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Ontario Securities Commission
Alberta Securities Commission
Manitoba Securities Commission
Registrar of Securities, Government of Yukon
Registrar of Securities, Department of Justice, Government of the Northwest Territories
Securities Commission of Newfoundland and Labrador
Nova Scotia Securities Commission
Commission des valeurs mobilières du Québec
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

c/o John Stevenson, Secretary
Ontario Securities Commission
20 Queen Street West
Suite 1900, Box 55
Toronto, Ontario M5H 3S8

c/o Denise Brosseau, Secretary
Commission des valeurs mobilières du Québec
Tour de la Bourse
800, square Victoria
C.O. 246, 22e étage
Montréal, Québec
H4Z 1G3

Ladies and Gentlemen:

Re: Proposed Multilateral Instrument 52-109 *Certification of Disclosure in Companies' Annual and Interim Filings*, its related forms and companion policy (together, Proposed 52-109)

We have read Proposed 52-109 and provide you with our comments herein. The first section of this letter contains our comments on specific issues not addressed by the questions in your request for comment notice accompanying Proposed 52-109 (Request for Comment). The second section addresses the questions you posed in the Request for Comment. Capitalized terms in this letter have the same meaning as those in Proposed 52-109, except as otherwise indicated.

COMMENTS ON SPECIFIC ISSUES

Implications of Proposed 52-109

We have noticed that the market place has made a wide range of interpretations regarding the implications of Proposed 52-109 and the extent of work required. Some believe that little needs to be done by company executives before they make their certification. Others tend to believe that Proposed 52-109 requires the same extent of documentation and internal testing as that required under the SEC rule that implements Section 404 of the Sarbanes Oxley Act (SOX). The Request for Comment attempts to clarify that it is not the intention of the proposed instrument to adopt the requirements under the SEC rules implementing SOX 404; however, the Request for Comment refers only to auditor attestation, while both auditor attestation and management reporting of internal controls are SOX 404 requirements.

While we do not believe that the CSA should regulate how issuers comply with the certification requirements, we have the following suggestions that we believe would help clarify some of the confusion the market-place has.

Evaluation of Internal Controls

Paragraph 4(c) of Form 52-109F1 requires certifying officers to certify that they have "evaluated the effectiveness of the issuer's disclosure controls and procedures and internal controls as of the end of the period covered by the annual filings *[emphasis added]*". We noticed that this wording resembles the wording used in the proposed amended SOX 302 certification form contained in the SEC proposed rule: Disclosure required by sections 404, 406 and 407 of the Sarbanes Oxley Act 2002 (published on October 22, 2002).

The SEC published the final rule implementing SOX 404 on June 6, 2003. The final rule contains the amended SOX 302 certification form. Paragraph 4(c) of the final form is as follows: "Evaluated the effectiveness of the issuer's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the controls and procedures, as of the end of the period covered by this report based on such evaluation". The main difference between the final form and the proposed amended form is the absence of the term "internal controls" in paragraph 4(c) of the final form. In other words, under the SEC final rules implementing SOX 302, officers are not required to evaluate the effectiveness of internal controls. Such requirement is now contained in the SEC rules implementing SOX 404.

The fact that Form 52-109F1 requires internal controls evaluation appears to be contradictory to the statement made in the Request for Comment that Proposed 52-109 closely parallels the SEC requirements implementing SOX 302. This perhaps represents a major source of confusion to the market-place.

Procedures required to evaluate internal controls differ significantly from those required to evaluate disclosure controls and procedures. Those required for the former are much more extensive and detailed-oriented.

We suggest the CSA re-consider the scope of Proposed 52-109, and provide a clear guidance of the rule's expectation, i.e., that management's certification requirement under Proposed 52-109 extends to disclosures and procedures, and not to internal controls. We believe the certification requirements under Proposed 52-109 should parallel those under the SEC rule that implements SOX 302.

Definitions of Internal Controls and Disclosure Controls and Procedures

Proposed 52-109 introduces the concepts of "internal controls" and "disclosure controls and procedures" to the Canadian environment. As the Request for Comment points out, Canadian legislation does not have a formal definition of internal controls, even though U.S. securities legislation has this definition for a number of years, and the term "disclosure controls and procedures" is new even in the U.S.. Auditors are generally familiar with the term internal controls, but the term is not formally defined in Canadian generally accepted auditing standards, and therefore it is subject to various interpretation and practices. Given the limited experience of these concepts in the Canadian environment, we believe the terms should be formally defined in the final rule. We recognize that the certification forms include the outcomes the controls are designed to achieve. However, formal definitions of the terms would provide more clarity and structure to issuers in their application of the rule. Moreover, as our comments above suggest, a distinction between internal controls and disclosure controls is important. Providing these terms with formal definitions helps emphasize the distinction. Please see below our comments to question 8 of the Request for Comment for our suggestions to the definitions of these terms.

