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Re: Proposed National Instrument 51-102 Continuous Disclosure Obligations

The Canadian Investor Relations Institute (CIRI) is pleased to make these written comments regarding the CSA's proposed NI 51-102 which is comprised of Continuous Disclosure Obligations (the Rule) and Forms 51-102F1 through 51-102F6.

Canadian Investor Relations Institute

CIRI is a professional, not-for-profit organization of corporate executives and consultants responsible for communication between public companies and the investment community. With 760 members, CIRI is the world's second largest society of investor relations professionals. Approximately 84% of CIRI's public company members are listed on The Toronto Stock Exchange, 10% on the TSX Venture Exchange, and 26% are interlisted on a U.S. exchange. CIRI is headquartered in Mississauga and has active chapters in Toronto, Montreal, Calgary and Vancouver.

CIRI's mission is to "advance the practice of investor relations, the professional competency of its members, and the stature of the profession". The prime focus of the organization is the education of its members about investor relations best practices through regular and ongoing professional development programs.

General Comments

CIRI supports the objectives of NI 51-102 which are to:

- Harmonize continuous disclosure requirements among Canadian jurisdictions;
- Replace existing local continuous disclosure requirements;
- Enhance the consistency of disclosure in the primary and secondary markets; and
- Facilitate capital-raising initiatives such as an integrated disclosure system.

CIRI recognizes the evolving international regulatory environment in which NI 51-102 is being introduced, and notes the CSA's request for comments whether to "change the Rule to reflect proposed SEC requirements." CIRI's position is that harmonization of continuous disclosure requirements of the 13 Canadian securities commissions is of primary importance, taking precedence over harmonization with U.S. regulations. Additionally, while we generally support increasing regulatory harmonization with the U.S., to contribute to investor confidence and international capital market access for Canadian issuers, we believe that changes should be subjected to a cost/benefit analysis from the Canadian perspective.

CIRI supports most of the recommended changes to existing continuous disclosure rules and forms. We provide recommendations where we differ with CSA proposals, and/or where we have additions or qualifiers. We have attached, as an appendix to this document, a survey of CIRI members conducted for our comments on proposed NI 51-102. Survey questions focussed primarily on accelerated filing deadlines and the proposed new business acquisition report.

Below is a summary of our key comments, followed (*on page 5*) by discussion supporting our key comments, and our recommendations.

- Contrary to the definition of material change in NI 51-102, we agree with the Five Year Review Draft Report that the "responsible investor" definition of materiality should replace the market impact test. (s*ee page 5*)

- We agree with accelerating annual and interim financial disclosure filings, in order to reduce market risks for investors and to narrow the gap with U.S. filing deadlines which are being further accelerated. We note the distinction between the proposed deadlines for 'filings' and current deadlines for 'delivery' to security holders, as the elimination of the formatting and production of shareholders' reports mitigates the added demands of the accelerated time period. We believe the CSA should provide a transition period for new filing deadlines to enable certain issuers, notably smaller issuers and complex multinationals, to adjust.

  The CSA additionally has asked for comment regarding harmonizing filing deadlines with those recently approved in the U.S. for public companies, including interlisted Canadian issuers, with a public float of at least US$75 million. We believe many Canadian companies will strive to benchmark against U.S. and interlisted-Canadian peers, but that a decision to further accelerate required filing deadlines should only be taken if a cost/benefit analysis supports the initiative and a sufficient transition period is provided. (*see page 6*)

  The CIRI issues committee conducted a survey of TSX and TSX Venture Exchange listed members, including U.S. interlisted members and found that a large majority of all respondents expect no significant problems with proposed new Canadian filing requirements, but 50% of interlisted companies expect significant problems with the new SEC filing requirements. (*see page 6*)

- We agree that mandatory delivery of financial statements and MD&A should be eliminated, to be replaced by delivery on request. The CSA is considering requiring that "if a security holder requests one of these documents, the issuer must deliver both." We believe that the two documents are integral and should be delivered together. (*see pages 7–8*)

- We ask what effect, if any, sections 4.2, 4.5 and 6.5 of NI 51-102, regarding accelerated filings and mandatory delivery of annual financials, will have on the contents and timing of the annual meeting mailing, and the timing of the annual meeting. We propose that the Companion Policy to NI 54-101 Communication with Beneficial Owners of Securities of a Reporting Issuer should be clarified regarding the requirements for the annual shareholders' meeting.

- The CSA in its request for comment states that it is considering amending the Rule so that financial statements and MD&A would have to be filed at the same time. CIRI believes that they should be filed at the same time. (*see pages 7–8*)

- Regarding the MD&A (*see pages 9–16*):
    - CIRI generally agrees with enhanced disclosure requirements regarding forward-looking information (FLI), changes in accounting policies, liquidity, capital resources and transactions with related parties. However:
        - CIRI recommends that Canadian issuers not be directed to review existing critical accounting policies in the MD&A, except where it is important to do so in order to explain material variances or risks, so as to not duplicate disclosure which is provided in the Notes to the Financial Statements. (*see pages 12–13*)
        - CIRI recommends that issuers should be required to file a fourth quarter MD&A concurrent with or as soon as possible after the public release of audited fourth quarter financial statements.
        - We believe that the CSA should bring greater clarity regarding two concepts: FLI and the duty to update in the MD&A. (*see pages 9–11*) This is particularly important with the move toward an integrated disclosure system, and with the prospect of a statutory civil liability regime for continuous disclosure pending.
        - We agree that all issuers, regardless of their size, should file MD&A on an interim basis, not just annually.
        - CIRI supports the general thrust and recommendations of the Canadian Performance Reporting Initiative Board of the CICA's draft report, *MD&A, Guidance on Preparation and Disclosure.* When the CICA's final report is published, we urge the CSA to review it and consider recommending the MD&A framework proposed by the report as a model for public companies to follow when preparing their MD&As. (*see page 15*)

- CIRI agrees that SEC issuers that currently file in accordance with Canadian GAAP should be permitted to file in U.S. GAAP, with reconciliation to Canadian GAAP for two years. We would add that the reconciliation period should be considered by issuers as a minimum, as they take into account the need for security holders to interpret financial statements in a consistent manner as long as there remain significant differences between U.S. and Canadian GAAP. (*see pages 8 – 9*)

