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October 11, 2021

**Without Prejudice**
**By E-mail**

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marches 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
Northwest Territories Office of the Superintendent of Securities
Office of the Yukon Superintendent of Securities
Superintendent of Securities, Nunavut

The Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor, Box 55
Toronto, Ontario M5H 3S8
Fax: 416-593-2318
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Me Philippe Lebel
Corporate Secretary and Executive Director, Legal Affairs
Autorité des marchés financiers
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Dear Sirs/Mesdames:

**Re: CSA Notice and Request for Comment Proposed Changes to Companion Policy 41-101CP to National Instrument 41-101 *General Prospectus Requirements* Related to Financial Statement Requirements**

We submit the following comments in response to the Notice and Request for Comment published by the Canadian Securities Administrators (the "**CSA**") on August 12, 2021 with respect to proposed changes (the "**Proposed Changes**") to Companion Policy 41-101CP to National Instrument 41-101 *General Prospectus Requirements* ("**41-101CP**").

We have organized our comments below with reference to the specific Proposed Change to which the comments relate, where applicable. All references to parts and sections are to the relevant parts or sections of the 41-101CP. Capitalized terms used and not defined in this letter have the meanings attributed thereto in the Notice and Request for Comment.

Thank you for the opportunity to comment on the Proposed Changes. This letter represents the general comments of certain individual members of our securities practice group (and not those of the firm generally or any client of the firm) and are submitted without prejudice to any position taken or that may be taken by our firm on its own behalf or on behalf of any client.

### A. General

We applaud the CSA's effort to reduce regulatory burden and we welcome additional guidance with respect to the Primary Business Requirements. We believe this initiative is a positive step towards facilitating continued growth in capital markets activity in Canada. However, we are of the opinion that any new guidance would go further in its positive impact by providing more clarity regarding the current rules with the goal of ensuring that issuers can identify and are able to assess their compliance requirements well in advance of the initial public offering or other transaction, along with related costs and challenges. We submit that additional guidance should not be subject to significant CSA Staff discretion and interpretation which effectively reduces the benefit of any transparency and predictability to market participants. As such, a number of our comments included in this letter are with respect to places where additional guidance would be desirable.

### B. Section 5.3 Interpretation of issuer – primary business

*Illustrative Examples:* We appreciate the CSA's attempt to provide examples of where a reasonable investor would regard an acquired business or related businesses to be the primary business of the issuer, thereby triggering the application of Item 32 of Form 41-101F1. However, we respectfully submit that the examples provided do not significantly enhance a current understanding of the Primary Business Requirements as the examples are very clear cut (i.e., Example 1 describes an acquisition that exceeds the 100% threshold and Example 2 is a clear change of business). In an effort to provide issuers with greater certainty as to the nature of the financial information required to be included in a long-form prospectus, additional examples and guidance with respect to the "grey area" are necessary. In particular, examples of acquisitions where the acquisition is less than the 100% significance threshold but still changes the primary business of the issuer in a way that would require financial disclosure of the acquired business would be greatly appreciated, particularly where the change of business is not as clear cut as a change from mining exploration and development to cannabis cultivation activities. For example, circumstances that may be subject to interpretation include tuck-in acquisitions of entities in similar (but not the same) businesses or vertical acquisitions in the same industry. From a practical perspective, acquisitions take place when opportunities present themselves and issuers do not necessarily have the opportunity to require target financial statements when negotiating an acquisition (or access to information necessary to construct such statements after the fact). The circumstances where this may be the case vary across a wide range, including where the acquisition is relatively insignificant, is subject to a competitive bidding process, represents the acquisition of assets obtained out of bankruptcy or restructuring, etc. In such cases, the financial statements or necessary financial information may not be available or accessible, and/or the cost of obtaining the target's financial statements may not be justified. In most cases, historical financial statements may also not be relevant to the issuer as the issuer will have satisfied itself through alternative diligence and other factors. Moreover, historical financial statements are often structured to address the unique circumstances of the operating entities, and will often reflect certain judgments and policies that may not be relevant to the acquiror (for example, acquisition of a small family business that has historically been structured for tax optimization in the hands of the vendor or acquisition of assets or operations that are insignificant to a large vendor and do not justify separate records, etc.). Furthermore, once acquired, the importance to investors may be further diminished due to the manner in which the acquisition is consolidated by the acquiror, including through significantly different costs structures, synergies, and in certain circumstances, changes to the revenue-producing character of the business. We respectfully submit that if the issuer itself does not require the target financial statements in order to make the acquisition in the first instance, such information is unlikely to be considered material to investors. Having to construct MD&A for such statements further exacerbates the regulatory burden imposed on issuers. We also think that it would be very useful if the CSA could provide some examples of when historical financial statements of an acquired business would not be required in a long-form prospectus.

*Full, True and Plain Disclosure:* We submit that additional guidance is required with respect to how issuers may satisfy the requirement that a long-form prospectus contain full, true and plain disclosure of

all material facts relating to the securities being distributed. While the Proposed Changes do reference this requirement, where an issuer is uncertain as to whether the omission of financial information with respect to an acquired business would result in a failure to satisfy the "full, true and plain" standard, the issuer is still encouraged to use the pre-filings procedures set out in NP 11-202 to determine whether additional disclosure is required. Based on our experience, we respectfully submit that the pre-filing process does not always provide certainty or a timely process for issuers. Importantly, the pre-filing process can be costly and result in transaction delays as it often results in issuers being required to seek exemptive relief. In the Request for Comment the CSA is explicit that the intention of the Proposed Changes is to reduce regulatory burden, including by reducing the instances in which an issuer will have to incur costs associated with filing an application for exemptive relief. Without additional guidance, we have concerns that pre-filing applications and exemptive relief will still be necessary in a significant number of cases.

