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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
Legal Registries Division, Department of Justice, Government of Nunavut

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Dear Sirs/Mesdames,

Re: Proposed Repeal and Replacement of MI 52-109, Forms 52-109F1, 52-109FT1, 52-109F2 and 52-109FT2, and Companion Policy 52-109CP Certification of Disclosure in Issuers' Annual and Interim Filings

The Canadian Bankers Association ("CBA") appreciates this opportunity to provide comments on the proposed repeal and replacement of Multilateral Instrument 52-109, Forms 52-109F1, 52-109FT1, 52-109F2 and 52-109FT2, and Companion Policy 52-109CP Certification of

Disclosure in Issuers' Annual and Interim Filings (the proposed instruments being referred to collectively as "NI 52-109").

We believe that it is important that where proposed Canadian requirements aim to achieve results that are similar to existing US certification and disclosure requirements, the specific certification and disclosure requirements should be harmonised to the greatest extent possible. Accordingly most of our comments point to provisions in NI 52-109 that differ from US requirements, where we believe the CSA should harmonize.

We have provided below responses to the specific requests for comments under proposed NI 52-109 that are relevant to us.

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?

No, we do not agree with the definition of "reportable deficiency" and the proposed related disclosures.

Reportable Deficiency Definition: We believe that, rather than introducing a new concept of "reportable deficiency", NI 52-109 should be aligned with the "material weakness" concept articulated under SOX 404. There is a large body of work and thinking on what constitutes a "material weakness" and Canadian issuers should be able to rely on that work when assessing the effectiveness of their ICFR. Introducing a new concept can only create confusion for both issuers and users of the disclosure. In addition, for inter-listed issuers it creates uncertainty as to whether the standards of "reportable deficiency" and "material weakness" are the same or different. There is a concern that with differing definitions in Canada and the United States, inter-listed companies will have two different tests to meet. This creates the possibility that a deficiency would be reportable in Canada but not in the United States or vice versa, resulting in conflicting disclosure between an issuer's Canadian and U.S. public disclosure.

We also note that the SEC has recently taken action to revise the definition of "material weakness" by replacing the "more than a remote likelihood" standard with a "reasonable possibility" standard. This change is designed to reduce the number of controls to be tested and the effort required to assess the remaining controls, thereby increasing the efficiency and cost-effectiveness of the ICFR assessment process. The definition of "reportable deficiency" appears broad and does not follow the direction taken by the SEC to raise the threshold for material weaknesses or appear to be in line with the CSA's belief that a top-down, risk-based approach is appropriate. Again, we believe that NI 52-109 should use the "material weakness" concept.

Related Disclosures: We understand that the qualification in section 5.2 is meant to provide issuers with the ability to certify the design of their ICFR on an interim basis where they have discovered a reportable deficiency in the design of their ICFR that is un-remediated but for which a remediation plan is in place. As drafted, this section seems to require a positive obligation to identify and disclose all reportable deficiencies in the design of ICFR on an interim basis. This is because the current wording implies that in order to provide the section 5(b) certification, an issuer must determine if any disclosure under section 5.2 is necessary and therefore must complete a quarterly evaluation of the effectiveness of the design of their ICFR. This interim obligation is not consistent with the approach adopted by the SEC which does not require an evaluation of the effectiveness of the design of ICFR on an interim basis even for its domestic issuers. We feel the CSA's proposed approach is unreasonable as a quarterly review or evaluation would impose considerable additional costs and burdens on issuers.

We believe that the CSA should clarify that the requirement to provide the disclosure in section 5.2 does not require an issuer to evaluate the effectiveness of the design of its ICFR on an interim basis. The CSA should explicitly state that section 5.2 only requires an issuer to disclose reportable deficiencies in the design of their ICFR necessary to qualify the certification in 5(b). To this end we submit that the CSA should set out in the Instrument itself, rather than the section 5.2 of Form NI 51-109F2, what disclosure is required to be included in the interim MD&A relating to a reportable deficiency in the design of ICFR and when this disclosure is required. We note that this approach would clarify that an interim evaluation of the design of ICFR is not required under the new instrument and therefore would not require issuers to adopt new controls and processes in order to comply with the Canadian certification requirements.

Further, we believe that any requirement to disclose information in an issuer's MD&A should be subject to the general disclosure standard of Part 1(e) of National Instrument 51-102F1 (Management's Discussion & Analysis) which provides that issuers should "Focus your disclosure on material information. You do not need to disclose information that is not material." We believe that any requirement to disclose a control deficiency in the MD&A should be limited to deficiencies that the issuer believes are material to a reasonable investor in the issuer's securities. This is consistent with an issuer's disclosure obligations under SOX 404 and the SEC's regulations thereunder. This is also consistent with both the SEC and NI 52-109 disclosure obligations with respect to changes in ICFR where the obligation is to disclose changes in ICFR that have materially affected, or are reasonably likely to materially affect an issuer's ICFR.

