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Saskatchewan Securities Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Nova Scotia Securities Commission
New Brunswick Securities Commission
Office of the Attorney General, Prince Edward Island
Securities Commission of Newfoundland and Labrador
Registrar of Securities, Government of Yukon
Registrar of Securities, Department of Justice, Government of the Northwest Territories
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Response To Proposed National Instrument 52-109 and Companion Policy 52-109

We are writing in response to the request for public comment on the above instrument made by the members of the Canadian Securities Administrators (the CSA), which we consider to be a very important proposal. We also refer you to our Response to Proposed Multilateral Instrument 52-111 and Companion Policy 52-111 dated June 30, 2005 as many of the comments we made at that time continue, in our view, to be relevant.

While we have a number of specific comments and issues for the CSA to consider, we emphasize at the outset our strong support for the introduction of mandatory reporting by management on the effectiveness of disclosure controls and on internal control over financial reporting.

We also note that this proposal is issued as a "National" as opposed to "Multilateral" Instrument and that it is intended to apply to all reporting issuers, other than investment funds, in all Canadian jurisdictions. We are delighted to see a united Canadian position.

Setting the Context

We believe it is important to place both the CSA proposals and our comments in the context of the evolution of our capital markets. Our Canadian capital markets are vitally important to the success of Canadian businesses and our economy as a whole. More and more Canadians are invested in the capital markets, either directly or through mutual funds, pension plans etc. Our markets are also a part, albeit a small part, of the world's global capital market that is changing and integrating at a rapid pace.

To illustrate the impact of globalization on our Canadian capital markets, we quote the following statistics presented by Richard Nesbitt, CEO, TSX Group in a presentation he made in New York City on April 11, 2007, the full text of which is available on the TSX Group website.

- *At the end of last year we did 38% of all the mining financings in the world – or approximately US$10 billion on a global total of US$26.5 billion.*
- *In fact, last year of our 45 TSX-listed mining companies with over $1 billion in market cap, 16 completed financings and raised more capital than all mining companies on NYSE, Nasdaq and Amex combined.*
- *As far as we can tell, we have more US-based listings than any exchange group in the world outside of America.*
- *China is the second highest source of international listing for us, followed by the UK/Europe and Australia/New Zealand.*
- *A contributing factor to that increased liquidity has been the active participation of U.S. broker dealers in our markets. Last year, approximately 40% of trading on TSX came from the U.S.*
- *This activity would be enhanced if free trade in securities becomes a reality – something that U.S. Treasury Secretary, Hank Paulson, and our Finance Minister, Jim Flaherty, have been promoting to their G-7 counterparts.*

In finalizing these proposals, the CSA needs to position its regulations not to just support the markets of today, but to facilitate the flow of capital in the capital markets of the future that are likely to be even more globally integrated (e.g., free trade in securities becomes a reality). As a result, the regulation of Canadian capital markets, including the TSX, must be:

1. Responsive to the needs of our small cap Canadian companies to raise capital;
2. Facilitate the cross border flow of capital within the North American markets; and
3. Attractive to global investors and issuers outside North America.

We believe that the CSA proposals are a significant step forward in accomplishing these three objectives. Internal control reporting enhances investor confidence by providing an early warning indicator of potential financial reporting risks that might materialize in future periods and what management is doing to mitigate the impact of these risks. Effective internal control also improves the timeliness and

reliability of internal information, processing of transactions, safeguarding of resources and helps Canadian companies be more efficient.

Given the fact that Canada has more US based listings than any other country, that we have more companies registered with the SEC than any other country, and that approximately 40 percent of trading on the TSX comes from the U.S., we believe that harmonization with the US internal control reporting requirements is very important to facilitate this significant cross border flow of capital and to support a mutual reliance approach to securities regulation by US and Canadian regulators (e.g., MJDS), which might be the foundation for Free Trade in Securities.

Simply put, Canadian public policy and securities regulations should be directed at facilitating the free trading of securities between the United States and Canada based on a principle of mutual reliance by the US and Canadian securities regulators.

