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Ontario Securities Commission

Submitted by e-mail to:

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RE : Comments on Proposed Ontario Securities Commission Policy 51-604, *Defence for Misrepresentations in Forward-Looking Information*

The Canadian Investor Relations Institute (CIRI) is pleased to respond to the OSC's Request for Comment regarding proposed Ontario Securities Commission Policy 51-604, *Defence for Misrepresentations in Forward-Looking Information*.

CIRI is a professional, not-for-profit organization of corporate executives and consultants responsible for communication between public companies and the investment community. With over 800 members, CIRI is the world's second largest society of investor relations professionals. CIRI is headquartered in Mississauga and has active chapters in Toronto, Montreal, Calgary and Vancouver.

CIRI is dedicated to advancing the stature and credibility of the investor relations (IR) profession and the competency of its members. CIRI is recognized as the Canadian authority on investor relations, and is committed to enabling fair and efficient capital markets. As part of that commitment, CIRI takes a strong interest in continuous disclosure obligations to aid shareholders in making informed investment decisions.

General Comments

CIRI appreciates the opportunity to comment on the proposed policy and is generally supportive and appreciative of the pragmatic approach the OSC has taken in interpreting the specific defences for misrepresentations in forward-looking information (FLI). In the comments below, we have expanded on areas of particular importance from an IR perspective. Specific comments on the sections of the Proposed Policy are addressed below.

Part II – Defence for Misrepresentations in Forward-Looking Information

Section 2.3 The “Proximate” requirement

Issuers vary in the type of FLI they provide. Some provide quantitative projections of key line items in the income statement or of other performance measures (such as production data and prices) that would assist investors in calculating future performance. Other issuers simply provide general directional outlooks. It follows that the level of detail regarding the risks and material factors or assumptions should be commensurate with the nature of disclosure provided in the FLI.

Detailed projections clearly require a detailed discussion of risks and assumptions. For general directional outlooks, however, CIRI would like clarification of whether the cautionary language currently required in news releases and MD&As (and updated as circumstances require) would suffice if expanded to include material factors or assumptions as well. Going a step further, we seek clarification regarding whether the currently required cautionary language in news releases and MD&A should be expanded in all instances to also include material factors or assumptions, and a reference that the issuer believes the assumptions to be reasonable. For safe harbour defence in the US, we note that risks, but not material factors or assumptions, related to the FLI are required in the cautionary language. Different safe harbour defence requirements in Canada would appear to require expanded cautionary language.

CIRI supports the statement in the policy: “We do not believe that the defence should be interpreted as requiring an issuer to anticipate and discuss everything that could conceivably cause results to differ. It follows that failure to include the particular factor that ultimately causes the forward looking statement to materialize as predicted should not necessarily mean that the disclosure is not protected by the defence.” We interpret this statement to pertain to risk factors only. We would suggest that it would be helpful if this also applied to assumptions.

CIRI agrees that effective disclosure is based on clarity of presentation and simplicity of language and style and as such agrees with the OSC’s comment that “breaking the flow of discussion to indicate each time that a particular statement is forward looking and to identify in a meaningful way the factors that could effect its outcome introduces complexity in presentation that could frustrate an investor’s ability to readily follow the MD&A discussion”. CIRI supports the view that a single broader reference at the start or end of the document in question should satisfy the “proximate” requirement of defence where “the reader is better served.” A concern of issuers would be that this subjective criteria for a broader reference could leave them vulnerable in the case of a lawsuit.

We recognize that it is not possible to provide interpretation that neatly fits each case; rather, issuers need to use their best judgment and would be advised to err on the side of caution. The proposed policy provides interpretations that will assist issuers in providing risks and assumptions that meet the safe harbour defence test while not unduly interrupting the word flow and reducing readability.

Overall, CIRI agrees that the interpretations provide guidance for issuers providing FLI, with the objective of qualifying for safe harbour defence while continuing to be as transparent as possible about what they see to be the outlook for their business. To the extent that uncertainties about what will qualify as defence remain, there is the risk of disclosure chill among issuers, leading to less FLI, or the likelihood that unduly repetitive cautionary language will reduce readability of disclosure documents.

Section 2.4 Risk Factor Disclosure

CIRI agrees with the OSC's approach of expecting cautionary statements to identify "significant and reasonably foreseeable factors that could reasonably cause results to differ" and hopes that this guidance will result in cautionary language that is succinct and relevant as opposed to some of the overly wordy, legalistic statements that so often are used.

Section 2.5 Assumption Disclosure

CIRI agrees that the factors or assumptions disclosed should be relevant and material to the conclusion, forecast or projection but suggests that they should also be qualified as reasonably foreseeable and probable.

Section 2.6 Reasonable Basis

CIRI supports the interpretation that there must be a reasonable basis for drawing conclusions and that companies must follow appropriate processes and procedures in preparing and reviewing forward-looking information. Issuers should be able to rely on implementation of their disclosure controls and procedures as a defence.

Part III – Defence for Misrepresentations in Oral Statements Containing Forward-Looking Information

Section 3.1 Legislative Scheme

The interpretation that "a document generally filed with the Commission or otherwise generally disclosed is deemed to be "readily available" is helpful and appropriate. We assume that the "Assessment of Business Risks" section generally included in AIFs and often MD&As, would be acceptable assuming that the appropriate risk factors are covered in that document.

Section 3.2 A More Flexible Approach

CIRI agrees with the OSC's interpretation that "the requirements of the defence may be satisfied in appropriate circumstances by one person making the required cautionary statements on behalf of another person making the forward looking statement. The animating principles underlying the defence support a pragmatic interpretation." It is often the case that someone other than the issuer's FLI spokesperson will make the required cautionary statements. For example, on quarterly conference calls, it may be the IR officer who makes the required cautionary statements and the CEO who makes the forward looking statement. This interpretation provides flexibility of presentation format; however, clarification of the type of occasions, if any, when the FLI spokesperson would also need to provide the cautionary statement should be outlined.

Part IV – Duty to Update

Section 4.1 Duty to Update

CIRI supports the OSC's interpretation that the defence for misrepresentations in FLI does not impose a duty to update FLI beyond any duty imposed under Ontario laws. This interpretation is consistent with our views. CIRI's Standards & Guidance for Disclosure (Third Edition, April 2006) states: "Issuers should avoid creating the impression that their forward-looking information continues to be valid unless and until it is expressly changed. To provide the flexibility to make adjustments to forward-looking information in a particular situation according to an issuer's own interpretation of best practices, it is prudent for the issuer to make it clear, at the time the forward-looking information is originally published, that the issuer does not undertake to update any forward-looking statement that is contained in that particular disclosure document or other communications. Readers should be cautioned not to place undue reliance on the forward-looking statements."

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

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