Finally, we note that 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.

2. 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.

Not entirely. While we agree with the 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, we submit that the disclosure obligations under subsection 2.3(2) of NI 52-109 should only apply in respect of entities that, based on the issuer's top-down, risk based approach to DC&P and ICFR design, would have been within the scope of the issuer's design of DC&P and ICFR absent the limitation. The disclosure obligations should not apply to entities that the issuer has determined are not within its design requirements because the entity is an area with little or no risk to the issuer as a whole. Failing to provide for such exception would undermine the CSA's belief that a top-down, risk-based approach is an appropriate design approach. It would also be inconsistent with the general disclosure standard of Part 1(e) of National Instrument 51-102F1 (Management's Discussion & Analysis) directing issuers to focus on material information.

[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.

Finally, it would be incongruous for issuers to be required to provide summary financial information for non-material proportionately consolidated entities, variable interest entities or acquired businesses as provided in s. 2.3(2)(b) of NI 52-109. This is recognized, for example, in s. 5.4 of National Instrument 51-102CP, which directs issuers to provide the disclosure required by s. 5.7 of National Instrument 51-102 (Additional Disclosure for Reporting Issuers with Significant Equity Investees) only if the equity investee meets the significance tests in Part 8 of the National Instrument. NI 52-109 should proceed on a similar basis.

3. 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.

Not entirely. While we agree with limiting the scope of the design of DC&P and ICFR for a newly acquired business, we have two concerns about the current proposal. First, we submit that the limitation should apply for up to a year from the date the business is acquired. In many cases a period of 90 days would not be a reasonable amount of time for management to properly design and evaluate the DC&P and ICFR of a newly acquired business. This is consistent with the SEC's position that management may omit a material acquired business's ICFR from its assessment of ICFR for up to one year from the date of the acquisition of such business, if it is not possible to conduct an assessment of the acquired ICFR between the acquisition date and the date of management's assessment. .

In addition, as explained above, the related disclosure obligations under subsection 2.3(2) of NI 52-109 in respect of a newly acquired business should only apply if it is determined that, absent the limitation, such business would have been within the scope of the issuer's design of DC&P and ICFR, and that the acquisition is material. We note that under SOX 404, the SEC permits a registrant to exclude an immaterial acquisition from the SOX 404 assessment. Materiality is not expressly a factor in NI 52-109, implying that all acquisitions, regardless of size and significance to the issuer's business, must be disclosed if excluded. This is inconsistent with the CSA's top-down, risk-based approach that it has expressed should be applied.

We believe that this lack of harmonization with the SEC's standards will be unduly burdensome for issuers who make acquisitions throughout their financial year. More particularly, inter-listed issuers who presently apply a top-down, risk-based approach to determine scope, whether they have to include acquisitions in the scope of their SOX 404 assessments based on qualitative and quantitative determinations of materiality or disclose the acquisition as a scope limitation / exclusion, would have to adopt an entirely different, new and costly process to adhere to the NI 52-109 requirements, in addition to those procedures already adopted to meet the SOX 404 requirements.

4. Do you agree that the nature and extent of guidance provided in the Companion Policy 52-109CP to NI 52-109 (Proposed Policy), particularly in Parts 6, 7 and 8, is appropriate? If not, please explain why and how it should be modified.

Not entirely. We find that the increased level of detail in the Proposed Policy about how to design and evaluate DC&P is inconsistent with the top-down, risk-based approach advocated by the CSA. It is also inconsistent with previous CSA guidance provided in the Companion Policy to Multilateral Instrument 52-109 (MI 52-109) in which the CSA stated it intentionally did not prescribe the degree of complexity or any specific policies or procedures that must make up DC&P and that these considerations are best left to management's judgement based on the size, nature of the business and complexity of the issuer's operations. We believe this is another area

where the CSA should not depart from SEC guidance on the design and evaluation of DC&P. In Release Nos. 33-8124 and 34-46427 dated August 28, 2002, the SEC did not prescribe any particular controls or procedures to be used by issuers, although it is clear that the DC&P must emphasize ensuring that information flows up the chain; i.e., internal communications and other procedures operate so that important information flows to the appropriate collection and disclosure points in a timely manner. The SEC stated that it does not require any particular procedures for conducting the required review and evaluation of DC&P, and instead it expects the issuer to develop a process that is consistent with its business and internal management and supervisory practices, and its only concrete recommendation is that the issuer establishes a disclosure committee. We are unaware of a regulatory concern with the quality of issuers' DC&P design and evaluation, and believe that the proposed detailed guidance in the Companion Policy might be interpreted as requiring the guidance to be followed even if inappropriate to the issuer's business and internal management and supervisory practices.