As a result, we suggest there are three major priorities for the CSA to address in finalizing these proposals:

1. Compare the CSA proposals for management with the SEC's management guidance that was recently issued to ensure there is consistency concept and terminology;
2. Harmonize the concepts and terminology with respect to the disclosure requirements for internal control weaknesses and deficiencies; and
3. Reassess the decision to not require auditor attestation.

We also provide other comments and suggestions for consideration by the CSA on these proposals.

Harmonize Definitions and Concepts For Material Weakness Disclosures

We strongly recommend that the CSA use consistent concepts, definitions and terminology with those in the U.S. in determining what weaknesses in ICFR design or effectiveness need to be disclosed, so that an expectations gap or confusion is not created between US and Canadian investors.

There is also confusion amongst issuers and investors as to the definition of internal control over financial reporting, the overlap with disclosure controls and procedures and in the factors to be considered in determining deficiencies that require disclosure ("reportable deficiencies").

The definition of "internal control over financial reporting" included in Section 1.1 of the proposed Instrument utilizes in part the words "regarding the reliability of financial reporting **and** [emphasis added] the preparation of financial statements for external purposes in accordance with the issuer's GAAP". We suggest that the CSA emphasize that the application of ICFR should be limited to the quarterly and annual financial statements prepared in accordance with Canadian securities legislation.

In this regard we suggest that:

- The CSA clearly indicate that internal control over financial reporting is limited to the preparation of financial statements in accordance with GAAP and does not include financial information included in reports or filings outside the financial statements.

- The CSA clarify that since annual and quarterly financial statements are required to be filed with Securities Administrators, that ICFR is a sub set of Disclosure Controls and Procedures (DC&P) and therefore a weakness in ICFR is also a weakness in DC&P.

- Use definitions for material weaknesses and reportable deficiencies that are consistent with the U.S. definitions and concepts.

- Confirm that there is a requirement for issuers to file annual and quarterly financial statements that are in accordance with applicable GAAP together with an auditors' opinion thereon.

- Recognize in the instrument that the securities requirements for disclosures (material facts and material changes) must be considered.

Auditor Attestation

We continue to believe that auditor attestation enhances the timeliness, completeness and reporting of required information concerning internal control over financial reporting. We are concerned that the decision to not require auditor attestation could create negative and unfair perceptions by US investors, rating agencies and foreign regulators about the quality of management and governance in Canadian companies, and therefore be an impediment to cross border flows of capital and trading in securities.

We must also consider the impact of this proposal on boards of directors and audit committees. Consider the position of a director who sits on the board of a Canadian issuer that is an SEC registrant and also sits on a board of a Canadian only issuer. It would be both logical and correct for this director to conclude that he or she receives greater audit assurance from the external auditors in the SEC registrant case and that the auditors performed a "better" audit than in the Canadian situation. Investors would also arrive at the same conclusion since in the SEC registrant case they receive two audit opinions (one on the financial statements and the other on internal control) and in the Canadian issuer they receive only one. Is this what we want to communicate to the market place and international investors?

We believe that introducing two levels of auditor attestation in the Canadian capital markets that are highly integrated with the United States is not a wise or appropriate public policy decision.

We fully understand the concerns that have been expressed in the United States about the costs involved in what is often called SOX 404 audits. The CSA has followed a prudent course of action in waiting to see how the US regulators and profession dealt with these concerns.

We are all aware that significant changes have been made this year by both the SEC and the PCAOB requirements in the U.S. to address these concerns, and it is our experience that these changes are already producing significant cost reductions. We strongly believe that the "integrated audit" based on a "top down, risk based" approach that is being developed in the U.S., is a significant and cost effective solution that will benefit investors and directors, and we believe these benefits will exceed the costs involved. We also note that the SEC is sufficiently confident in their revised approach that they have stated that there will be no exemption for small public companies.

