

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

September 25, 2003

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

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  
Proposed Multilateral Instrument 52-109, Companion Policy 52-109CP  
and Forms 52-109F1 and 52-109F2**

The following are comments on the proposed Multilateral Instrument 52-109, Companion Policy 52-109CP and Forms 52-109F1 and 52-109F2. The comments are the views we have received from one of our clients and are not necessarily the views of our firm. For convenience, we have repeated the questions as you have presented them in your Request for Comments.

- 1. We believe that all reporting issuers should, and most typically already have, a reasonable process of internal and disclosure controls in place. However, we appreciate that some issuers may not yet have controls that their CEOs and CFOs believe are appropriate for the purpose of making all of the representations required of them in the annual and interim certificates. In addition, we do not think it is appropriate to require certification of matters relating to financial periods ending prior to the implementation of the Proposed Instrument. Therefore, we propose a one-year transition period for all issuers. During this transition period, issuers will be required to provide only a "bare" version of the annual and interim certificate containing the first three representations rather than all six. This transition period is set out in section 1.3 of the Proposed Instrument.*

**(a) Do you agree that the proposed one-year transition period is appropriate?**

Answer: The proposed one year transition period may not provide sufficient time for large corporations with complex operations to document and implement the appropriate procedures. We would suggest a two year transition period.

---

2. *A bare certificate will only be accepted on a transitional basis because we believe it is important that CEOs and CFOs make all of the representations in the annual and interim certificates. The elements of representation four (design, implementation and evaluation of internal and disclosure controls), establish that the informational foundation exists upon which to credibly support representations two and three, both of which are qualified as being to the best of the CEO and CFO's knowledge. The fifth and sixth representations complement the fourth and are designed to ensure greater transparency of the internal controls of an issuer by requiring any deficiencies in those controls to be disclosed to the auditors as well as being publicly disclosed in the annual MD&A.*

*In formulating our proposals for comment we considered whether it was necessary to mandate the representations in paragraphs 4 through 6 as the CEO and CFO will, of necessity, establish appropriate controls to provide the second and third representations. We also considered whether the requirement to provide the representations in paragraphs 4 through 6 would be too onerous for smaller issuers. For the reasons stated above, we are proposing that paragraphs 4 through 6 form part of the certification requirements.*

- (a) *In our view, because the second and third representations are knowledge-based, it is necessary not only to require CEOs and CFOs to certify (i) the accuracy and fairness of their issuer's filings (representations 2 and 3) but also to require them to certify (ii) as to the informational foundation upon which these representations are based (representations 4 through 6). Do you believe it is appropriate to include representations 4 through 6?***

Answer: Yes, assuming that the appropriate time to implement and document the appropriate processes and procedures is provided.

- (b) *Do you think that there is reason to differentiate between smaller and larger issuers? For example, is there any reason to exclude representations 4 through 6 with regard to smaller issuers?***

Answer: No

---

3. *Form of reporting*

*Generally, the U.S. rules require certification in a company's annual report on Form 10-K and quarterly report on Form 10-Q. However, with the exception of Québec, Canadian securities legislation does not prescribe annual and quarterly reports per se. Therefore, the Proposed Instrument prescribes the annual and interim disclosure documents that CEOs and CFOs will be required to certify, and when the annual and interim certificates must be filed.*

*Rather than the one all-encompassing annual report on Form 10-K that is required in the U.S., under Canadian securities legislation a reporting issuer is generally required to file, on an annual basis, more than one disclosure document relating to its most recent fiscal year. While those documents, when considered as a whole, approximate the line-item requirements of an annual report on Form 10-K, the various Canadian disclosure documents are not required to be filed at the same time. Therefore, the Proposed Instrument (in Part 2) requires annual CEO and CFO certification of "annual filings". This is a new definition that encompasses an issuer's AIF, and its annual financial statements and MD&A. Under the Proposed Instrument the annual certificate relates to the disclosure in the annual filings because the objective of the annual certificate is for the CEO and CFO to certify the accuracy of the annual filings as a whole. The annual certificate must be filed at the same time as the issuer files the last of its AIF and its annual financial statements and MD&A.*

- (a) *If the AIF and annual financial statements and MD&A are not all filed at the same time, there will be a gap between the time that the earliest of those documents is filed and the time the annual certificate is filed. Is this timing gap problematic?***

Answer: The timing gap is not problematic if it is clear that the certification relates to the time period referred to in each of the documents filed.