While the Companion Policy states in various places that it is not meant to be prescriptive, the overall effect is the opposite with respect to DC&P compared to the current guidance and the SEC's approach. The Companion Policy seems to start from the position that there is substantial overlap between the concepts of ICFR and DC&P such that they are interchangeable as to the CSA's guidance, except in the instances noted in the Companion Policy. In practice, one area of an issuer may design ICFR and another area may design the balance of DC&P that do not overlap with ICFR. This is a rational and efficient approach that stems from a need to make practical distinctions between the two concepts in order to apply them to the issuer's actual business, internal management and supervisory practices. However, as a consequence of this, it is not correct to proceed on the basis that most guidance relating to ICFR should also apply to DC&P. We would therefore urge the CSA to focus its guidance in the Companion Policy on ICFR and to revert to the previous, more general approach to DC&P. This would minimize additional costs and potential disruption because issuers have developed DC&P and organized their approach to the two concepts on the basis of the current guidance and the SEC's approach.

Specifically with respect to evaluation, while we acknowledge that Part 7.3 of the Companion Policy states that NI 52-109 does not prescribe how certifying officers should conduct their DC&P and ICFR evaluations, we believe that additional emphasis should be provided that not all evaluation tools are appropriate for each control and that DC&P and ICFR evaluations can be conducted in different manners with different levels of documentation. We believe that many of the evaluation tools outlined in Part 7.6 of the Companion Policy are not applicable to DC&P evaluations. For example, Part 7.6 lists reperformance as an evaluation tool for both DC&P and ICFR and Part 7.9 of the Companion Policy describes how reperformance is conducted. Reperformance is an appropriate tool for evaluating a control that is generally considered an ICFR (such as inspecting whether the quantity and price information in a sales invoice agrees with the quantity and price information in a purchase order, and confirming that an employee previously performed this procedure); however, it is not an appropriate tool for evaluating a control that is generally considered a DC&P (such as issuing a news release).

Furthermore, Section 6 of Form 52-109FI and 52-109F2 specifically allows DC&P to be designed under the certifying officers' supervision which appears to be inconsistent with Part 7.6 of the Companion Policy. For example, the certifying officers of many large issuers may have delegated the activity of designing and evaluating the issuer's DC&P to a disclosure committee under their supervision. Part 7.6 of the Proposed Policy provides examples of tools that certifying officers can use to evaluate DC&P and ICFR, however in reality members of the disclosure committee under the certifying officers supervision, not the certifying officers, would be the individuals using these evaluation tools.

These are two areas where it would be helpful to emphasize that a particular evaluation tool might not be appropriate for all types of controls. Overall, as noted above, we believe that the emphasis and guidance should be on the design and tools of evaluation for ICFR and not DC&P.

5. Other comments:

Management report on effectiveness of ICFR: Paragraph 6(b) of Form 52-109F1 (Certification of Annual Filings) requires that an issuer's certifying officers disclose in the issuer's annual MD&A their conclusions as of the financial year end about the effectiveness of the issuer's ICFR, a description of the process used to evaluate the effectiveness of ICFR and a description of any reportable deficiency relating to operation (the management report). We request that paragraph 6(b) be amended to give an issuer the option to include its management report either in its annual MD&A or as a stand-alone report. This would allow issuers the option to appropriately highlight the management report to investors in a location of the annual report to shareholders that suits the framework of their specific report. For example, some issuers may wish to have the management report on ICFR and the report on management's responsibility for financial reporting together in close proximity to the Auditor's Reports on financial statements on ICFR which is customarily immediately after the MD&A and at the beginning of the audited financial statements. In doing so, the management report would still be filed on SEDAR and would attract the same degree of liability as if it were located in the MD&A. Moreover, allowing issuers this flexibility to have stand-alone reports would be consistent with the SEC's approach of requiring a stand-alone report.

Board Reporting of fraud involving individuals with a significant role in the issuer's ICFR: The title to paragraph 8 of Form 52-109F1 is "Reporting to the issuer's auditors and board of directors or audit committee" while the certification states that the relevant fraud disclosure has been made to issuer's auditors, board of directors and audit committee. We believe that the title and content of the paragraph should be consistent and we believe that reporting to the board of directors or audit committee is more appropriate and is closer in line to SOX 302 requirements.