- Consistent with CIRI's position in its response to the Five-Year Review Committee Draft Report, CIRI believes the CSA should provide for safe harbour protection, similar to the US Private Securities Litigation Reform Act of 1995. We believe this would contribute to enhanced disclosure by helping protect well intentioned issuers from litigation. (*see page 16)*

- CIRI strongly supports the proposal that the issuer's board of directors be required to review its annual and interim MD&A, or delegate the review to the audit committee of the board. (*see page 19*)

- We agree with increasing disclosure requirements for executive equity compensation plans, in order to increase disclosure transparency and help build confidence in corporate governance as it relates to executive compensation. (*see page 16*)

- We expect that the proposed new Business Acquisitions Report (BAR) will affect primarily issuers acquiring private companies that do not require broad-based shareholder approval. We understand that this new report is one of the building blocks leading to an integrated disclosure system. However, we found some concern regarding the significance test and reporting requirements among respondents to a CIRI member survey. (*see pages 17 – 18*) Accordingly, we propose review of certain aspects of the proposal, notably: whether the significance test should be based on balance sheet rather than income statement measures; whether the reporting requirements compromise timeliness; and whether the compilation report meets the cost/benefits test. (*see page 18*) The CIRI survey referred to above found that 27% of TSX respondents and 89% of TSX Venture respondents felt the BAR did not meet the cost/benefits test, and 44% of TSX Venture respondents expected significant problems meeting the 75-day filing deadline.

- We believe that the definitions for exempt issuers for various disclosure requirements should be clarified and adjusted if necessary to avoid inconsistencies or inequities. For example, some TSX Venture Exchange issuers will need to file AIFs while some senior issuers listed on the TSX will not. (*see page 19*).

Comments On Issues From An Investor Relations Perspective

Below, we have elaborated on a number of rules and forms of NI 51-102 from an investor relations perspective. We provide recommendations where our perspective differs from NI 51-102 proposals.

Material Change Definition

CIRI notes that N1 51-102 maintains the market-impact definition of material change currently subscribed to by all provinces except Quebec, and expects this same approach would apply to "materiality." For several reasons outlined in the Five Year Review Committee Draft Report [Section 12.2], CIRI supports the recommendation of the Five Year Review Committee that "the existing materiality standard should be changed for all purposes under securities legislation to a reasonable investor standard."

As we stated in our response to the Five Year Review Draft: "A main benefit of the change would be that it would eliminate the 'hindsight' aspect of the current definition, which can be used to judge materiality based upon whether information actually significantly affected the market price or value of securities. Since the aim of a good definition should be to provide guidance in decision-making, the objective 'reasonable investor' test is more suitable for applying when deciding disclosure questions in the context of when these decisions were made, in advance of their ultimate impact on the market."

Reasons provided by the Five Year Review Committee for adopting the reasonable investor definition include: the reasonable investor definition alignment with “full, true and plain disclosure” applicable to prospectuses; use of the reasonable investor standard in Ontario securities law in the context of specific regulatory instruments; and harmonization with U.S. securities law.

Recommendation

- CIRI believes that the existing materiality standard should be changed for all purposes under securities legislation to a reasonable investor standard.

Part 4, NI 51-102: Interim And Annual Financial Filings

Filing deadlines – financial statements and notes

CIRI supports timely disclosure within the market place and notes that many issuers already publicly release their financial results well before the current filing deadlines. Certain issuers will require some time to adapt to the new proposed deadlines and negotiate new time lines with their auditors and boards. In addition, some may need to develop new processes to achieve the new deadlines.

Senior Issuers

CIRI conducted a survey of 424 corporate members (390 listed on the TSX and 34 on the TSX Venture Exchange) and received a 14% response rate from the TSX-listed companies and 26% from those on TSX Venture exchange. This survey found that, of TSX-listed respondents, 85% expect to have no significant problems meeting the proposed Q1 through Q3 filing requirements (45 days), and 71% indicated they expect no significant problems meeting the new year-end filing requirements. Of these senior issuer respondents, 87% expected no significant problems filing their MD&A with the interim financial statements, and 84% expect no significant problems filing the MD&A with the annual financial statements, within the accelerated timeframes. The survey found that, of the TSX-listed issuers that responded, 61% currently file Q1-Q3 financial statements with SEDAR within 45 days of quarter end, and 50% file audited annual financial statements within 90 days.

Other Issuers

89% of the TSX Venture Exchange issuers felt they would have no significant difficultly meeting the purposed year end filing (120 days). Of TSX Venture listed issuers that responded, 67% currently file audited annual financial statements within 120 days. All respondents indicated that they now file their Q1 through Q3 material within the required 60-day delivery period.

Reasons for Difficulty in Meeting Proposed Requirements

For those respondents that indicated they would have difficulty in meeting the requirements, the four most frequently cited reasons were:

- There would be insufficient time to complete the auditors' report;
- Timing of board meetings;
- Insufficient time to consolidate diverse business segments; and
- Accelerating the work processes will incur substantial costs and reallocation of workload.

Recommendation

- The CSA should take into account the challenges faced by some issuers, notably smaller TSX issuers that face shorter deadlines than TSX Venture issuers, and provide a suitable transition period to prepare for the adoption of accelerated filing deadlines.

Filings – MD&A By All Issuers

CIRI supports the requirement for all issuers to file interim MD&As. We believe that a company that is prepared to go public must be prepared to provide a high standard of continuous disclosure to its shareholders.

Filing Deadlines – MD&A

We note that the CSA is considering a proposal requiring that an issuer accelerate the filing of the MD&A to be concurrent with the financial statements and notes. We believe that this should be required, as it currently is for the quarterly shareholder report, as the MD&A is integral to an understanding of the financial statements. As the CSA states in Part 1 (d) of Form 51-102F2: "[the MD&A should] explain the nature of and reasons for changes in your company's performance…Your [MD&A] discussion should assist the reader to understand trends, events, transactions or expenditures."