---

4. *Certification of Executive Compensation*

*The annual information form, annual financial statements and annual MD&A grouped together are generally equivalent to the annual report filed in the U.S. on Form 10-K. One notable exception, however, is that the Form 10-K typically includes details of executive compensation. In certain jurisdictions, primary disclosure on executive compensation is contained in Form 40. The Form 40 information is typically contained in an issuer's proxy circular, which is filed in advance of its annual general meeting but may be filed subsequent to the documents forming the annual filings. We did consider including Form 40 disclosure in the definition of annual filings and requiring the annual certificate to capture this disclosure "as and when" the Form 40 was filed. However, we considered that this approach may be unfair to the certifying officers who would have personal liability for the information and would be called upon to certify this information in advance, in some instances, of when it*

would be available or filed. In order to avoid delays in the filing of the annual certificate we have decided not to require certification of Form 40 and thus have not included it in the definition of annual filings.

- (a) ***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?***

Answer: No. The certificate should not cover Form 40 executive compensation disclosure. In order to cover the Form 40 disclosure, the annual certificate would have to be filed after the proxy circular is filed.

---

5. *Interim evaluation of internal controls and disclosure controls and procedures*

*The U.S. rules require an issuer's CEO and CFO to certify annually and quarterly that they have evaluated, and disclosed their conclusions about, the effectiveness of their issuer's internal controls and disclosure controls and procedures. While the Proposed Instrument maintains this requirement in the annual certificate, it does not impose this requirement for the certification of interim filings. In our view, maintaining those controls will necessarily require some form of on-going evaluation process, otherwise those controls will become less effective over time due to regulatory changes, changes to generally accepted accounting principles (GAAP), or changes in, among other things, the size or nature of the issuer's business. However, we acknowledge that a formal interim evaluation that is subject to certification will likely be costlier than an informal evaluation. Therefore, we have concluded that from a cost-benefit standpoint, a formal interim evaluation is unnecessary.*

- (a) ***Do you agree with this approach?***

Answer: Yes

---

6. *Part 4 provides for a number of exemptions from the Proposed Instrument.*

*Part 4 includes an exemption for issuers that comply with U.S. federal securities laws implementing section 302(a) of SOX. We believe that issuers that comply with the annual and quarterly certification requirements in SOX should be exempt from the Proposed Instrument because the investor confidence benefits of requiring them to also comply with the Proposed Instrument will be minimal. Moreover, because our certification requirements are slightly*

*different than the SOX certification requirements (in order to accommodate language and legal differences between our respective regimes), we would be imposing a double requirement on interlisted issuers with minimal additional benefits from an investor confidence standpoint.*

*We note that proposed National Instrument 52-107 Acceptable Accounting Principles, Auditing Standards and Reporting Currency will allow certain Canadian issuers to satisfy their requirements to file financial statements prepared in accordance with Canadian GAAP by filing statements prepared in accordance with U.S. GAAP. However, it is possible that some Canadian companies may still continue to prepare two sets of financial statements and continue to file their Canadian GAAP statements in the applicable jurisdictions. In order to ensure that the Canadian GAAP financial statements are certified (pursuant to either SOX or the Instrument) those issuers will not have recourse to the exemptions in subsections 4.1(1) and (2).*

- (a) *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?***

Answer: Yes. The exemption may provide another reason to "migrate" towards U.S. GAAP Statements.