Auditor attestation has had a significant and positive impact on the completeness and quality of disclosures provided by management in SEC registrants. While we have had only one year of experience

with the CEO/CFO certification of the design of ICFR, we believe that the approach taken by most Canadian companies is not nearly as rigorous as that taken by the management of interlisted companies subject to SOX 404. If this first year experience carries forward to the proposed certification of the effectiveness of ICFR, then investors will have a false sense of comfort when management does not disclose any ICFR weaknesses in their MD&A.

While we believe that an integrated audit, based on the top down, risk based approach, is cost effective for all companies, we would support an exemption, for auditor attestation but not CEO/CFO certification, for TSX-V issuers as originally proposed by the CSA.

Establishing and monitoring the "Culture of Integrity"

We believe that the integrity of the CEO and the "culture of integrity" that the CEO, CFO and other senior officers create in an organization are the fundamental underpinnings of an effective ICFR design and implementation. This is addressed in the CSA corporate governance guidelines set forth in National Policy 58-201, Corporate Governance Guidelines. We believe that there should be a much stronger linkage and connection between the NP 52-109 and NP 58-201.

In addition, we suggest that the CSA should state that the activities performed by the board in monitoring compliance with its code of business conduct, or if the board does not monitor compliance, the explanation on how the board satisfies itself regarding compliance with its code, should be a key part of the assessment of ICFR design and effectiveness – and a disclosable weakness if it is not done effectively.

Disclosure Requirements and Practices

We fully support the proposal that CEOs and CFOs amend their certificates in an "except for" manner when weaknesses in DC&P and ICFR are disclosed in the MD&A.

We suggest, based on our experience with the disclosure of DC&P and ICFR design, that further guidance on disclosure would be appropriate and welcomed by issuers.

We suggest the CSA try to strengthen the integration of the board's disclosure of the code of business conduct and how it monitors it, disclosure controls and procedures, and internal control over financial reporting. These are all integrated concepts and the disclosures about their effectiveness should be presented in an integrated manner. For example, an issuer's culture of integrity is influenced by its code of business conduct, which in turn impacts the effectiveness of its DC&P and ICFR.

We suggest the CSA consider requiring a separate "control" section of the MD&A in which an issuer would provide its disclosures in accordance with a prescribed framework, which might be something like:

- A description of the issuer's control structure and design;
- An outline of:
  - how the board monitors the code of business conduct and the organization's culture of integrity;
  - how the CEO and CFO assessed the effectiveness of DC&P and ICFR; and

- the conclusions of the CEO and CFO the effectiveness of DC&P and ICFR, including:
  - remediation plans, and
  - actions taken to ensure that ICFR and DC&P weaknesses have not produced material errors in the annual or quarterly financial statements or filings.

We also think it is important for the CSA to emphasize that the disclosure of information on control weaknesses are intended to be leading indicators of potential deficiencies in DC&P and ICFR. Too often we have seen management take the view that disclosure of material weaknesses in DC&P and ICFR should only be made when there is evidence of an actual error or control breakdown, such as a restatement. If disclosure of ICFR and DC&P weaknesses are only made when there is a material error or restatement, then this disclosure is redundant and the investor is not served by the disclosure.

Auditing Standards

We understand that the CICA Auditing and Assurance Board is considering developing a Canadian assurance standard on the audit of internal control over financial reporting that is consistent with the integrated audit standards developed by the PCAOB. In our view it is important for the CSA to support this initiative and ensure there is alignment between CICA auditing standards, the new US requirements and the reporting requirements under National Instrument 52-109 as it relates to the reporting of identified deficiencies in internal control.

The CSA might also consider providing guidance for disclosing the report of the auditor when an issuer chooses to voluntary engage its auditor. When an issuer engages its auditor to perform an audit of internal control to assist an audit committee in fulfilling its responsibilities, or for other reasons, then, such audits should be based on an integrated audit as set forth in the CICA standards and the issuer should disclose the auditors' report on internal control over financial reporting. On the other hand, we believe that the disclosure of attest reports by the auditor on elements of a business or specific components of internal controls, while potentially of assistance to those in charge of governance in fulfilling their responsibilities, should not be disclosed as this would create confusion and could lead to situations where investors place inappropriate reliance on the related auditors' report.

