OGILVY RENAULT

LLP / S.E.N.C.R.L., s.r.l.

Direct Dial: (416) 216-2045
Direct Fax: (416) 216-3930
tkernahan@ogilvyrenault.com

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British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
New Brunswick Securities Commission
Registrar of Securities, Prince Edward Island
Nova Scotia Securities Commission
Superintendent of Securities, Newfoundland and Labrador
Registrar of Securities, Northwest Territories
Registrar of Securities, Yukon Territories
Registrar of Securities, Nunavut

To the attention of:	
Mr. John Stevenson Secretary Ontario Securities Commission 20 Queen Street West 19th Floor, Box 55 Toronto, Ontario M5H 3S8 e-mail: jstevenson@osc.gov.on.ca	Ms. Anne-Marie Beaudoin Directrice du secrétariat Autorité des marchés financiers Tour de la Bourse 800, Square Victoria C.P. 246, 22e etage Montréal, Québec H4Z 1G3 e-mail: consultation-en-cours@lautorite.qc.ca

Dear Sirs/Mesdames:

RE: Proposed Repeal and Replacement of Multilateral Instrument 52-109
Certification of Disclosure in Issuers' Annual and Interim Filings

This letter is submitted in response to the Notice and Request for Comments made by the Canadian Securities Administrators ("CSA") on the proposed repeal and replacement of Multilateral Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings*

(the "Proposed Rule") and includes comments generated from consultations with certain clients having a combined market capitalization of more than $150 billion. We appreciate the opportunity to comment on this important proposal to introduce internal control certification in Canada. We have the following comments on the Proposed Rule:

A. General

We support the CSA's decision not to proceed with Multilateral Instrument 52-111 *Reporting on Internal Control Over Financial Reporting* (the "Previous Proposal") and in particular, their decision not to mirror in its entirety the requirements of section 404 of the *Sarbanes-Oxley Act of 2002* and the related rules of the U.S. Securities and Exchange Commission (the "SOX 404 Rule"). We further support the CSA's decision not to require reporting issuers to deliver a management report assessing the effectiveness of their internal control over financial reporting ("ICFR") or a report of their external auditors prepared in accordance with the CICA's auditing standard for internal control audit engagements. However, as further described below, we believe that the proposed Canadian-made definition of "reportable deficiency" and its interpretation may create some confusion in the market, especially with respect to cross-listed issuers.

B. Implementation Date

Section 8.2 of the Proposed Rule provides that the rule will be effective for all issuers on the same date, which is currently proposed to be July 28, 2008. We note that in the Previous Proposal internal control certification was to be introduced on a staggered schedule based upon the market capitalization of the issuer. We note that the SOX 404 Rule was introduced on a staggered basis which allowed smaller issuers additional time to undertake the necessary requirements to allow certification and further allowed them to monitor the experience of larger issuers in complying with the rules.

We are of the view that staggered implementation of the Proposed Rule is the appropriate way to introduce such requirements. This recognizes the varying resources and expertise of different issuers in complying with the rules. In the Notice and Request for Comments the CSA state, in response to earlier public comments, that they have decided not to proceed with staggered implementation as they are of the view that the Proposed Rule appropriately addresses the concern about limited resources being available for implementation.

While we note that the requirements have been reduced by removing the requirement to file an external auditor's report, the certification requirements introduced are still, in our view, new and significant obligations for all issuers, especially for smaller issuers. The requirements will involve organizations and their executive officers ensuring there are proper procedures in place, which will include the preparation of all necessary risk and control documentation to make such certifications. Smaller issuers will have fewer dedicated resources to undertake these activities, so appropriate lead-in time should be provided for.

C. Cross-Listed Issuers

We support the exemption described in the Proposed Rule, pursuant to which if an issuer files or furnishes to the U.S. Securities and Exchange Commission ("SEC") and the Canadian securities commissions certificates that comply with the U.S. requirements, it should be exempted from the Canadian obligations. However, unless the CSA adopt definitions and corresponding interpretations of such definitions which are similar to those in SOX 404 (i.e. "material weakness" and "significant deficiency"), the Proposed Rule could create confusion since cross-listed issuers will use the U.S. definitions given the more onerous requirements of SOX 404 and Canadian-only issuers will apply the Canadian definitions. Obviously having two sets of definitions makes it more complicated for investors to understand reporting issuers' disclosure. Hence, as outlined in section D.1 below, we would strongly encourage the CSA to harmonize its definitions with the U.S. ones.

