Bennett Jones LLP
4500 Bankers Hall East
855 2nd Street SW
Calgary Alberta
Canada T2P 4K7
Tel 403.298.3100
Fax 403.265.7219

Perry Spitznagel
Direct Line: 403.298.3153
e-mail: spitznagelp@bennettjones.ca

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British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission -- Securities Division
Manitoba Securities Commission
Ontario Securities Commission
Office of the Administrator, New Brunswick
Registrar of Securities, Prince Edward Island
Nova Scotia Securities Commission
Newfoundland and Labrador Securities Commission
Registrar of Securities, Northwest Territories
Registrar of Securities, Yukon Territory
Registrar of Securities, Nunavut

Dear Sirs:

Re: Notice and Request for Comments re Changes to Proposed National Instrument 51-102

The following are our comments on the proposed changes to National Instrument 51-102 and related amendments. In respect of questions 1, 3 and 4, our comments are based on the views we have received from a number of our clients. In respect of question 2, our comments are our own views.

1. Filing documents - Part 11 of the Rule requires reporting issuers to file copies of any materials they send to their securityholders. Part 12 of the Rule requires reporting issuers to file copies of contracts that create or materially affect the rights of their securityholders.

a) We propose to limit these requirements to instances in which securities of the class are held by more than 50 securityholders. This is to prevent issuers from having to file documents that relate to isolated securityholders, such as a bank holding security in connection with a business loan, if the bank is the only holder of that class of security. Is this the correct approach, or should copies of all materials sent to securityholders and all agreements that affect the rights of securityholders, regardless of the number of securityholders, be required to be filed?

Answer: Copies of all materials sent to securityholders and all agreements materially affecting the rights of securityholders should be required to be filed. There are no compelling reasons to make distinctions based on an arbitrary threshold minimum number of securityholders.

We are unclear as to whether Part 12 would contemplate filing documents to which the issuer is not a party (i.e., voting trust agreements). Issuers should not be obliged to file documents to which they are not a party.

b) Should we expand the requirement in Part 12 to require filing of all contracts that are material to the issuer? These contracts are required to be filed with an annual report on Form 10-K, in the US.

Answer: Subject to confidentiality concerns, we generally agree with the concept of filing all contracts that are material to an issuer.

The existing general obligation of an issuer to provide full, true and plain disclosure of material matters in primary offering documents and continuous disclosure documents, including prospectae, offering memoranda, press releases, material changes reports, MDA and AIF's is consistent with this concept. Without derogating from the issuer's obligation to summarize material items in disclosure documents, the provision of the underlying documents which form the basis of these summaries provides interested parties with the full details of material items and the ability to arrive at their own conclusions as to the impact of those items. The availability of the underlying documents which form the basis of an issuer's continuous disclosure provides a more comprehensive record. That being said, issuers should not be required to put on the public record confidential or competitor sensitive information. It must be recognized that issuers must be permitted to protect the value of its intellectual property and sensitive business information, much of which is represented by material contracts.

We do note, however, that the U.S. requirement to file such contracts with an annual report on Form 10-K is part of a securities regulatory system with continuous disclosure obligations, particularly in the area of reporting material changes, that are arguably not as rigorous as the Canadian system. In addition, it should be noted that, in practice, many of the documents filed in the U.S. are often deleted from the public file for confidentiality reasons.

2. Business acquisition disclosure - The Rule would require the filing of a BAR, in addition to any material change report filed in respect of the acquisition, within 75 days after completion of the significant acquisition. This requirement is meant to achieve greater consistency with the prospectus rules implemented in 2000, and to provide investors in the secondary market, on a relatively timely basis, the type of information currently required for primary market prospectus investors. The requirement is based on meeting certain defined thresholds of significance. It is patterned after a requirement of US federal securities law.

We continue to be troubled by the requirement that audited historical financial statements for acquired businesses be included in business acquisition reports. We are hard pressed to identify any other area of securities regulation in which business reality and regulatory requirements diverge so markedly. In our comment letter on the initial draft of the Continuous Disclosure Instrument, we indicated that we do not perceive much utility in the provision of historical financial statements for acquired businesses and provided a number of examples of transactions in which the availability of historical financial information would not have helped an investor form a view as to the appropriateness of the price paid for a business or the future performance of the acquired assets. We also noted that a mandated focus on factors not considered relevant by the decision makers who implemented the transaction may create a directionally misleading impression for users of business acquisition reports. In short, the benefits derived from the inclusion of historical financial information in business acquisition reports are questionable, in our view. Against that backdrop we suggested that a meaningful cost/benefit analysis is called for that extends beyond the entrenched regulatory assumption that historical financial statements have considerable analytical value in acquisition transactions. To our disappointment, we have not seen any substantive consideration of costs/benefits in the June 20, 2003 materials released by the Canadian Securities Administrators. Instead, we are advised that "the CSA believe historical financial statement information about the target company required in a BAR is relevant for ongoing secondary market investors as well as current investors in the issuer". The question that arises is, relevant to what degree? Is the information sufficiently relevant to require an acquiror to create audited historical financial statements, in circumstances where that exercise would entail significant expense and delay? We are also concerned that the requirement for historical financial information in respect of private businesses (for which audits have not historically been undertaken) may result in transactions not proceeding in the first place. We are advised by a number of our American colleagues that a similar requirement in the United States has, on occasion, precluded the completion of acquisition transactions. It seems to us imperative that more work be done, by way of cost/benefit analysis, having regard to the possibility that the introduction of a similar requirement in Canada may bar certain acquisition transactions. If acquisition transactions are precluded as a result of the regulatory fixation with historical financial statements, assets may arguably not gravitate to a higher use, all of which may have an impact on the larger economy. Certainly, it is not asking too much that existing regulatory assumptions as to the utility of historical financial statements actually be tested in some meaningful way.

