not be lowered. We believe that the current requirements and practices in risk factor disclosure and in the MD&A requirements (Section 1.6(h)) have produced meaningful and appropriate information for investors regarding the issuer's debt covenants and significant risks of default. Lower thresholds may result in more speculative-type disclosure that may place Canadian reporting issuers at a relative disadvantage against hostile activity and potentially exposed to the vagaries of market confidence based on interpretation of abstract or generic MD&A disclosure. In addition, in certain industries and for certain issuers, debt covenant amendments are routine, without posing material risks to the issuer or investors. The proposed additional MD&A disclosure requirement may thus result in boilerplate information that is de-coupled from significant risks, potentially resulting in confusing disclosure.

In addition, we note that Section 7(1) of the new MD&A form has been amended to remove the concept of disclosure when the board of directors has decided to proceed with the transaction, leaving only the concept of senior management believing that the confirmation of the decision by the board of directors is

probable. This amendment is, in our view, undesirable and, again, would place Canadian issuers in a comparatively disadvantaged position relative to other jurisdictions. In many situations, it would be imprudent for issuers to disclose a transaction in the absence of a board approval, and disclosure may be confusing or even misleading in a scenario where a board decides not to approve a course of action. Indeed, such a requirement runs counter to the general principles of disclosure under which public disclosure is necessary only once a decision has been crystalized. The current text on disclosure of proposed transactions under Section 1.11 of the current MD&A Form, which parallels the approach regarding "material changes" under Regulation 51-102, reflects a more logical and consistent disclosure scheme.

## 3 SPECIFIC QUESTIONS OF THE CSA

Please find below the answers of members of the Working Group to certain questions posed in the Notice of Consultation that were most relevant to them.

### 3.1 Questions relating to risk factors:

*(a) Would it be beneficial for reporting issuers if we provided further clarity on what "seriousness" means and how to determine the "seriousness" of a risk?*

We do not believe that there is a need to provide more clarity on what "seriousness" means and we submit that the seriousness determination should be left to the issuers' judgment. However, should the CSA opt to provide more clarity on what "seriousness" means and how to determine the "seriousness" of a risk by reference to an impact/probability assessment (as is currently proposed in Instruction (3) to Section 16), the CSA should clarify the type of impact/probability assessment that is expected. Please also refer to our comment under section 2.3(b) above with respect to impact/probability assessment for each risk factor.

*(b) The SEC's Modernization of Regulation S-K Items 101, 103, and 105 adopts amendments which require the following:*

- *grouping similar risks together;*
- *disclosing generic risks under the heading "general risks"; and*
- *requiring a summary of risk factor disclosure if the risk factor disclosure exceeds 15 pages.*

*If we adopted similar requirements to the SEC's amendments, what would be the benefits and costs for investors and reporting issuers?*

The Working Group believes that it is more relevant to list the risk factors by order of seriousness rather than by groups of topics. As such, grouping should be optional for issuers. Also, in our view, a summary of risk factors, if the risk factor disclosure exceeds 15 pages, would simply increase the number of pages of risk disclosure without being particularly useful to the reader. Finally, it may increase the potential exposure of issuers given that not all aspects of risk factors can be explained in a summary. The CSA should instead remind issuers that disclosure of risk factors should be focused on what is material to issuers and be written in plain language that will be easily understandable.

**3.2 Question relating to impact of refiling on auditor's report**

(a) *Considering that the annual disclosure statement will include annual financial statements, MD&A and, where applicable, AIF, do you think there will be an impact, including on auditing requirements, if a reporting issuer amends or re-files only one of these documents, or re-files the annual disclosure statement in its entirety?*

Members of the Working Group are of the view that maximum flexibility should be provided in that respect, so that if only a portion of the annual disclosure statement needs to be refiled, issuers are allowed to do so. Requiring the entirety of the annual disclosure statement to be updated and refiled in the event that only a portion needs updating could impose additional and onerous costs on issuers.

**3.3 Questions relating to semi-annual reporting for certain venture issuers on a voluntary basis**

At this time, we do not wish to provide any substantial comments in this regard. However, we note that if semi-annual reporting is allowed for all issuers in the United States in the future, Canadian issuers should benefit from the same flexibility.

**3.4 Questions relating to transition provisions**

(a) *Do you think the proposed transition provisions are sufficiently clear? If not, how can we make them clearer?*

In reading the transition section, it is in our view not apparent in what way the text constitutes a "transition" as it appears to simply explain how the effective date of the new rules is to be applied. We would appreciate further clarity in this regard.

(b) *Do you think the transition provisions in the amending regulation for Regulation 51-102 would provide reporting issuers with sufficient time to review the Draft Amendments and prepare and file an annual disclosure statement for a financial year ending on, for example, December 31, 2023 if the final amendments are published in September 2023? Do you think more time should be afforded to smaller reporting issuers (such as venture issuers)?*

Given the significant impact of such amendments on issuers' internal organization in preparing and considerably revising the annual and interim disclosures and in view of the new alignment of filing deadlines for the financial statements, MD&A and AIF, we respectfully submit that, in order to allow sufficient time for issuers to fully adapt to the new rules, the final amendments should be published earlier. Issuing the final rules in September 2023 with an entry into force in December 2023 does not provide sufficient time for companies to review the final version of the Draft Amendments and prepare and file an annual disclosure statement for companies that have a December 31 year-end.

For an effective date of December 2023, the final rules should in our view be issued at the latest in September 2022, to allow all companies, regardless of their size, to appropriately review, analyze and update their processes in line with the new rules in advance of the next annual reporting period. Processes for many organizations take time to modify and implement, even in furtherance of the most welcome changes.

We also note that, under the current rules, some issuers choose to file their financial statements before other documents, such as the AIF, in response to general expectations of the analysts and investors prevalent in certain industries. For companies using this anticipated filing, the Draft Amendments have even more considerable impacts on organization timelines, including the time for drafting the documents and having them approved by the appropriate committees and the Board. Hence, a sufficiently long transition period would be required.

Finally, it is crucial that the rules on "access equals delivery" be in force prior to or concurrently with the entering into force of the Draft Amendments. Otherwise, the requirement to deliver the annual disclosure statement will be unduly burdensome for issuers.

## 4 CONCLUSION

Thank you again for allowing us to provide comments on the Draft Amendments. Members of the Working Group appreciate the efforts of the CSA at reducing the regulatory burden by providing a more efficient set of continuous disclosure rules. They hope that the comments and suggestions set forth in this letter will further contribute to provide meaningful information to the market, in a user-friendly format.

Yours very truly,

*(signed)* Norton Rose Fulbright Canada LLP