September 24, 2003

Ontario Securities Commission
Alberta Securities Commission
Manitoba Securities Commission
Registrar of Securities, Government of Yukon
Registrar of Securities, Department of Justice, Government of Northwest Territories
Securities Commission of Newfoundland and Labrador
Nova Scotia Securities Commission
Commission des valeurs mobilieres du Quebec
Saskatchewan Financial Services Commission
Office of the Attorney General, Prince Edward Island
Registrar of Securities, Legal Registries Division, Department of Justice, Government of Nunavut
Department of Justice, Securities Administration Branch, New Brunswick

Dear Sirs:

RE: Multilateral Instrument 52-109, Certification of Disclosure in Companies' Annual and Interim Filings, (the "Proposed Instrument"), Forms 52-109F1 and 52-109F2 (the "Forms") and Companion Policy 52-109CP (the "CP")

The following opinion is based on extensive deliberation and research undertaken by the members of the Committee on Corporate Reporting (CCR) of Financial Executives International Canada as a response to the Request for Comment on Multilateral Instrument 52-109, Forms 52-109F1 and 52-109F2 and Companion Policy 52-109CP issued June 27, 2003 by the above noted Commissions. The remarks represent the views of the CCR and are not necessarily the views of Financial Executives International Canada or its members.

FEI Executives International (Canada) ("FEI Canada") is an all-industry professional association for senior financial executives, with eleven chapters across Canada and approximately 1,500 members. Membership is generally restricted to senior financial officers of medium to large corporations. CCR is a technical committee of FEI Canada, which reviews and responds to research studies, statements, pronouncements, pending legislation, proposals and other documents issued by domestic and international agencies and organizations.

CCR generally agrees with the spirit of the Commissions' proposed rules. There are a number of specific issues, however, mostly with respect to conformity with U.S. rules that we have noted in our response.

CCR's response has been prepared in the order of the comments requested in the material issued on June 27.

Is the proposed one-year transition period appropriate?

During this transition period, filing of "bare" version (i.e. representations 1 to 3 only) would be permitted. This would require the CEO and CFO only to acknowledge that based on their knowledge of the information provided, the information is accurate and fairly presents the financial results. Allowing issuers to temporarily exclude representations 4 to 6 acknowledges that certain companies may need to establish more formal policies/processes around disclosure controls and procedures and internal controls before the CEO/CFO are able to certify that they are "responsible for establishing and maintaining these same controls".

Both the SEC and the Commissions recognize that some sort of transition period is needed, given that a reference to internal controls over financial reporting which is required in the certification, cannot be concluded until the process for the annual certification of internal controls over financial reporting is completed. CCR believes that this transition period is appropriate.

In addition, CCR understands that the Commissions are continuing to study the SEC's recently adopted rules relating to SOX 404, which deal with management's assessment of internal controls. Therefore, a transition period is also appropriate as the Commissions need to make their requirements clear before an issuer's certification includes representations 4 to 6. CCR would also recommend that the guidance and the SEC rules are consistent, leading to the sought-after harmonization of SEC and Commissions' standards.

CCR has noted a specific transition period issue (both in Canada and the U.S.). All registrants will not be reporting under a harmonized basis until year-end financial statements after June 15, 2004 for U.S. registrants and year-end financial statements after April 15, 2005 for foreign private issuers in the U.S. In order to eliminate any confusion that may arise as a result of differing dates for compliance, CCR recommends that the Commissions finalize the effective date for complying with applicable requirements as April 15, 2005.

The SEC (through SOX 302) and the Commissions (through MI 52-109) use different wording for the certification, both for the accepted wording during the transition period and the accepted wording once the certification is effective. The fact that the message included in the certification during the transition period is more detailed under the SEC rules compared to the Commission's rules may cause investors in Canada to believe that the control measures taken by Canadian companies are not as extensive as their U.S. counterparts.

After the transition period, the certification in both Canada and the U.S. presents essentially the same message, but the suggested wording is still different. This, too, adds an unnecessary confusion.

CCR, from a review of the material issued to date, has concluded that the process for filing certificates by foreign private issuers in the U.S. has not been specifically addressed. Will the U.S. form be satisfactory or will a new form have to be developed? If the U.S. form is satisfactory, the Commissions should provide appropriate guidance to Canadian users as to its comparability to Canadian requirements particularly if the harmonization of wording cannot be achieved.

The issues that have been outlined support the position of CCR that a transition period is appropriate for the majority of Canadian public companies. Accordingly, CCR recommends the following:

1. Conform the minimum requirements of information to include in the certification during the transition period to the SEC rules;
2. Harmonize the wording used in the certification, both during the transition period and once full certification is required with the wording used in the SEC rules;
3. Adopt April 15, 2005 as the implementation date for the introduction of the Commissions' certification requirements; and
4. Ensure that clear, non-prescriptive guidance is provided on the requirements for completing representations 4 to 6 as expeditiously as possible.