Recommendation

- Issuers should be required to file the MD&A within the accelerated quarterly and annual timeframes.

Section 6.5 Elimination Of Mandatory Delivery Of Financial Statements And MD&A To All Security Holders

CIRI agrees with the CSA's proposal to eliminate mandatory delivery of financial statements and MD&A to all security holders, restricting the delivery obligation to security holders that request this information. Some security holders prefer the original hardcopy and/or do not have access to the Internet or to a printer to download disclosure material from the Internet. Best IR practices will dictate that issuers notify

security holders of the change in distribution procedure, and provide request forms for those wishing to stay on the mailing or email list.

CIRI believes that availability of such disclosure materials should be referred to not only annually in the AIF and information circular, but also in the annual report and interim results documents and on the website. Also, as CIRI recommended in its response to the Five Year Review Committee, the CSA should create greater awareness of SEDAR among investors and encourage them to use it as a primary source of information.

Currently, companies are required to send the annual report to all registered shareholders and to beneficial shareholders who do not indicate to intermediaries that they do not want to receive it, and to send the interim reports to all those who request it via the supplemental mailing form included with other annual meeting materials.

We note too that the CSA is considering requiring that financial statements and MD&A be delivered together if one is requested. CIRI supports this because the two documents are integral to an understanding of performance, and in any case they currently are filed jointly as part of quarterly reports, and the annual report.

We ask what affect if any sections 4.2, 4.5 and 6.5 of NI 51-102, regarding accelerated filings and mandatory delivery of annual financials, respectively, will have on the content and timing of the annual meeting mailing, and the timing of the annual meeting. We propose that the Companion Policy to NI 54-101 Communication with Beneficial Owners of Securities of a Reporting Issuer should be clarified regarding the requirements for the annual shareholders' meeting.

Recommendations

- The availability of the annual and interim financial reports on request should be referred to in the annual and interim results documents and on the website, in addition to in the AIF and information circular.
- Issuers should send both the financial statements and the MD&A when security holders request one of the two documents.
- We propose that the Companion Policy to NI 54-101 Communication with Beneficial Owners of Securities of a Reporting Issuer should clarify the requirements for the annual shareholders' meeting, to reconcile with sections 4.2, 4.5 and 6.5 of proposed NI 51-102.

Sections 4.7 and 4.8, NI 51-102 Reporting In U.S. GAAP

CIRI supports the CSA's proposal that SEC issuers that currently file financial statements in accordance with Canadian GAAP and Canadian GAAS be allowed to file in accordance with U.S. GAAP and U.S.

GAAS as their primary filing. This would result in cost savings for interlisted issuers. We do note, however, that while there has been increasing harmonization between Canadian and U.S. GAAP in recent years, significant differences remain, and we expect that issuers will consider the needs of their Canadian security holders when determining whether to reconcile to Canadian GAAP for two years, as proposed in NI 51-102, or for longer.

CIRI agrees that materiality should continue to be the key factor in determining required reconciliation items between Canadian and other acceptable GAAP differences. A description (in plain English) in the notes to the financial statements explaining the material differences and their financial impact should suffice to enable users to evaluate comparable companies.

We note that the proposed national instrument does not provide for adoption of IAS GAAP and believe this is appropriate as long as issuers that file outside North America in accordance with IAS are not subject to a rigorous and transparent regulatory review in their home country.

Recommendation

- CIRI agrees with the CSA that SEC issuers that currently file in accordance with Canadian GAAP and Canadian GAAS should be allowed to file in accordance with U.S. GAAP and U.S. GAAS, provided they provide reconciliation with Canadian GAAP for two years. However, we believe that the reconciliation period should be considered by issuers as a minimum. We believe that issuers should take into account the need for security holders to interpret financial statements in a consistent manner as long as there remain significant differences between U.S. and Canadian GAAP.

Form 51-102F2 – Management's Discussion And Analysis

Part 1 (g) Forward-Looking Information

CIRI agrees that FLI, if provided, should be included in the MD&A which increasingly is becoming the core disclosure document. We also agree that FLI should be accompanied by the relevant assumptions, risks and sensitivities that enable investors to assess the FLI, and that provide some legal protection to issuers in the event performance differs materially.

However, CIRI believes there is considerable uncertainty among issuers regarding the definition of FLI, and the duty to update FLI. Additionally, there are concerns about legal liability, particularly should statutory civil liability come into effect for continuous disclosure. We believe the CSA should bring greater clarity to these issues.

Regarding the definition of FLI that is encouraged in Part 1 (g) of the MD&A Form, CIRI interprets FLI as the "voluntary financial outlooks" referred to in Section 5.5 of NP 51-201 Disclosure Standards. CIRI has further interpreted FLI in its Model Disclosure Policy, published February 12, 2001, which states that: "Companies should distinguish FLI from the requirement to discuss current trends and provide a prospective analysis of the business of the company within the MD&A section of annual and quarterly reports." However, it is not clear, as we move toward an integrated disclosure system, what the distinction is between FLI and future-oriented financial information (FOFI) as defined in NP 52-101 Future Oriented Financial Information. NP 52-101 sets parameters for FOFI such as a maximum 24-month forecast period.

Regarding the duty to update, Form 51-102F states that: "You must discuss any FLI disclosed in MD&A for a <u>prior period</u> which in light of <u>intervening events</u> and absent further explanation, may be misleading. Forward-looking statements may be considered <u>misleading when they are</u> <u>unreasonably optimistic or aggressive</u>, or <u>lack objectivity</u>, or are not adequately explained. Your timely disclosure obligations might also require you to issue a news release and file a material change report." We believe this direction, particularly the phrases we have underlined, is ambiguous and needs to be clarified in order to encourage a high standard of continuous disclosure by issuers.

