September 13, 2022

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
Northwest Territories Office of the Superintendent of Securities
Office of the Yukon Superintendent of Securities
Nunavut Securities Office

Re: Submission to public consultation on updates to National Instrument 43-101

Dear Colleagues,

This is my written response to your request for feedback on the next round of updates to National Instrument 43-101. I will focus my comments on only one of the issues raised in the Consultation Paper released by the CSA in April 2022: item E on the definition of a Qualified Person.

The Consultation Paper notes that CSA staff "have seen an increase in practitioners with less than 5 years of experience as professional engineers or geoscientists acting as qualified persons in technical reporting". I, and others, have previously drawn the attention of individual regulators to the fact the that published definition of a Qualified Person does not require that QPs have been professionally accredited for five years. The CSA might want it to say that or might believe that it should be understood that way, but the current definition does not say that. What it does say is: one has to be a geoscientist and engineer; one has to have at least five years of experience that is relevant to the degree or area of practice; one has to have experience relevant to the subject at hand; and, finally, that one has to be in good standing with a recognized professional accreditation body. What individual regulators have asserted, and what the Consultation Paper implies is that the (d) requirement, being in good standing, somehow gets fused with the five years of relevant experience in the (b) requirement, so that one must be registered as a professional for at least five years before one can claim to be a QP.

The interpretation that the CSA prefers cannot have been correct when Ontario's new APGO was created in the early 2000s, and when its Practising Members (like me) served as QPs before they had logged five years as accredited professionals. The QP definition has not essentially changed from the March 2000 version of NI 43-101 to the present; the (a) part of the definition in 2000 has been split into three items, each with some more detail, but it's the same set of criteria. Despite no significant change having been made to the definition, an interpretation that could not have been correct in the early days of the APGO has now become the CSA's preferred interpretation. If the CSA decided at some point that it had become sensible to require five years of professional accreditation, then it should have made that clear in the revisions to NI 43-101 in 2005, 2011 or 2016. But it didn't; it stuck with a set of criteria that do not mention

professional accreditation until the last item and that always state the requirement as currently being in good standing … not having been in good standing for the past five years.[1]

In response to the Consultation Paper's request for feedback on the QP definition, my suggestion is that if the CSA wants all QPs to have five years of professional accreditation, then they need to state that clearly. It makes no sense to continue to assume that this is implied by the current definition; a plain English reading of the current definition does not support that view.

I do not believe that it is necessary to change the QP definition. Five years of relevant experience followed by a successful application to a professional body should be sufficient for signing off on technical information. I do not believe that requiring an additional five years … at least ten years from graduation … will augment the confidence that the public can place on the assurances given by a QP. But if the CSA is determined to change the definition, then it should also address the issue of what happens with QPs who meet the current definition but who do not meet the future definition. There is, currently, public disclosure that has been QPed by people who meet all of the current requirements but who have not been registered as professionals for five years. They have read the rules, understood them in the way that a normal reader would understand them, and included in their QP certificate the statement that they have read the rules and that they meet the definition of a QP … all in complete good faith because they had no way of knowing that the rules are being interpreted to mean something different from what they say. What do those people do if a new definition now clearly disqualifies them? Are they grandfathered under the old rules? Do they have to advise their clients that previous assurances given in consent letters and QP certificates are no longer valid? Are securities regulators going to issue deficiency letters requiring the retraction and amendment of technical reports that were filed and accepted two, three, four years ago? The CSA has a role to play in maintaining order and predictability in public markets. If it changes the QP definition, it should think carefully about the transition from current rules to changed rules.