a) *Is this approach appropriate? Would it be more appropriate, for some or all classes of reporting issuer, to recast the BAR requirement as a subset of the material change reporting requirement, governed by the same trigger - the occurrence of a material change?*

Answer: We support the idea of linking the requirement for a business acquisition report to material change reporting. Materiality is a key component of securities legislation and, in our view, although the application of the material change concept is difficult at the margin, it is desirable that the basic principle be utilized and diffusion of concepts within securities legislation be kept to a minimum.

b) *If the BAR requirement is recast as a subset of the material change reporting requirement, should the current thresholds of significance be retained? If so, should they demonstrate materiality in the absence of evidence to the contrary, or merely be guidelines to materiality?*

Answer: To avoid confusion, we do not think it appropriate that materiality be defined by the significance thresholds, which are not an explicit component of the current definition of "material change" in securities legislation. Defining materiality solely with reference to the threshold tests would appear to be inconsistent with Section 4.2 of National Policy 52-201 (Disclosure Standards), which provides that, in making judgments as to materiality, "it is necessary to take into account a number of factors that cannot be captured in a simply bright line standard or test". However, we do think that it would be useful if the thresholds were utilized as guidelines in assessing materiality in the context of acquisition transactions.

3. *Disclosure of auditor review of interim financial statements - Subsection 4.3(3) and section 6.5 of the Rule require that if an auditor has not performed a review of the interim financial statements, a reporting issuer must disclose that fact. These sections also require that if the auditor performed a review and expressed a qualified or adverse communication or denied any assurance, then the reporting issuer must include a written review report from the auditor accompanying the interim financial statements. Section 3.3 of the Policy elaborates that no positive statement is required when an auditor performed a review and provided an unqualified communication.*

This approach was designed to accommodate the requirement in Section 7050 of the Handbook that, if an auditor's interim review is referred to in any document containing the interim financial statements, the auditor should issue a written interim review report and request that it be included in the document. We understand that the CICA Assurance Standards Board currently has a project to amend Section 7050 and this requirement in Section 7050 may be changed. We also understand that the reporting provisions in Section 7050 relating to a scope limitation may be changed; if those provisions of Section 7050 were changed, items (i) and (ii) of subsection 4.3(3)(b) may have to be modified.

a) *Do you agree with the approach in subsection 4.3(3) and section 6.5 of the Rule? Alternatively, if a review was performed and an unqualified report was provided, should a reporting issuer be required to disclose the fact that a review has been performed? If you recommend the latter, what are the benefits of that disclosure?*

Answer: A reporting issuer should disclose that a review of interim financial statements was performed and an unqualified report was provided. Such reviews should be mandatory for all issuers, rather than a discretionary matter. Such reviews, and disclosure of such reviews, provides an added level of comfort for market reliance on information contained in interim financial statements, supporting the fundamental integrity of financial reporting. We do, however, note that this requirement will add a new level of costs which some issuers, particularly smaller issuers, may find objectionable.

b) *Where a review was performed and an unqualified report was provided, if a reporting issuer discloses that a review has been performed, should the review report from the auditor accompany the financial statements?*

Answer: Yes, subject to possible cost considerations for smaller issuers.

4. *Added MD&A disclosure - In the MD&A, we propose to require all issuers to discuss off-balance sheet arrangements, and to analyze changes in their accounting policies.*

a) *Would it be helpful to include a definition of "off-balance sheet arrangements" to the MD&A? What would you expect the definition would capture?*

Answer: The disclosure obligation should be to discuss any off balance sheet arrangements that would reasonably be expected to have an impact on the financial condition of the issuer. While some commentary or guidance as to the kinds of arrangements that are contemplated may be helpful, we believe that it is more important to impose an overall general obligation to disclose matters that have an impact on financial condition or performance and that would reasonably be expected to be of interest to an investor or reader of the statements. Consistent with existing MD&A requirements, the overall objective should be to require issuers to provide an accurate view of financial condition and to retain a significant level of subjectivity that requires issuers to rigorously assess their financial statements to ensure that they provide an accurate and meaningful picture.

b) *The requirement to discuss and analyze changes in accounting policies applies to any accounting policies a reporting issuer expects to adopt subsequent to the date of its financial statement, and to any accounting policies that have been initially adopted during the financial period. We are considering whether this disclosure is appropriate for venture issuers. Should venture issuers be exempted from the requirement to discuss either changes in their accounting policies, or the adoption of an initial accounting policy, or both, and why?*

Answer: Venture issuers should not be exempted from this requirement. While there are a number of matters, such as the timing of filing of financial statements, for which a distinction should be drawn between venture issuers and senior issuers, we do not think that a distinction is appropriate for the matters referred to in b) above.

Yours truly,

Perry Spitznagel

CPS/ljm