How far back does the 'prior period' extend? The longer it extends, the greater the potential issuer liability. Do 'intervening events' refer to corporate developments, or also to general market or world events that might impact the company? When would an issuer be required to update, given that it can take time to quantify the impact? The reference to 'unreasonably optimistic or aggressive' suggests that the FLI was unreasonably optimistic when given, rather than proved to be unreasonably optimistic in hindsight as a result of subsequent events. 'Lack of objectivity' also suggests unrealistic FLI at the time it was given. CIRI strongly believes that FLI need to be realistic and objective when given. We expect updates to reflect events subsequent to the FLI, or factual errors discovered subsequent to FLI and duly corrected when discovered,

CIRI's model disclosure policy states: "If FLI was provided, and the company subsequently becomes aware of an error in the FLI, which was an error at the time the FLI was provided, the company has a duty to correct the original disclosure. If a company has provided FLI, it generally does not have a duty to update the FLI based on subsequent results, unless required to do so in the circumstances of National Policy 48. However, if the public has some reason to believe the FLI statement is still a current statement, the company may have a duty to update, should subsequent events prove the FLI to be materially off target."

In summary, there would appear to be a duty to update if the company made an error at the time the FLI was provided, or subsequent material developments have changed the company's outlook materially. But what if, for example, external factors beyond the company's control are altering the outlook, or pose a significant risk the forecast will not be achieved, but the change cannot yet be quantified? What is the

duty to update? The lack of clarity means that companies with good intentions could become legally liable, unless protected by safe harbour provisions which CIRI advocates on page 16 of this document.

Our concern is that regulatory ambiguity will compromise the level of FLI provided by many issuers due to their resulting fear of legal liability. Furthermore, as CIRI stated in response to the Five-Year Review committee Draft Report "Because the judgement of materiality can be debated, senior executives would increasingly shy away from forward-looking disclosures – material or otherwise – in a legal environment which could expose the issuer to statutory legal liability."

Recommendations

- The CSA needs to provide greater clarity regarding the definition of FLI in the context of Form 51-102F2.
- The CSA needs to provide greater clarity regarding issuers' duty to update.

Summary of Quarterly Results

The proposed Form 51-102F2 requests a discussion in the MD&A of the causes of the variations over the last eight quarters. We believe this discussion would provide the reader with a unique perspective on the business. However, the rule should emphasize that this explanation needs to be only at a summary level so as not to duplicate the effort expended on the more substantive parts of the MD&A form.

Fourth Quarter

For some issuers, the fourth quarter is the most significant period of operations during the year, generating a disproportionate amount of revenue and earnings. Therefore, CIRI believes that there should be a requirement for the same MD&A level of disclosure for the fourth quarter as for the first three quarters.

We recognize there is a range of approaches to fourth quarter interim reporting, as companies grapple with whether to have one or two MD&A-level discussions at year end; and, if two, how to reconcile the Q4 interim MD&A with the annual MD&A. The annual MD&A typically is filed as part of the annual report, several weeks after financial statements are filed as part of the year end press release. Yet investors expect MD&A level explanation of fourth quarter results at the time the financials are released. Some issuers provide a more detailed fourth quarter press release, where they provide some MD&A-level discussion. Others provide a fourth quarter MD&A as part of the press release, or referenced in the release and posted on their web site. Some reference the fourth quarter in the annual MD&A, while others do not. Some provide no MD&A-level discussion of the fourth quarter in interim or annual filings.

CIRI believes that clearer direction is required for fourth quarter disclosure. We agree with NI 51-102 that the annual MD&A should discuss "extraordinary items, year end and other adjustments, seasonal aspects

of the company's business and dispositions of business segments" related to the fourth quarter. To this, we add the following recommendations.

Recommendations

- For purposes of the MD&A, the interim period should be redefined to include the fourth quarter.
- Issuers should be required to file a fourth quarter MD&A concurrent with, or as soon as possible after, the public issuance of the fourth quarter and annual statements, which precedes the annual report filing, given the importance of timely disclosure and the integral nature of financial statements and the MD&A.
- The full fourth quarter MD&A should not be part of the annual MD&A, as this would result in a cumbersome document, difficult to prepare and read, and could not give prominence to the 'current' quarter as instructed in 51-102F2, Part 2, Item 2.1, instruction (ii).

Trends

In a recent report on the continuous disclosure review program dated August 2002, (OSC Staff Notice 51-708), we note that some issuers were found to be not adequately discussing known trends or expected fluctuations in liquidity. We acknowledge that such discussions are important in providing the investor with a view of the business through the eyes of management and should be properly addressed by each issuer in its MD&A. We understood a discussion of trends already to be a requirement of the MD&A as well as of the AIF, and are surprised to see them singled out as an addition to the MD&A.

Critical Accounting Policies and Changes in Accounting Policies

Parts 1.9 and 1.10 of Form 51-102F2 contain requirements similar to those included in a recently proposed rule by the U.S. Securities Exchange Commission (SEC) entitled "Disclosure in Management's Discussion and Analysis about the Application of Critical Accounting Policies" (Release Nos. 33-8098; 34-45907). The relevant SEC rule would require U.S. issuers to provide MD&A disclosure about: the estimates that they make in applying critical accounting policies; and, the initial adoption of an accounting policy that is likely to have a material impact on the company's financial presentation.

Part 1.9 Critical Accounting Policies

CIRI endorses the aim of consistency and harmonization of disclosure requirements within Canada and, as appropriate to Canadian issuers, across North America. We believe that, to the extent existing (versus new) critical accounting policies are detailed in the notes to financial statements, they should not be duplicated in the MD&A, with the exception of instances where disclosure would be required as part of a proper year-over-year performance variance analysis.

CIRI notes that the overriding objective of the SEC's proposed rule is to ensure that issuers disclose the key estimates that go into creating their financial statements. In fact, most of the SEC's proposal deals specifically with estimates, not the underlying accounting policies. The SEC also provides guidance as to what levels of uncertainty and materiality need to exist in relation to accounting estimates to trigger a disclosure obligation. In contrast, the OSC's Form 51-102FS appears to focus more on accounting policies, not estimates, and makes only passing reference to the issues of uncertainty and materiality.

CIRI believes that, in most cases, the review of key accounting policies, and the estimates related to them, are best located in the Notes to the Financial Statements. There are, however, two exceptions where we would recommend MD&A disclosure:

1. where a change to an accounting estimate (as distinct from an accounting practice) has had a significant impact on earnings and/or cash flows, and where prior period results have not been restated; and
2. cases where an accounting estimate, should it prove inaccurate, may have a sufficiently material impact on an issuers' reported results or financial condition that it warrants disclosure in the risks and uncertainties section of the MD&A under an appropriate title such as "Accounting Risk".