Responsibilities of the CEO and CFO

We believe the proposed National Instrument should be strengthened with respect to the expectations the CSA has for the CEO and CFO, beyond signing the certificates. We believe that a strengthening of "expectations" would not deter the initiatives of those issuers that have devoted appropriate resources to their assessments and evaluations while a strengthening of the CSA's expectations could and likely would serve to cause other issuers to reconsider the appropriateness of their efforts. In this regard we suggest that the CSA:

- Reconsider the general section of the companion policy and commence the companion policy with a statement to the effect that "management is responsible to ..."

- Introduce in the Companion Policy at the outset the concept of "reasonable assurance" to set a standard for issuers to consider. The introduction to the *Guidance Regarding Management's report on Internal Control Over Financial Reporting Under Section 13(a) or 15(d) of the Securities Exchange Act of 1934* referred to above contains in the introduction additional material

in this regard.

- Move the reference in the first paragraph of section 7.5 to the introduction and move the comment that the CEO and CFO maintain and cannot delegate the responsibility for the evaluation to early in the above referenced section.

- Emphasize more prominently the expectation expressed elsewhere that appropriate judgements are required.

- Consider adopting additional related phrases from the Guidance referred to in the first point above such as "bring its own experience and informed judgement to bear", and "such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs".

We also are of the view that the consequences of non-compliance will have to be more evident. Without some monitoring of actual compliance by the external auditors, the CSA or some other party, and without visible consequences for non-compliance, we are of the view that the disclosure objectives of the CSA will not be met and the needs of investors will suffer. We also believe it is not appropriate to implicitly give this monitoring responsibility to the audit committee and board of directors who must review and approve the MD&A before it is released. If the CSA wants the audit committee and board of directors to monitor and test management's ICFR disclosures and supporting processes, then it should clearly state this.

Responsibilities of the Audit Committee

At the present time, MI 52-110 requires the audit committee to review the MD&A and NP 58-201 suggests that the mandate of the board should acknowledge its responsibility for the issuer's internal control and management information systems.

In our view, the CSA should clearly state that the board is responsible for:
- Culture of integrity flowing from CEO & CFO.
- Risk identification and management.
- Internal control and management information systems.

The Audit Committee responsibility for:
- Reviewing the disclosures provided in the MD&A.
- Assessing the reasonableness of the processes followed by the CEO and CFO to evaluate DC&P and ICFR.
- Reviewing the issues raised in the evaluations performed by the CEO and CFO, the work of internal audit and the reports of the external auditors.

We think it is important, for both financial reporting and the protection of the directors, that the CSA clearly state what it expects the board and the audit committee to do.

Integration of Requirements/ Guidelines

We commend the CSA for their efforts to identify and integrate into the Companion Policy related guidance and information including National Policy 51-210 *Disclosure Standards,* Multilateral Instrument 52-110 *Audit Committees,* and National Policy 58-201 *Corporate Governance Guidelines.*

We believe that the CSA should reassess whether there are portions of the proposed MI 52-109 that unnecessarily differ from the guidance for management recently released by the United States Securities and Exchange Commission (RELEASE NOS. 33-8810; 34-55929; FR-77; File No. S7-24-06 *Commission Guidance Regarding Management's report on Internal Control Over Financial Reporting Under Section 13(a) or 15(d) of the Securities Exchange Act of 1934.*

We believe, given the number of cross-border registrants, that the introduction of unnecessary differences in definitions, requirements and or disclosure requirements, even if only in the Companion Policy, may create additional requirements and analysis for many issuers with little consequent benefit to investors in terms of incremental meaningful disclosure. Further, such differences may well be contrary to the overall aspirations of many Canadian Capital Market participants (see section above entitled "The Impact of Globalization").