Certification of Annual and Interim Filings: Under Forms NI 52-109F1 and NI 52-109F2, the CEO and CFO are now required to certify that the information required to be disclosed by the issuer in the annual (interim) filings or other reports filed or submitted by it under securities legislation is "recorded, processed, summarized and reported within the time periods specified in securities legislation".

Since DC&P is defined under NI 52-109 as those procedures designed to ensure that information required to be disclosed is "recorded, processed, summarized and reported within the time periods specified in the securities legislation", and certifying officers already certify in respect of DC&P we believe it is redundant to include this new certification.

We also note that the certifications required under NI 52-109 are similar to those required under SOX 404 except for the requirement to disclose a "description of the process used by management to evaluate the effectiveness of ICFR" under NI 52-109. It is unclear whether this is a reference to the framework used by management to evaluate the effectiveness of ICFR, or a full description of management's process. Further clarity on what is expected should be provided.

Control Framework Disclosure in Interim MD&A: We believe it is unnecessary to include Part 5.1 (Control Framework) in Form 52-109F2 which requires disclosure in the interim MD&A of the control framework. The control framework is required to be disclosed in the annual MD&A and Instructions to Item 2.2 (Interim MD&A) in Form 51-102F1 allows issuers to assume the reader has access to your annual MD&A and the issuers do not have to duplicate the discussion if the disclosure is substantially unchanged. Requiring discussion of the control framework on an interim basis is inconsistent with the CSA approach to interim MD&A disclosure.

Exemption for issuers that comply with U.S. laws: We note that Canadian MJDS issuers provide the various certifications and disclosures required by the SOX 302 and SOX 404 rules on an annual basis. We believe these represent the majority of inter-listed Canadian issuers. However, these issuers cannot take advantage of the exemption provided in s. 7.2 of NI 52-109 unless they file signed certificates relating to the quarterly report filed or furnished with the SEC under SOX 302. These would be additional, voluntary filings, not required by the SEC for foreign private issuers.

To achieve compliance with the SOX 302 and 404 rules, work is done on a quarterly basis and "rolled up" for the annual certification and disclosures. Having auditors involved in the process, as required by the SOX 404 rules, leads to a very rigorous process. In our view, a formal quarterly certification and disclosure process does not add a significant amount of value to these annual requirements, but would add significant costs.

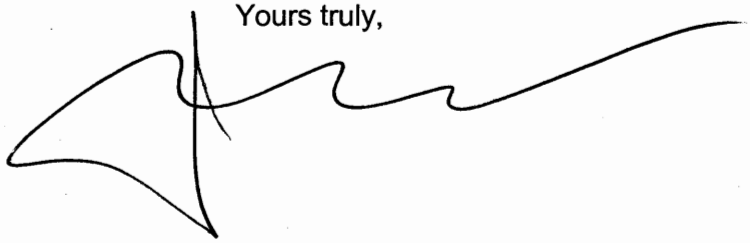
We do not believe Canadian MJDS issuers should be forced to choose between additional, voluntary SEC filings and the attempting to reconcile the differences between the Canadian and US certification and disclosure requirements. For this reason, we urge the CSA to increase the harmonization of the two regimes wherever possible as described further above. In addition, we request the CSA to reconsider whether an exemption could be provided in NI 52-109 from the new ICFR disclosure and certification aspects of the rule if the issuer is in compliance with SOX 404 rules and management's annual report on ICFR and the related independent auditors' report is included in the issuer's annual report filed with the SEC. This would be similar to the exemption contained in s. 7.4 of proposed MI 52-111.

Asset Backed Securities Issuers: We believe it is onerous for Asset Backed Securities issuers to meet the obligations under NI 52-109 given the nature and purpose of these types of issuers and we would recommend that the CSA take the U.S. approach and exclude them from the requirements of NI 52-109.

Continuation of Exemptive Relief: Several banks establish subsidiaries that operate as special purpose vehicles and are reporting issuers under Canadian securities law. These subsidiaries issue a range of innovative capital instruments that, under stringent conditions, qualify as Tier 1 regulatory capital. Exemptive relief from the continuous disclosure requirements, including the preparation and filing of an annual information form, annual and interim financial statements and accompanying MD&A and the applicable certification requirements under current Multilateral Instrument 52-109, have been applied for and provided to these subsidiaries by securities regulators. In the interests of efficient regulation, we recommend that an exemption similar to the one contained in s. 13.2 of National Instrument 51-102 be provided allowing a reporting issuer with relief under current Multilateral Instrument 52-109 to continue to rely on such relief with notice to securities regulators.

We have appreciated the opportunity to express our views regarding NI 52-109. We would be pleased to answer any questions that you may have about our comments.

Yours truly,



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