Recommendations

- To the extent existing critical accounting policies are detailed in the notes to financial statements, they should not be duplicated in the MD&A, with the exception of instances where disclosure would be required to properly explain variances, risks and uncertainties that could significantly affect an issuer's financial results and condition.
- The CSA should provide guidance regarding what levels of uncertainty and materiality in relation to accounting estimates would trigger a disclosure obligation.

Part 1.10. "Changes in Accounting Policies"

As to Part 1.10 of Form 51-102F2, CIRI endorses the CSA's recommendation that changes in critical accounting policies should be subject to MD&A disclosure, whether the accounting changes are being made voluntarily, as a result of changes to accounting standards, or as a result of the introduction of new accounting standards. The disclosure being proposed, particularly the anticipated impact the change will have on the issuer's financial statements (i.e. earnings), should provide valuable insight to readers as they assess the issuer's future prospects and seek to understand variances between different reporting periods.

Parts 1.4, 1.5 and 1.6 Liquidity, Capital Resources and Transactions with Related Parties

CIRI endorses the CSA's efforts to improve disclosure requirements related to liquidity, capital resources and relationships involving non-independent parties. We applaud the CSA's consideration of

requirements being proposed by the SEC in its recently published, “Commission Statement about Management’s Discussion and Analysis of Financial Condition and Results of Operations” (Release Nos. 33-8056; 34-45321).

Given the substantial disclosure obligations proposed by both regulatory bodies, CIRI believes that the inclusion of clear guidance around such issues as materiality is important for the proper implementation of any new requirements.

CIRI believes that the over-riding objective of enhanced disclosure in these areas is not to provide excessive detail about contracts, commitments, guarantees and relationships. Rather, it is to allow investors to have a clear view of a company’s cash and capital resources relative to its requirements and obligations, regardless of whether they involve on or off-balance sheet items, or independent versus related parties. After all, what investors really want to know is: Will the companies I've invested in have enough money to stay in business and to achieve their growth objectives?

Given its view, CIRI supports the comments by the SEC reminding U.S. issuers that MD&A disclosure must be “useful and understandable,” and that “management should provide the most relevant information and provide it using language and formats that investors can be expected to understand.”

Consistent with this reminder, the SEC has provided useful guidance for issuers with regard to liquidity and capital resource disclosures, particularly those relating to “trends, demands, commitments, events and uncertainties.” CIRI believes that the CSA should provide similar guidance in order to minimize confusion among issuers and maximize the value of disclosures that are provided.

Recommendation

- CIRI believes that the CSA should take steps to enhance the guidance provided to Canadian issuers about the information relating to liquidity, capital resources and transactions with non-independent parties that should be subject to MD&A disclosure under Form 51-102FS.

CIRI further recommends that the OSC consider the questions provided below when developing this guidance.

- What is the likelihood threshold that should be used when assessing whether to disclose obligations under financial guarantees, commitments and/or other arrangements?
- What level of certainty must exist around emerging trends, uncertainties and risks to trigger a disclosure obligation?

- What is the materiality test that issuers should use when considering whether to disclose trends, risks and uncertainties, as well as the impact of guarantees, commitments, other obligations and related-party relationships on the company's existing and future liquidity and capital resources?

Comment On MD&A Framework

In December 2001, the Canadian Institute of Chartered Accountants ("CICA") released a review draft of its document entitled Management's Discussion and Analysis: Guidance on Preparation and Disclosure. In a number of areas the CICA guidance goes beyond current regulatory requirements. For example, the CICA proposed that the analysis of past results and discussion of future prospects in the MD&A would be presented within the context of a disclosure framework containing the following five key elements:

- the company's vision, core business and long-term business strategy;
- critical success factors;
- capabilities (resources) to achieve desired results;
- results analysis – past results and future prospects; and the risks and opportunities that may shape and/or affect the achievement of results.

On April 18, 2002, CIRI submitted its comments to the CICA on the Guidance document. In these comments, CIRI expressed its overall support for the direction proposed by the CICA. In particular, CIRI indicated that the proposed disclosure framework provides a stronger conceptual context for the MD&A than current requirements. We also indicated that the guidelines would receive widespread usage if endorsed by regulators.

While the final CICA MD&A Guidance document has not yet been released, we reiterate our support for the framework it presents. We are encouraged to see that the proposed National Instrument 51-102, Continuous Disclosure Obligations, incorporates some of the same concepts included in the CICA disclosure framework. In particular, the instructions to sections 1.1, 1.2 and 1.3 of the MD&A include a reference to discussing "changes in competition, including an assessment of the issuer's resources, strengths and weaknesses relative to those of its competitors."

Recommendation

- When the CICA's final report titled *MD&A, Guidance on Preparation and Disclosure* is published, we urge the CSA to review it and consider recommending the MD&A framework proposed by the report as a model for public companies to follow when preparing their MD&As.

Recommendation For Safe Harbour Clause

The proposed NP 51-102 requires that issuers in their MD&A provide, "a discussion of any forward-looking information disclosed in prior MD&A if, in light of intervening events and without that discussion, the earlier disclosure could mislead".

Consistent with our comments made in connection with NP 51-201 and the recent Five-Year Review Committee of the OSC, CIRI continues to be concerned about the absence of safe harbour protection in Canada with regard to forward-looking information. We believe that the absence of safe harbour protection in Canada will expose Canadian issuers to greater risks of liability for forward-looking statements, and could lead to a proliferation of class action lawsuits against Canadian issuers both in Canada and in the United States.

Recommendation

- CIRI strongly recommends the need for a safe harbour for forward-looking information consistent with the US Private Securities Litigation Reform Act of 1995.