Other Comments

We believe that reference to a control framework in the MD&A disclosure is highly desirable and consistent with the requirements in the United States and is necessary should an issuer wish to obtain audit assurance on their internal control over financial reporting. While the Companion Policy addresses many of the common elements within known control frameworks in the absence of a requirement to reference a control framework, we believe that the CSA should consider whether some additional guidance concerning the COSO components concerning monitoring of information and communications would be desirable.

We note that in the Companion Policy that section 6.4 indicates that the Instrument does "not prescribe specific components of DC&P or ICFR or their degree of complexity ....". We also note that the material in section 6.5, however, uses phrases such as "certifying officers should explicitly consider", "certifying officers would initially consider", and "generally consider". The CSA may wish to reconsider the use of such phrases and/ or present them in the context that the CSA members feel that many issuers' evaluations and assessments would be strengthened if management followed the procedures outlined.

Section 6.15 (4) lists items that certifying officers generally document. We believe that this list should be expanded to include a listing of all deficiencies in design and operational effectiveness identified.

Section 6.10 (d) lists, in the second paragraph, a number of services a reporting issuer's external auditor might perform. We believe that where an auditor is required to be independent, as is the case with most issuers and all larger issuers, that the provision of the services mentioned could impair the auditors' independence. The CSA may wish to reconsider the material in this section and or reference auditor independence requirements and the size limitation for the utilization of auditors that are not independent. We also observe that where auditors are not independent that this might well represent a "reportable deficiency" as defined.

Section 8.3 of the Companion Policy lists strong indicators of a reportable deficiency. We believe that this material should include the language considered in the SEC guidance for management as situations indicative of a deficiency that would require consideration as to whether such conditions, should they exist, would represent a material weakness.

The emphasis in the National Instrument is on the disclosure of information that would be useful to investors. The SEC Guidance for Management referred to above includes a section on Reporting Considerations. We believe that some of the material included in this guidance/thinking included therein should be considered for inclusion in the Companion Policy.

Specific requests for comment

Specific Request	Question	Comment
1.	Do you agree with the definition of "reportable deficiency" and the proposed related disclosures? If not, why not and how would you modify it?	In our view the definitions and concepts involved in the disclosure of ICFR weaknesses, should be harmonized with those in the United States.
2.	Do you agree that the ICFR design accommodation should be available to venture issuers? If not, please explain why you disagree.	Yes, assuming a reasonable challenge as to whether the issuer should avail itself of the accommodation – and that this decision is reviewed by the Audit Committee
3.	Do you agree that our proposal to provide a scope limitation in the design of DC&P and ICFR for an issuer's interest in a proportionately consolidated investment or variable interest entity is practical and appropriate? If not, please explain why you disagree.	Agree
4.	Do you agree that our proposal to allow certifying officers to limit the scope of their	Yes/No Agree with provision that 90

	design of DC&P or ICFR within 90 days of the acquisition of a business is practical and appropriate? If not, please explain why you disagree.	days seems inappropriately short in most instances. We would recommend at least six months if not one annual certification
5.	Do you agree that our proposal not to require certifying officers to certify the design of ICFR within 90 days after an issuer has become a reporting issuer or following the completion of certain reverse takeover transactions is practical and appropriate? If not, please explain why you disagree.	No – should have carve out wording (positive assurance on all else and negative assurance on carve out) – know what the. know disclose all relevant facts including known fraud etc
6.	Do you agree that the nature and extent of guidance provided in the Proposed Policy, particularly in Parts 6, 7 and 8, is appropriate? If not, please explain why and how it should be modified.	See above comments
7.	Are there any specific topics that we have not addressed in the Proposed Policy on which you believe guidance is required?	See above comments

Should you wish to discuss this response to your request for comments, please contact James L. Goodfellow at 416-601-6418 or Brian J. Reinke at 416-601-5757.

Yours truly,

Deloitte & Touche LLP

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