---

7. *Application of the Proposed Instrument to Certain Classes of Reporting Issuers*

*As presently drafted, the Proposed Instrument will apply to every reporting issuer in adopting jurisdictions, other than an investment fund. Consequently, under the Proposed Instrument, every reporting issuer other than an investment fund will be required to file an annual certificate and interim certificates personally signed by each CEO and CFO of the reporting issuer or, in the case of an issuer that does not have a CEO or CFO, those individuals who perform similar functions to the functions of a CEO or CFO.*

*We believe that for certain types of issuers, such as issuers that are income trusts, it may be the case that the certificate filing requirement should apply to more than one issuer, or to an issuer other than the reporting issuer.*

*In the case of an income trust, for example, it may be the case that the certificate filing requirement should apply to the underlying business entity (Opco) in the place of, or in addition to, the income trust. In respect of an entity structured as an income trust, in many cases, the investment ultimately represents an investment in Opco and the investors' return can be entirely dependent on the operations and assets of Opco. Requiring certificates only from the CEO and CFO of the income trust may not be sufficient. For example, the CEO and*

*CFO of Opco may not be the same as the CEO and the CFO (or their equivalents) of the income trust. Also, in some jurisdictions it may be unclear in certain circumstances whether Opco is a "subsidiary" of the income trust for the purposes of the Proposed Instrument. It may be arguable that the "business" of the income trust -- to act as a passive holding/distributing entity -- is different from the business of Opco. Consequently, if certificates were required only from the CEO and CFO of the income trust, the controls being certified might be those of a "passive" investor rather than the controls that would be necessary in relation to Opco.*

- (a) *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?***

Answer: Yes

---

8. *Internal Controls, and Disclosure Controls and Procedures*

*A key aspect of management's responsibility for the preparation of financial information is its responsibility to establish and maintain internal controls. While internal controls has been defined in U.S. securities legislation for a number of years, Canadian legislation has no similar legal requirement. The Proposed Instrument does not contain an express definition of "internal controls". We believe a formal definition is unnecessary since representation 4(b) of the annual and interim certificates in effect defines the outcome that internal controls are designed to achieve. This representation requires the CEO and CFO to state that they have designed and implemented internal controls "...to provide reasonable assurances that the issuer's financial statements are fairly presented in accordance with generally accepted accounting principles." As discussed in the commentary under "Parts 2 and 3", how issuers' achieve this outcome is best left to the judgment of their CEOs and CFOs.*

*Unlike internal controls, "disclosure controls and procedures" is a term that was newly introduced by the SEC following enactment of SOX. "Disclosure controls and procedures" is currently defined by the SEC as controls "designed to ensure that material information required to be disclosed by a company under the Exchange Act is recorded, processed and summarized, and reported within the time periods specified by the SEC."{3}*

*This concept generally refers to the non-financial aspects of an issuer's release of information to the public. Disclosure controls and procedures, for example, not only include procedures that aid in reaching the correct accounting numbers, but also encompass the procedures involved in reporting the significance of those numbers to the public. Some examples of non-financial disclosure include the signing of a significant contract,*

September 25, 2003

Page Seven

*developments regarding intellectual property, changes in union relationships, termination of a strategic relationship and legal proceedings.*

*Like internal controls, the term "disclosure controls and procedures" is not expressly defined in the Proposed Instrument. However, representation 4(a) of the annual and interim certificate does, in effect, define the outcome that disclosure controls are designed to achieve because the CEO and CFO must certify that they have designed and implemented those disclosure controls and procedures "...to provide reasonable assurances that material information relating to the issuer, including its consolidated subsidiaries, is made known to us by others within those entities...and that such material information is disclosed within the time periods specified under applicable provincial and territorial securities legislation". Again, we will leave it to management's judgment how to best effect this outcome.*

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

Answer: No. We agree with the "outcome" approach and reliance on management's judgment as to how best to achieve the desired outcome.

Yours truly,

*Perry Spitznagel*

Perry Spitznagel

CPS/ljm