*OSC Guidance:* We respectfully suggest that the CSA consider including a statement in the Proposed Changes that the guidance published by the Ontario Securities Commission (the "**OSC**") in July 2015[1] (namely, that issuers must include the financial history of acquired businesses that are *in the same primary business as the issuer* in the three-year financial history included in an IPO prospectus) no longer apply. This OSC guidance has resulted in issuers being required to include financial information in a long-form prospectus filed in Ontario that would not otherwise be required in other jurisdictions. If the Proposed Changes are an effort to harmonize approach across Canada, explicit clarification to this effect would be greatly appreciated.

*Acquisitions of Multiple Businesses and Related Businesses:* In many cases, issues with respect to the Primary Business Requirements arise where an issuer has undertaken a number of acquisitions over the course of the three years leading up to the issuer's initial public offering. In many cases, issuers have at times been required to include historical financial information for each such acquisition in their long-form prospectuses, including those that were not individually significant or otherwise material to the issuer, having regard to the overall size and value of the issuer's business and operations. In addition, these types of acquisitions tend to be fully integrated into the issuer's operations through consolidation of operations, shared management, harmonized human resources, and coordinated sales and marketing strategies, among other things. Once incorporated into an issuer's business, the acquired businesses get the benefit of these types of organizational synergies and, as a result, the historical financial statements of such businesses as they had been individually operated cease to be relevant to investors. We respectfully submit that additional guidance in 41-101CP with respect to the treatment of multiple acquisitions and related businesses is warranted and would serve to reduce the regulatory burden faced by highly acquisitive issuers.

*SPACs*: We request that additional guidance be included in 41-101CP with respect to the treatment of SPACs, and in particular, with respect to how acquisitions that are supplemental to the main qualifying transaction, or were previously completed within the past three years by the target company, are to be assessed. It is our position that supplemental acquisitions in a similar business alongside the main acquisition should be assessed in the same manner as any other prior acquisition in the context of an initial public offering. Namely, if the supplemental acquisition does not cross the 100% significance threshold, historical financial statements should not be required. Similarly, it has been our experience that issues with respect to the Primary Business Requirements frequently arise where the target of an issuer's prior acquisition had previously acquired another business (i.e., a "target of a target"). In such cases, it is particularly difficult and costly for issuers to obtain historical audited financial information for the target of the target as the issuer was not involved in the initial acquisition. We respectfully request that additional guidance be provided as to the financial statements that would be required in such circumstances, and when financial statements would not be required. The OSC has treated SPAC

[1] OSC staff Notice 51-725 *Corporate Finance Branch 2014-2015 Annual Report* (July 14, 2015) ("**Staff Notice 51-725**"), page 13.

qualifying transactions as akin to an initial public offering and so we believe that the same principles should be applied

**C. Section 5.7 Additional information that may be required**

Consistent with our desire to increase regulatory transparency, we are concerned that the new guidance captured in section 5.7(2) of the Proposed Changes, may result in in uncertainty for issuers. Proposed section 5.7(2) provides that "[t]here may be other exceptional scenarios where issuers may be required to include additional financial information, other than financial statements, in a prospectus in order for the prospectus to meet the requirement for full, true and plain disclosure". The examples provided include (i) an acquisition where an acquisition or proposed acquisition does not exceed any significance test at the 100% threshold but is close to doing so, or (ii) where an issuer has completed a relatively large number of unrelated and individually immaterial acquisitions (that are not predecessor entities) in the relevant periods prior to the prospectus filing. If an issuer is uncertain as to whether additional financial disclosure is necessary, the CSA guidance recommends that an issuer use the pre-filing procedures in NP 11-202. Not only can the pre-filing process be costly and result in transactional delays, the issuer may not have the opportunity after the fact to obtain or construct the type of information that is deemed necessary by the regulators. If the goal of the Proposed Changes is to provide clarity for issuers and reduce regulatory burden, the enhanced guidance should aim to provide bright-line thresholds for issuers rather than broad statements about where additional disclosure may be required. Given the proposed threshold has been determined to be 100%, similar to the significant acquisition test, it should not be relevant that the calculation falls a few percentage points below the threshold. While this may appear arbitrary to some, in our view, the certainly of a bright-lines threshold is much more beneficial to capital markets participants than being subject to application of discretionary rules.

**D. Pre-Filing Applications**

To the extent that pre-filing applications are necessary with respect to the Primary Business Requirements, we request that the CSA consider providing additional guidance in 41-101CP with respect to the type of information that would be expected to be included in a pre-filing application, including any spreadsheet or financial information requirements. We submit that this guidance would assist issuers in providing consistent information that is relevant to the CSA's decision making process and would reduce the volume of correspondence required to file a long-form prospectus.

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Thank you for the opportunity to comment on the Proposed Amendments. Please do not hesitate to contact any of the undersigned if you have any questions in this regard.

Yours truly,

Laura Levine,

on my own behalf and on behalf of

Ramandeep K. Grewal
Jeff Hershenfield
Simon A. Romano