We are further concerned that another aspect of the Proposed Rule may create difficulties for cross-listed issuers. Sections 5.2 and 5.3 of Form NI 52-109F2 require an issuer to publicly disclose reportable deficiencies in the design of ICFR on an interim basis. This requirement is a departure from the SOX 404 Rule which generally requires only annual disclosure. The SEC's rules under SOX 404 do not require U.S. issuers to make disclosure on a quarterly basis of whether there are any material weaknesses. In footnote 20 to SEC release Nos. 33-8810 issued on June 20, 2007, the SEC stated that if management's evaluation process identifies material weaknesses in ICFR, but all material weaknesses are remediated by the end of the fiscal year, management may conclude that ICFR is effective as of the end of the fiscal year.[1] In effect, in many situations a U.S. issuer would simply report the interim material weakness to the audit committee and external auditor as required under the SOX 302 interim certification form and work to remediate the material weakness prior to year end. We believe the CSA may also wish to consider this approach in light of the concerns for such issuers. Interim disclosure of reportable deficiencies in the design of ICFR will be onerous for issuers as they will need their auditors to evaluate and confirm management's conclusions regarding control deficiencies, resulting in a significant increase in time and expense for such issuers each quarter.

D. Specific Request for Comments

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?

We are of the view that the definition of "reportable deficiency" and the accompanying guidance contained in Part 8 of the Companion Policy 52-109 are confusing and will create significant difficulties for issuers and their management in applying such a definition. In particular, we are of the view that the definition as drafted does not

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[1] The SEC also stated that management should consider whether disclosure of the remediated material weaknesses is appropriate under Item 307 or Item 308 of Regulations S-K or S-B or other Commission disclosure rules.

properly reflect the fundamental basis of the certification rules, namely material accuracy of financial statements. In applying this concept to the reporting of deficiencies to investors, the focus should not be on management identifying deficiencies but rather identifying which deficiencies are material weaknesses the reporting of which would provide important information to an investor.

Part 1 of Proposed NI 52-109 sets out that a reportable deficiency is a "deficiency or combination of deficiencies…that would cause a reasonable person to doubt that the design or operation of internal control over financial reporting provides reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with the issuer's GAAP". Nowhere in this definition is there a reference to the materiality of a deficiency or the materiality of a combination of deficiencies nor what standard is to be applied in determining whether there is an issue regarding the reliability of financial reporting. We are of the view that the actual definition should reference a threshold of materiality.

We note that the Companion Policy provides some guidance as to what constitutes a reportable deficiency. We find such guidance confusing and in some instances inconsistent. Section 8.1(1) appears to set out a general standard. It states that in order to have reliable financial reporting, there must be no misrepresentation in the annual or interim filings. Misrepresentation is defined in the *Securities Act* (Ontario) to be an untrue statement of a material fact or omission to state a material fact that is required to be stated or that is necessary to make a statement not misleading in light of the circumstances in which it is made. It further states that for an issuer's financial statements to be prepared in accordance with GAAP there must be no material misstatement. Notwithstanding this general guidance in section 8.1(1), section 8.1(4) states that a reportable deficiency relating to operation exists when a "properly designed component of ICFR does not operate as intended". A component of ICFR not "operating as intended" does not necessarily mean it is a material defect or would cause a reasonable person to question the reliability of the financial reporting.

If the CSA choose not to adopt the U.S. concept of "material weakness", the CSA should at the very least make it clear in the final Multilateral Instrument that the concept of materiality is the overriding principle in determining whether a deficiency should be reported. In their current drafting the Proposed Rule and Companion Policy do not significantly distinguish between inconsequential and material deficiencies. We also are of the view that further guidance should be provided as to when a combination of deficiencies will become reportable. In our opinion, a combination of deficiencies should generally only be considered where the deficiencies are related.

Furthermore, the concept of "reasonable person" should be developed as part of the Companion Policy. Is the reference to be interpreted as a reasonable person who is financially literate or any reasonable person? Since the concept of reasonable person is at the center of the proposed definition, guidance would seem necessary to better understand the proposed concept.

Significant guidance exists in the U.S. with regards to the interpretation of similar concepts used in the SOX 404 Rule. If the CSA choose to use different definitions from those in the U.S., the Companion Policy should provide guidance as to how the definition of "reportable deficiency" compares with the U.S. concepts of "material weakness" and "significant deficiencies". This would enable issuers who have looked or will look to the U.S. experience in developing their control procedures to understand the key differences between the two systems, if any.

2. *Do you agree that the ICFR design accommodation should be available to venture issuers? If not, please explain why you disagree?*

We are of the view that the ICFR design accommodation does not provide the necessary accommodation for venture issuers and that the CSA should consider implementing a broader exemption for venture issuers. We are concerned as to whether the CSA are satisfied that the benefit of full compliance with the rule will exceed the costs of compliance, specifically for smaller issuers. At the very least, the CSA should consider reinstating a staggered implementation date, as contemplated by the Previous Proposal which would allow venture issuers greater time to implement the Proposed Rule. The U.S. experience has shown that the costs are higher in proportion to their revenues for smaller issuers and, as such, an exemption or staggered implementation date would be appropriate for them.