The term internal controls has, in practice, been used to refer to a wide range of corporate procedures, ranging from controls over the reliability of financial reporting, to controls over the effectiveness and efficiency of operations, and controls over compliance with applicable laws and regulations. The definition of internal controls for the purpose of management certification should be limited to internal controls over financial reporting. This is consistent with the definition used by the SEC.

Further Guidance on Application

We recommend that the companion policy of the final rule provides further guidance on the application of the rule and the extent of work management is required to perform. For example, the companion policy should provide an explanation of the differences between disclosure controls

and internal controls, such as that provided in the commentary included in the adopting release of the SEC final rule implementing SOX 404[1].

Transitional Provisions

Proposed 52-109 provides for a one-year transition period during which only a "bare" version of the certificate needs to be filed. An issuer will need to file a full certificate, either annual or interim, on or after January 1, 2005. The first full certificate that an issuer needs to file may therefore be an interim certificate (for example, the first full certificate to be filed by an issuer with a September year end would be on its second quarter report for fiscal 2005). Paragraph 5 of Form 52-109F2 *Certification of Interim Filings* requires the officers to certify that they have disclosed, based on their most recent evaluation, all significant deficiencies or fraud. For an issuer whose first full certificate to be filed is an interim certificate, the issuer has to perform either: (1) an interim evaluation as at the interim period to which the first full certification applies; or (2) an annual evaluation as at the end of the fiscal year that ends prior to January 1, 2005. Both of these are inconsistent with Proposed 52-109's intentions of not requiring a formal interim evaluation and allowing issuers to have at least a year before they are required to perform an evaluation. We recommend that the proposed rules be amended so that the full certification requirements are applicable to the first annual filing an issuer makes after January 1, 2005.

RESPONSES TO QUESTIONS LISTED IN REQUEST FOR COMMENT

The numbers for the responses below correspond to the order in which the questions appear in the Request for Comment. The questions listed below represents a summary of the questions included in the Request for Comment.

1. *Do you agree that the proposed one-year transition period is appropriate?*

   We believe the one-year transition period is imperative. Issuers require ample time to consider the implications of the rule, and to seek further professional advice if necessary. Some issuers may also need to conduct a formal study of their systems and controls before they can provide their certification regarding the effectiveness of controls or the identification of deficiencies. During the transition period, we do not believe there would be any problem for CEOs and CFOs to provide the first three representations, since, as the Request for Comment points out, these representations are knowledge-based.

[1] In its commentary included in the adopting release, the SEC expresses its view that, while there is "substantial overlap" between a company's disclosure controls and procedures and its internal control over financial reporting, there are some elements of disclosure controls and procedures that are beyond the scope of internal control over financial reporting and there are some elements of internal control over financial reporting that may fall outside the scope of a registrant's disclosure controls and procedures. In the SEC's view, the elements of internal control over financial reporting that provide reasonable assurances that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles would always be included in a company's disclosure controls and procedures. Aside from those elements, the SEC indicated that companies can be expected to make judgments regarding the processes and controls on which management relies to meet applicable Exchange Act disclosure requirements.

2. *Do you believe it is appropriate to include representations 4 through 6? Do you think that there is reason to differentiate between smaller and larger issuers?*

   Requiring CEOs and CFOs to provide representations 4 through 6 has the benefit of requiring company executives to scrutinize their existing controls system, and to correct any deficiencies identified. Representations 4 through 6 enhance the credibility of representations 2 and 3. Therefore, we support the inclusion of representations 4 through 6 in the certifications.

   We do not believe that there is reason to differentiate between smaller and larger issuers. Both smaller and larger issuers require an appropriate controls system, albeit different in terms of the system's complexity. The same protection should be provided to investors of both small and big companies.

3. *Is the gap between the time the earliest of the annual filings are filed and the time the annual certificate is filed problematic?*

   We find this time gap acceptable, although not ideal. We would expect the CEO and the CFO to have performed the work required to provide their certification when they file the earliest of the company's documents (commonly the company's financial statements and MD&A), in anticipation of the requirement to provide their certification when they file the rest of their annual filings (the AIF). There may be certain legal implications if, during the time gap, the company is accused of misrepresenting certain information contained in the earlier-filed documents. We do not expect the probability of this occurring to be high given the short time frame between filings. This issue will be further mitigated by the shortening of the filing deadlines as proposed by draft National Instrument 51-102.