These steps will demonstrate to investors that the SEC and the Commissions are requiring the same due diligence of certifying officers, be they in the U.S. or in Canada.

Do you believe that it is appropriate to include representations 4 to 6?

Yes. The requirement to include representations 4 to 6 in the CEO/CFO certification, gives appropriate importance to disclosure controls and procedures and internal controls as these procedures/controls are being established and maintained under the authority of these same executives. This is an important step to restoring investor confidence in financial markets.

Is there any reason to exclude representations 4 to 6 with regard to smaller issuers?

No. The importance of having the CEO/CFO (or equivalent person) certify that they are responsible for establishing and maintaining these procedures/controls is no different for a smaller issuer. The purpose of requiring a small issuer to make these representations is the same as for a large issuer – to give investors confidence that controls and procedures are in place and functioning appropriately.

Is the probable time gap between the date of filing various annual returns (Annual Report, AIF) problematic?

CCR believes that many companies file their financial statements, MD&A and AIF concurrently with securities regulators on a timetable that allows for mailing to shareholders in preparation for the annual meeting. In those circumstances, the gap is not problematic.

There are circumstances, usually resulting from the requirement to obtain financing or a desire by listed companies to provide investors and the market with information as soon as it is available, where the financial statements are filed in advance of the other documents and an exemption is required from regulators to allow for filing without mailing to shareholders. In such cases the financial statements and MD&A are often prepared well in advance of the AIF, to allow for the public release of year-end financial information. As a matter of best practice, CCR believes that most companies will execute the steps necessary to certify the financial statements before the year-end results are released, but without execution of the certificate, and again when the balance of the documents are complete, when the certificate is signed.

However, if the actual certification is filed with the balance of the documents, which is always later, this will expose the CEO and CFO to unnecessary risk due to the timing gap in the event that there is a material change in circumstance with respect to disclosures and internal controls in the intervening time period. The Commissions must provide guidance on how to deal with such events to issuers which choose or may be required to file their public documents on different dates.

There may also be practical issues with respect to the ability to obtain financing during this period as the underwriters (and perhaps the securities regulators) may not accept the financial statements as part of the offering document without some "preliminary" certification. It may expose companies to increased costs of compliance as the certification process will need to be executed twice – once when the financial statements are filed and later when the other two documents are filed. Again, this will expose the CEO and CFO to unnecessary risk due to the timing gap in the event that there is a material change in circumstance with respect to disclosures and internal controls in the intervening time period.

This issue is tied to issuance of fourth quarter reports. The proposed rules require certification of interim reports. If a fourth quarter report was required, certification of that report might provide a solution to the timing gap issue. This assumes that the full financial statements would not be required for a financing between the time that the year-end is completed and all of the annual filings were filed with the regulator.

CCR believes that this issue must be addressed in the final rule, either by not requiring certification of the financial statements if they are filed in advance or by requiring the issuance of a certified fourth quarter report which is sufficient to support the financing document. In either case, practical issues with respect to the underwriters' comfort may remain. The Commissions should talk with underwriters specifically on this issue to ensure an appropriate solution is reached.

One other practical issue emerges from the exemption from interim certification in Part 4.1.3 in respect of foreign private issuers in the U.S. who file interim financial

statements and MD&A on Form 6-K. Such issuers are not required to certify their interim filings in the U.S. Therefore, the result would be a Canadian certificate on interim filing and U.S. certification on year-end filings. CCR believes this would be confusing for investors.

Should the annual certificate in the Proposed Instrument cover certification of Form 40 executive compensation disclosure. If yes, how should this be done? For example, should the annual certificate cover subsequently filed material in the Form 40 as and when that information is filed?

As long as executive compensation is part of the disclosures included in Form 40, the certification should not cover that information. CCR believes that it is cumbersome to certify information that is only a small part of another document and will confuse users unduly. Also, there is a risk that the certification could be construed to cover the entire proxy statement, which is inappropriate since there are reports from committees of the Board of Directors included in that document that the CEO and CFO should not certify.

If the objective is to ensure that Canadian companies are certifying the same information as U.S. companies, then CCR proposes that the executive compensation disclosures should become part of the AIF disclosures. Without this change, certification should not be required.

Do you agree that a formal interim evaluation of internal controls and disclosure controls and procedures is unnecessary?

We agree with the Commissions' approach in this matter that a formal interim evaluation of internal controls and disclosure controls and procedures is unnecessary and would add additional costs. The requirements for annual certification are sufficient to cause companies to put in place ongoing procedures to ensure internal controls and disclosure controls and procedures are effective and those evaluations are performed regularly to meet the certification requirements. More frequent formal evaluations on a quarterly basis would add to management costs with little discernable added benefit to the investment community.