Form 51-102F5 Information Circular

Part 1, Item 8 – Securities Authorized for Issuance under Equity Compensation Plans

CIRI supports enhanced disclosure which enables investors to better assess the dilutive effect of equity compensation plans, including individual compensation arrangements, and which contributes to transparency regarding corporate governance as it relates to compensation. CIRI supports the requirement to disclose equity compensation plans aggregated in two categories: those not previously approved by security holders, as well as those previously approved by security holders.

We note that Canadian issuers interlisted in the U.S. have disclosure obligations under the SEC amendments for disclosure of equity compensation plan information (SEC Release Nos. 33-8048 and 34-45189) which are intended to "enhance disclosure of the number of outstanding options, warrants and rights granted by registrants to participants in equity compensation plans, as well as the number of securities remaining available for future issuance under these plans." Separate filings are required for equity compensation plans that have not been approved by security holders. This information is to be included in registrants' proxy information circular and the 10K. Registrants are to be able to aggregate plans, vs. provide details separately for each plan.

Part 2, Item 4 Interest of Certain Persons or Companies in Matters to be Acted Upon

We note in Part 2, Item 4 of the information circular, regarding solicitation of proxies, that persons and companies deemed not to be those on whose behalf solicitation is made include external advisors in many capacities including lawyer, accountant and public relations but not investor relations, and recommend that investor relations officers of issuers be added to this list. Investor relations officers often are involved in proxy solicitations because of their knowledge of investors and investor sentiments.

Recommendation

- Investor relations officers and consultants should be added to the list of "persons and companies deemed not to be those on whose behalf solicitation of proxies is made."

Form 51-102F4: Business Acquisition Report

CIRI, in general, agrees with the recommendations requiring a Form 51-102F4 Business Acquisition Report within 75 days of a significant acquisition. We understand that this requirement is one of the building blocks leading to an integrated disclosure system, and additionally note that it parallels an SEC requirement. As most significant acquisitions require preparation of an information circular or prospectus (documents that can be referenced in the BAR), we believe that the greatest onus will fall on issuers acquiring private companies that do not require broad-based shareholder approval to be acquired, and that may not have audited financial statements.

Given the complexity of business combinations and the frequency that companies either acquire or dispose of significant businesses, it is clear that a standard for disclosure would be helpful to ensure transparency, allowing stakeholders the ability to assess transactions. But while we agree with the spirit of the requirements, we have concerns regarding some of the detail, specifically: whether the significance test should be based on balance sheet rather than income statement measures, whether the reporting requirements compromise timeliness; and whether the compilation report meets the cost/benefits test.

CIRI believes that income in some cases is too cyclical to use as a standard significance measure. Additionally, emerging companies that have little or no income but reasonable assets, including intangibles, and that often buy private companies, could find BAR disclosure requirements unduly onerous and costly. We believe that balance sheet measures, such as total assets or total capital, should be considered as qualifying measures.

The significance test as it stands, implies that an acquisition would be more significant in an industry where earnings are at a cyclical low. However, the long-term capability of an enterprise to earn income is more relevant to judge significance. The provision in the instrument, which allows the use of three year's average income, does not recognize phenomena that affect earnings for more than one-year. Regardless of

current profit levels, balance sheet amounts are more stable and provide more insight into overall financial position.

In any financial report there is a trade off between timeliness and relevance. The Instrument allows filing 75 days after closing a transaction. Yet a transaction may not close for months after it is announced, by which time the Business Acquisition report may be stale. Accordingly, certain important details such as the consideration paid could be held up while waiting for items such as pro-forma financial reports. We believe a reduction of the level of detail in the report should be considered in conjunction with reduction in the time allotted to file the report. In addition, there should be some mechanism to encourage more timely disclosure of readily available information.

Cost/benefit is an important factor that should be considered before recommendations for change are made. A compilation report will certainly cost issuers money, but because a compilation provides no assurance, the benefits of the report appear less obvious. In addition to cost, the requirement for a compilation report lengthens the time needed to meet the requirements of the Business Acquisition Report.

The CIRI survey indicates that, 27% of the TSX members and 89% of the TSX Venture exchange respondents said that the benefits of enhanced disclosure do not justify the administrative effort required to prepare a BAR. Thirty-one per cent of TSX responses and 56% of TSX Venture exchange respondents said they did not anticipate a significant problem meeting the 75 day deadline. A number of respondents replied to other questions on the survey but not the BAR section. Most comments were from TSX listed companies with under $75 million market cap, and TSX Venture exchange issuers. Comments included:

- "Limited resources in house would make this deadline difficult to manage."
- "The cost and time associated with providing substantially more disclosure may be onerous, adding to significant acquisition costs already incurred. Would need 90-120 days."
- "Too much detail, too late."
- "Disclosure to shareholders is important so that they can evaluate the acquisition, but guidelines will be required in advance so that negotiating parties understand what information will ultimately be disclosed publicly."
- "The level of materiality is important enough to justify the work. We would have trouble meeting the deadline because the report requires considerable work."

Recommendations

- We request that the CSA review certain aspects of proposed Form 51-102F5, notably: whether the significance test should be based on balance sheet rather than income statement measures; whether the reporting requirements compromise timeliness; and whether the compilation report meets the cost/benefits test.

Item 4.6 BOARD APPROVAL OF MD&A

CIRI supports the proposal that the issuer's board of directors be required to review its annual and interim MD&A, or delegate the review to an audit committee of the board.

We note that the TSX's *Corporate Governance Policy – Proposed New Disclosure Requirement and Amended Guidelines* recommends that the board should adopt a charter for the audit committee which sets out the roles and responsibilities of the audit committee to provide guidance regarding their duties. We also note that the CICA's Canadian Performance Reporting Initiative Board in its document, *MD&A: Guidance on Preparation and Disclosure*, proposes that MD&A reports include a statement about management's responsibility for the information disclosed and the oversight role of the audit committee and, as appropriate, the board of directors. We note that with responsibility comes accountability, and with the likelihood of a statutory civil liability regime for continuous disclosure in Canada, it is particularly important that responsibility and accountability be recognized.

Varying Definitions Of Exempt Issuers

Given the goal of NI 51-102 to harmonize continuous disclosure reporting requirements, we believe that the instrument must clearly define terminology for issuers; notably the terms "senior" and "non-senior issuer". This definition may or may not also be appropriate as the trigger mechanism for issuers that are required to file an AIF.