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?*

We support, as a minimum position, the CSA 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. However, we have two concerns regarding this proposal. At a fundamental level, we question the relevance of an issuer providing this information with respect to proportionately consolidated investments and variable interest entities. Many issuers have limited participations in tens or even hundreds of entities, which may not be material for investors. Requiring disclosure for each such entity will generate information that may be lengthy without being necessarily relevant to investors.

In addition, from a practical perspective, we question how such a disclosure obligation can be met in respect of partially owned interests and joint ventures, where issuers are not involved in the design and cannot assess the effectiveness of DC&P and ICFR. At a minimum, guidance is required as to what is reasonable and sufficient to allow a certifying issuer to certify with respect to such interests or joint ventures. In many circumstances, an issuer may need to rely on reporting obligations contained in joint venture or other agreements. Even then, for many global companies with joint ventures in numerous countries, the proposed disclosure obligations may be very difficult to meet.

4. *Do you agree that our proposal to allow certifying officers to limit the scope of their 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?*

We do not agree with the CSA proposal to allow certifying officers to limit the scope of the design of DC&P or ICFR within 90 days of the acquisition of a business as the 90 day time period is not a sufficient length of time for such limitation. In the context of an arm's-length acquisition, it is highly unlikely that a purchaser would be able to thoroughly access or assess the target's corporate controls during the due diligence process. Such assessment would often require the assistance of internal and external auditors, who are generally not involved in those aspects of the due diligence. Also, in practice, the timeframe for due diligence processes has, in recent years, been greatly reduced, partly due to the introduction of virtual data rooms. Therefore, the process does not allow for sufficient time to assess a target's internal controls, particularly in cases where the target is a private company and has not documented its controls.

Even in those instances where a purchaser may identify some deficiencies in ICFR or disclosure controls prior to the acquisition or shortly thereafter, we are of the view that the 90 day period would be insufficient to remediate such deficiency before it needs to be disclosed. In the course of an acquisition, many deficiencies are remediated in the first year of the acquisition as reviews and audits are completed and therefore the appropriate period should be a minimum of one year. Ideally, the exemption should be of one year with respect to the design of ICFR or disclosure controls (like it is the case in the U.S.) and two years with respect to the assessment of their effectiveness.

In our view, the shorter the period of compliance, the more expensive the compliance will be and the greater the likelihood that deficiencies will be identified out of an abundance of caution due to a lack of time to properly assess or address potential deficiencies. Such identification will likely create some uncertainties in the market, and the Canadian issuers will thus be at a disadvantage compared to their U.S. counterparts. The 90-day period will be particularly problematic for acquisitions made later in an issuer's financial year.

Finally, we think the CSA should consider introducing a transition period for acquisitions made prior to the implementation of the Proposed Rule in order to allow issuers to properly address concerns relating to ICFR with respect to completed acquisitions.

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?*

Please see our response to question 4 above. We are of the view that the period following an initial public offering or the completion of a reverse take-over transaction is an intense period of activity for an issuer and represents a fundamental change to the governance

structure of such issuer. The time period should be extended to at least a year to allow the necessary time to implement and remediate deficiencies relating to ICFR.

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?*

We are of the view that the guidance provided in the Companion Policy is often inconsistent with the CSA's approach to corporate governance generally. In many instances the guidance appears to be mandatory and prescriptive and does not reflect the CSA's prior view that there is no one type of governance that is appropriate for all issuers, large and small. We are particularly concerned with the CSA prescribing the actions of directors and senior officers who are already the subject of fiduciary and other legal duties under corporate legislation. The Companion Policy should be amended to outline considerations, which may or may not be definitive for an issuer, and which a certifying officer or director may wish to consider or may determine, in his or her own judgment, not to be applicable. We are also concerned that the prescriptive nature of the guidance may have the effect of unnecessarily increasing the disclosure made by issuers.

Finally, we would request clarification, to the extent such guidance differs from that of the U.S., as to why that departure has been made. This will assist issuers who are relying on U.S. guidance.

7. *Are there any specific topics that we have not addressed in the Proposed Policy on which you believe guidance is required?*

We note that section 5.1 of the Companion Policy does not require an issuer and its certifying officers to design their ICFR using a control framework or to evaluate their effectiveness using such a control system. Since the Companion Policy states that this is the decision of the certifying officers, we question why the Companion Policy requires the MD&A to contain a statement to this effect. MD&A disclosure should be restricted to material information and should not include superfluous information that would distract an investor or reader.

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If you have any questions concerning these comments, please contact Tracey Kernahan, (416) 216-2045 (direct line), or by e-mail at tkernahan@ogilvyrenault.com or Thierry Dorval, (514) 847-4528 (direct line), or by e-mail at tdorval@ogilvyrenault.com.

Yours very truly,

Ogilvy Renault LLP