Does the Committee think that the current exemption in Section 4.1 will discourage issuers that prepare financial statements in U.S. GAAP from preparing and filing Canadian GAAP financial statements?

Currently the majority of interlisted companies in the U.S. prepare and file with the SEC Canadian GAAP financial statements with a U.S. GAAP reconciliation by way of note disclosure. The Proposed National Instrument 52-107 Acceptable Accounting Principles, Auditing Standards and Reporting Currency would allow Canadian issuers to satisfy their Canadian financial statement filing requirements by filing statements prepared in accordance with U.S. GAAP. While this is an important step in reducing the compliance burden and costs for interlisted companies, we believe that only a small proportion of interlisted companies would take advantage of this option and having done so would therefore be unlikely also to prepare and file Canadian GAAP financial statements.

However, for those issuers who would wish to prepare both Canadian and U.S. GAAP financial statements for business reasons, we believe the proposed annual and interim certification requirements are similar enough to the U.S. requirements that the same certification process should enable certification to be performed for Canadian purposes without significant additional effort.

One key issue is whether the act of certifying two different sets of financial statements will potentially increase liability for issuers and their certifying officers. Provided the certification requirements in Canadian and the U.S. remain similar this is unlikely to be a significant issue.

We therefore believe that the exemption in section 4.1 as currently drafted will not be a significant deterrent to issuers that prepare their financial statements in accordance with U.S. GAAP from preparing and filing Canadian GAAP statements.

Should an issuer that is structured such that all or the majority of its business is operated through a subsidiary or another issuer of which it materially affects control or direction such as an income trust, be subject to the same certification filing requirements as issuers that offer securities directly to the public?

CCR is of the view that the requirements outlined by the Commissions for certification should apply to the publicly traded entity, and not to the wholly owned subsidiaries/trusts. The financial statements of the public entity will form the basis for an investment/financing decision, and hence are the financial statements upon which the public will rely. Therefore, the certificate filing requirements should support the publicly traded entity's financial statements.

In the case of an income trust, the trust is the public vehicle, and may control or own many subsidiaries and/or additional trusts. As the trust would issue consolidated financial statements, the certificate would address the disclosure issues, if any, of the top level financial statements. As these are the financial statements that are relied on by regulators and the investing public, it is appropriate for the certification requirement to be issued for those statements.

The certification requirement will need to be addressed in concert with audit committee recommendations, in order for the certification to be as meaningful as possible. Thus the audit committee, in addition to meeting the requirements of the Commissions for independence and financial expertise, should be a Committee of the Trustees of the Trust. As such, the audit committee would recommend the consolidated financial statements of the Trust to the Trustees for approval. The certification of the CEO/CFO would therefore extend to the financial statements of the operating subsidiaries.

In those cases where the reporting issuer is an income trust, and does not consolidate an operating entity (as the requirements for consolidation are not present), FEI Canada recommends that the Commissions develop clear guidelines indicating that the applicable subsidiary is subject to the same certification requirements as the parent income trust.

Should the Commissions formally define (i) internal controls and (ii) disclosure controls and procedures? If so, what should the appropriate definition be?

No. We agree with the Commissions' position that the proposed wording of the annual and interim certificates clearly states the objectives and outcomes that (i) internal controls and (ii) disclosure controls and procedures are designed to achieve, thereby providing clear meaning without being prescriptive as to approach and implementation. This is consistent with the principles based approach adopted by Canadian GAAP. A more prescriptive definition may lead to the imposition of inappropriate and costly processes and procedures on smaller companies where they are not required. Management of an entity must decide the level of controls and procedures required to enable the CEO and CFO to complete the certifications, as currently proposed, based on their knowledge and understanding of the entity and its business.

In the document "Investor Confidence Initiatives: A Cost-Benefit Analysis" external advisors to the OSC have estimated the costs and benefits of implementing the CEO and CFO certifications. Based on our interlisted members' experience with SOX 302 and 404 compliance, we believe this study significantly understates the costs an issuer will incur in implementing the certifications, particularly in respect of internal controls. In addition to costs identified in the analysis (increased internal hours expended by the CEO and CFO, increased expenditures on auditors and lawyers, and a small increase in CFO salaries) there is also an increase in time expended by internal financial staff involved in the preparation of the issuer's financial information and in documenting, reviewing, monitoring and testing internal control systems to provide basis for certification.

CCR hopes that these comments will be useful to the Commissions in their deliberations of this important subject. We would be pleased to answer any questions that you may have concerning our response.

Yours truly,

Karyn A. Brooks
Chair
Committee on Corporate Reporting
Financial Executives International (Canada)