We note that the qualifications of issuers for the various disclosure requirements differ, and believe the rationale for the varying qualifications should be clarified. What is the rationale behind the qualifications for the various rules – regarding filing deadlines, filing the AIF, Statement of Executive Compensation, Development Stage Issuer requirements, and Business Acquisition Reports?

For example, all non-exempt senior issuers, defined as TSX-listed issuers, need to accelerate filing of their interim and annual statements to a greater extent than TSX Venture exchange listed issuers, though some of the senior issuers may have less revenue, assets and market cap than some TSX Venture exchange listed issuers. Also, some TSX-listed companies may not need to file an AIF, for which qualifications are based on revenue and market cap, while some TSX Venture Exchange listed issuers will. If a senior exchange listing is an important criteria for accelerated filings, why is it not for AIF disclosure? Or, conversely, if market cap and revenue are important criteria for filing the AIF, why are they not for accelerated filings?

Recommendation

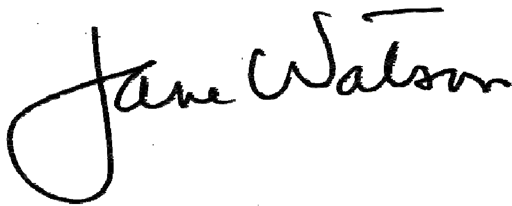
- The rationale behind the several definitions for exempt issuers for various disclosure requirements should be clarified and adjusted if necessary to avoid inconsistencies or inequities.

Conclusion

In conclusion, we support the objectives and most of the proposals of NI 51-102. We believe that harmonization of continuous disclosure requirements among Canadian regulatory jurisdictions is of primary importance, providing the foundation for an integrated disclosure system, and also for a national securities regulator. Our comments on specific aspects of NI 51-102 are based on an investor relations perspective, considering the cost/benefits through the eyes of Canadian issuers seeking to achieve IR best practices.

CIRI appreciates the opportunity to make this submission and we would be pleased to answer any questions you may have.

Yours truly,



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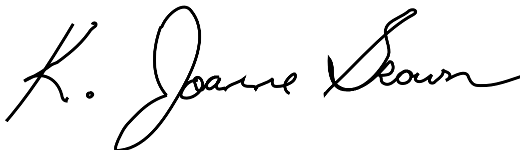

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Appendix One

CIRI Issues-Committee Survey Regarding CSA proposed NI 51-102, Continuous Disclosure Obligations.

The survey sought CIRI member feedback regarding the proposals to accelerate interim and annual financial filings and to require a Business Acquisition Report within 75 days of the close of a significant-acquisition transaction. The survey also asked whether companies had interim results reviewed by outside auditors, or intended to.

In the period August 15 through August 24, CIRI surveyed 424 corporate members – 34 listed on the TSX Venture Exchange and 390 on the TSX. Of those, 9 TSX/V members [26%] and 55 TSX members [14%] responded by the deadline. [NIRI recently conducted a survey regarding the SEC's proposed accelerated filings, and had 406 responses, representing an 11% response.] The numbers provided below are percentages – clearly less representative the smaller the sampling. The percentages for the interlisteds are based only on the sampling that is interlisted. Regarding external auditor review of interim financials, it is not clear if respondents refer to an informal review or a more formal, comprehensive review

[Seven responses were received after the tabulation was completed, and all were TSX listed. Six saw no significant problem meeting the accelerated filing deadlines, and engage external auditors to review interim financials. Five believe the administrative requirements to prepare a BAR are not justified but see no problem in filing it. One respondent, a multinational company, expects a significant problem with meeting the accelerated filing deadlines, and regarding the BAR, says that "resources are fully employed in compliance of existing rules."]

The responses were divided into four groups:
A – TSX issuers with market cap over $75 million and not interlisted
B - TSX interlisteds (all over $75 market cap)
C – TSX issuers under $75 m market cap
D – TSX/V not interlisted
E – TSX/V interlisted

The letter beside responses identify the type of respondent.

Questions

1. Where are your shares listed?

	TSX issuers	TSX/V issuers
a. TSX		
b. TSX / Venture Exchange		
c. NYSE	15 %	
d. NASDAQ	7 %	1 %
e. AMEX	4 %	

2. What is your company's market cap?

	TSX issuers	TSX/V issuers
a. over Cdn $75 million	64 %	22 %
b. under Cdn $75 million	36 %	78 %

3. How long after Q1-Q3 quarter ends do you currently <u>file</u> with SEDAR your financial statements and notes? [typically, with a press release]

	TSX issuers	TSX/V issuers
a. within 30 days	16 %	
b. between 31-45 days	45 %	22 %
c. between 46-60 days	31 %	67 %

4. How long after Q1-Q3 quarter ends do you currently <u>file</u> the MD&A?

	TSX issuers	TSX/V issuers
a. concurrent with financial statements and notes	42 %	56 %
b. within 30 days	2 %	
c. between 31 – 45 days	31 %	
d. between 46 – 60 days	22 %	44 %

5. How long after Q1-Q3 quarter ends do you currently <u>deliver</u> the report to shareholders?

	TSX issuers	TSX/V issuers
a. concurrent with the press release	7 %	44 %
b. within 30 days	5 %	
c. between 31 – 45 days	42 %	
d. between 46 – 60 days	44 %	56 %

6. How long after fiscal year end do you currently <u>file</u> audited financial statements and notes?

	TSX issuers	TSX/V issuers
a. within 40 days	4 %	
b. between 41-60 days	13 %	
c. between 61-90 days	33 %	
d. between 91-120 days	33 %	67 %
e. between 121-140 days	16 %	33 %

7. How long after fiscal year end do you currently file the MD&A?

	TSX issuers	TSX/V issuers
a. within 60 days	18	
b. between 61-90 days	29	1
c. between 91-120 days	35	56
d. between 121-140 days	16	33

8. If your company is listed on the TSX

a. Would you anticipate any significant problems

	YES	NO
1. meeting the proposed CSA filing deadline for Q1-Q3 of 45 days regarding unaudited financial statements and notes?	11 %	85 %
2. meeting the proposed CSA filing deadline for fiscal year end of 90 days regarding audited financial statements and notes?	25 %	71 %
3. filing the MD&A with the financial statements and notes for Q1-Q3?	9 %	87 %
4. filing the MD&A concurrent with the financial statements and notes at year end?	9 %	84 %

b. If your answer is "yes" for 8a. (1), (2), (3) and/or (4) above, please explain why.