4. *Should the annual certificate cover certification of Form 40 executive compensation disclosure? If yes, how should this be done?*

   Executive compensation disclosure included in Form 40 forms part of a company's continuous disclosure records. As such, we do not see any reason why such information should be excluded from certification requirements. We believe it is even more essential to have officers' certification over such information, as the information is not required to be audited.

   We agree that it might be unfair to the certifying officers to require them to certify information in advance. One way to deal with this issue is to require issuers to separately provide a Form 40 certification, which would be filed together with Form 40. The wording of this certificate needs only be changed slightly from that of the annual certificate.

5. *Do you agree that formal interim evaluation is unnecessary from a cost-benefit standpoint?*

   SEC rule requires SOX 302 certifications to include an evaluation of disclosure controls and

procedures both on an annual, as well as on a quarterly, basis. On the other hand, the SEC only requires management to evaluate internal controls over financial reporting on an annual basis, and any material changes to internal controls are to be disclosed quarterly, with a certification in the interim management certifications that such disclosures have been made. As commented above, we believe Proposed 52-109 should make a differentiation between disclosure controls and procedures versus internal controls. In terms of interim evaluation, we believe Proposed 52-109 should be amended to adopt the SEC approach, i.e., an interim evaluation of disclosure controls and procedures should be required, and on an annual basis, an evaluation of internal controls over financial reporting should be performed, with any material changes to be disclosed on a quarterly basis.

6. *Do you think that the exemption in section 4.1, as currently drafted, will have the effect of discouraging issuers that prepare their financial statements in accordance with U.S. GAAP from preparing and filing Canadian GAAP financial statements?*

   We do not have a conclusive answer to this question. Issuers who are able to provide certifications with respect to their U.S. GAAP financial statements, especially those who have experience in preparing and filing both sets of financial statements, should have little difficulty certifying their Canadian GAAP financial statements as well. The majority of the internal controls and disclosure controls and procedures over U.S. GAAP financial statements overlap with those over Canadian GAAP financial statements. On the other hand, providing two sets of certifications does impose additional liability to the certifying officers. It is difficult to predict how officers will react to this issue.

7. *Should an issuer that is structured such that all or 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?*

   We believe such issuers should be subject to the same certification filing requirements. The parent company or the income trust, which is itself a reporting issuer, has an obligation to comply with securities legislation and rules. It prepares and files consolidated financial statements, which consolidate the financial statements of the operating entity. To certify the consolidated financial statements, the officers of the parent company or the income trust have to ensure that the operating entity's financial statements are fairly presented and that the controls used to prepare them are sound. Having separate certifications of the operating entity's financial statements and controls is just an additional administrative burden, which provides little, if any, additional protection to investors.

8. *Should we formally define: (i) internal controls and (ii) disclosure controls and procedures? If so, what should the appropriate definitions be?*

   As noted above, we believe we need formal definitions of the terms internal controls over financial reporting and disclosure controls and procedures. We believe the definitions of these terms should be consistent with those in the SEC final rule implementing SOX 404 to avoid confusion to the market-place. For your ease of reference, the SEC definitions of these terms are reproduced below:

   Definition of internal controls over financial reporting:

   "A process designed by, or under the supervision of, the issuer's principal executive and principal financial officers, or persons performing similar functions, and effected by the issuer's board of directors, management and other personnel, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles and includes those policies and procedures that:

   - *Pertain to the maintenance of records that in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of the issuer;*
   - *Provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the issuer are being made only in accordance with authorizations of management and directors of the issuer; and*
   - *Provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use or disposition of the issuer's assets that could have a material effect on the financial statements."*

   Definition of disclosure controls and procedures:

   " (c)ontrols and other procedures of an issuer that are designed to ensure that information required to be disclosed by the issuer in the reports that it files or submits under the [Exchange] Act is recorded, processed, summarized and reported, within the time periods specified in the Commission's rules and forms. Disclosure controls and procedures include, without limitation, controls and procedures designed to ensure that information required to be disclosed by an issuer in the reports that it files or submits under the [Exchange] Act is accumulated and communicated to the issuer's management, including its principal executive officers and principal financial officers, or persons performing similar functions, as appropriate to allow timely decisions regarding required disclosure."

Should you have any questions or comments on this letter, we would be pleased to hear from you.

Yours sincerely,

Ernst & Young LLP

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