In the past year, individual regulators have required the retraction and amendment of NI 43-101 Technical Reports because an author claiming to be a QP has not been an accredited professional for five years (but does meet all of the published requirements). At the same time that these individuals have been disqualified from serving as QPs for Technical Reports, some of them continue to serve as the named QP for other public disclosure that does not require a QP certificate, e.g. press releases, AIFs, websites, trade show booths, corporate presentations, etc. Before changing the definition to conform to the wished-for interpretation, the CSA should decide if the provincial securities commissions are going to have the resources to root out QPs who do not have at least five years as accredited professionals, but who are not obliged to supply a QP certificate that documents their qualifications. If the future regulatory practice continues along the lines of current regulatory practice, where the five-year rule is used only to disqualify QPs who have provided certificates for Technical Reports, then there will be a drift toward two types of disclosure: Technical Reports that require "real" QPs and everything other type of public disclosure. Even the wording of the CSA Consultation Paper points in this direction when it refers to people wrongly claiming to be QPs "in technical reporting". If the CSA is serious about creating a more restrictive definition for QPs, it should decide if regulators are going to weed out people named as QPs for disclosure other than Technical Reports, or if it is only going to be able to rein in self-declared QPs when the certificate required by a Technical Report provides sufficient information to disqualify certain individuals.

The CSA should also decide how it is going to determine if a self-declared QP does meet the five-years-as-a-professional rule. Currently, some professional bodies make available information on the year of

[1] At times, regulators have pointed to the Companion Policy's commentary on five years of professional accreditation to support their novel interpretation. But it is clear that this comment pertains only to people registered by professional bodies outside of Canada.

registration; but not all of them do. What individual regulators are currently doing is selectively disqualifying professionals who happen to be accredited by one of the professional bodies that makes available on the Internet the information on year of registration. For geoscientists and engineers accredited by other professional bodies that do not publish this information, and merely confirm that the individual is professionally registered, that fortunate group of QPs gets to continue being regarded as QPs whether or not they have five years of professional accreditation … because regulators have no easy way of establishing how long they have been registered.

Rather than moving into a future that has two types of QPs, those whose years of professional accreditation can easily be confirmed online and those who can't, and two types of public disclosure, Technical Reports that have checkable QP certificates and other disclosure that does not allow easy disclosure, the CSA could instead decide simply to let the current definition stand, and to accept that it has never stipulated that a QP must have been a registered professional for five years.

Regardless of what the CSA decides on the QP definition … "improving" it or continuing with the definition that has worked for more than 20 years … it would also strengthen the 43-101 system if the CSA would undertake to adhere to the rules that it has published, and not to introduce interpretations that are not consistent with a plain English reading of the published rules or that, worse, directly contradict the published rules. It is central to the notion of "the rule of law" that people be able to read the published rules and follow them, all in good faith that they have correctly understood what is written. Individual regulators at provincial securities commissions have undermined accountability and transparency by introducing interpretations that are not consistent with the written rules. The issue of whether or not a QP needs to have been a professional for five years is one example. Everyone who reads the published rules, except for a few regulators, understands them the same way. A handful or regulators are the only people who manage to interpret the published definition as requiring at least five years of professional registration. In a very straightforward and obvious way, the published rules do not say what a few regulators want them to say. By continuing to insist that they do, when they evidently don't, individual regulators undermine confidence in the entire framework. If a regulator can invent rules that haven't been written, what is the point of the written regulations?

A more startling example of disregard for published rules is the issue of whether or not a QP needs to be an "expert". At least one regulator has said, in writing, that a QP should be an expert, and has underscored this belief with the observation that most professionals will spend their entire careers and never be QPs. What the Companion Policy says is that a Qualified Person does <u>not</u> need to be an expert. It does not help the investing public for a securities regulator to be insisting on the exact opposite of what the CSA has published. Everyone, from the professionals who work in the industry to individuals who make decisions about investing in companies with mining projects, should be allowed to regard the published rules as correct. No-one should have to put up with an individual regulator ignoring written rules and insisting that black is white.

When the next version of NI 43-101 has been crafted, and properly harmonized across the main Instrument itself, Form F1 on Technical Reports, and the Companion Policy, public confidence in the new and improved framework would be enhanced if the CSA developed a Staff Notice that drew the attention of individual regulators to the importance of making rulings that adhere to a plain English interpretation of the new rules and that do not contradict anything that has been published in the main Instrument or its associated documents.

Yours sincerely,

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