- A "Function of dependence on outside auditors."
- A "Having international operations, it would be difficult to issue audited statements within these timeframes."
- A "We consolidate four major Canadian companies, one US and four significant [other] companies. To ensure quality of statements and MD&A, we need the time."
- B "We don't anticipate any problem with getting the documents prepared in the timeframe. However, it would require companies to schedule earlier audit committee and board meeting dates."
- B "The print/production of the annual report is a huge job – we file when we mail so we must have the hard copy complete. This is generally in early January (we have a fiscal Sept. 30 year end)"
- C "Small company with limited accounting staff to compile statements, then consolidate; small window for audit committee and external auditor review, additional pressure on graphics design and printing; for annual third party – legal, banking, transfer agent – confirmations."
- C "The audit process at year end creates delays in the issuance of financial statements."
- C "Financials would not be ready in time, due to limited resources."
- C "Before above our statements are approved by the board. Our board meetings are not usually held close enough to the end of quarter to comply."
- C "Resources"
- C "As a new public company, it takes a little longer to compile the information at year end- each quarter we have released info quicker, but our last annual went right to the deadline. I'm sure this will be a challenge for many new public companies."
- C "Year end audit, etc makes getting in under 90 days tight. increases likelihood of errors if everyone is in panic mode to complete."
- C "Our company has procedures that make it this long."
- C "All pertain to issues of timing, auditors flexibilities, etc!"

9. If your company is listed on the TSX Venture Exchange:	YES	NO
a. Would you anticipate any significant problems 1. meeting the proposed CSA filing deadline of 120 days regarding audited fiscal year end financial statements and notes?	11 %	89 %
2. filing the year end MD&A concurrent with the financial statements and notes?	11 %	89 %

b. If your answer is "yes" for 9a. (1) or (2) above, please explain why.

- D "Will need to have auditors who are more responsive to our needs"
- D "Audit issues may arise, causing delays in filing."

10. If you will have difficulty meeting the accelerated filing deadlines, would you be prepared to discuss your current filing timeline with a CIRI Issues Committee member? If so, many thanks for your assistance and please provide

a. Your name
b. Phone and email coordinates

Responses Confidential

11. If you are a Canadian company listed on a US exchange, with a public float greater than US$75 million:	YES	NO
Would you anticipate any significant problems 1. meeting the proposed SEC filing deadlines of a. 30 days for Q1-Q3 financial statements, notes and MD&A?	50 %	50 %
b. 60 days for fiscal year end financial statements, notes and MD&A?	50 %	50 %
2. meeting NIRI's proposed deadlines, dependent on certain press release disclosure, of a. 40 days for Q1-Q3 statements, notes and MD&A?	43 %	57 %
b. 80 days for fiscal year end financial statements, notes and MD&A?	43 %	57 %

12. Do you currently have your Q1-Q3 financials reviewed by your external auditor?	TSX issuers	TSX/V issuers
Yes	60 %	56 %
No	24 %	4 %

13. If you answer "no" for 12, do you plan to?	TSX issuers	TSX/V issuers
Yes	4 %	
No	7 %	4 %

- B "If required, yes, otherwise, no."
- B "Under discussion"
- D "They see them, however they do not currently perform a review engagement report on the statements"
- C "If required by regulators"

Business Acquisition Report (BAR)

1. Do the benefits of enhanced disclosure justify the administrative effort required to prepare a Business Acquisitions Report	TSX issuers	TSX/V issuers
Yes	20 %	11 %
No	27 %	89 %

2. Do you anticipate significant problems meeting the 75 day deadline	TSX issuers	TSX/V issuers
Yes	9 %	44 %
No	31 %	56 %

3. If you answered "yes" to 2, please explain.

A "We would anticipate significant problems meeting the 75 days for BAR, and would likely be acquiring private companies if opportunities were available."
A "The level of materiality is important enough to justify the work. Would have trouble meeting the deadline because the report requires considerable work … which takes time."
A Our resources are fully employed in compliance with existing rules."
B "too much detail, too late"
C "small company with limited resources; increased legal, accounting fees possible"
C "Limited resources "in house" would make this deadline difficult to manage."
C "Resources"
C "Need 90-120 days. The cost and time associated with providing substantially more disclosure may be onerous, adding to significant acquisition costs already incurred. Disclosure to shareholders is important so they can evaluate the acquisition, but guidelines will be required in advance so that negotiating parties understand what information will ultimately be disclosed publicly."
C "Smaller companies will require greater consulting costs to complete requirements in the time frame."
C "Although we are the type of company (software development) that could be exposed to incremental reporting because a likely acquisition consolidate could be private, a TSX issuer should provide prospectus quality disclosure if the acquisition is significant."
C "Disclosure required on info circulars if shareholder approval is required for the acquisition."
D "would require additional staff and/or legal expenses to prepare report."
D "Problems occur in that a financial history of an acquisition is sometimes not indicative of future financial results of business to be acquired. I have not yet examined the form, however I expect that audited financial results are required. If the acquisition is of private management business audited financial information often is not available. The reporting issuer would be required to incur costs to audit past results of business" [*part of response missing from fax]*

Additional Comments

Please provide any additional comments you may have regarding the proposed NI 51-102

- C “The timing re: financial reporting should not be driven by market cap but rather by asset levels and the number of businesses within a company’s portfolio. These are the issues that drive the timing of consolidating a number of companies’ reporting results for any given period.”
- E “We are in the process of training a part-time person to help with financials to meet the new deadlines. As a smaller company, we suggest the new requirements are more onerous for small cap companies than for larger companies with full accounting departments. PS – the benefits of accelerated disclosure are unclear – perhaps we should simply to monthly reports.”