CANADIAN BANKERS ASSOCIATION

Box 348, Commerce Court West
199 Bay Street, 30th Floor
Toronto, Ontario, Canada M5L 1G2
www.cba.ca

Nathalie Clark
General Counsel & Corporate Secretary
Tel: (416) 362-6093 Ext. 214
Fax: (416) 362-7708
nclark@cba.ca

June 17, 2008

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Nova Scotia Securities Commission
New Brunswick Securities Commission
Office of 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
Registrar of Securities, Legal Registries Division, Department of Justice, Government of Nunavut

RECEIVED
JUN 2 0 2008
Ontario Securities Commission
SECRETARY'S OFFICE

c/o Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
Tour de la Bourse
800, square Victoria
C.P. 246, 22 étage
Montreal, Québec H4Z 1G3
Email: consultation-en-cours@lautorite.qc.ca

John Stevenson
Secretary
Ontario Securities Commission
20 Queen Street West
19th Floor, Box 55
Toronto, Ontario M5H 3S8
Email: jstevenson@osc.gov.on.ca

Dear Sirs/Mesdames,

Re: Proposed National Instrument 52-109
Certification of Disclosure in Issuers' Annual and Interim Filings

The CBA works on behalf of 51 domestic chartered banks, foreign bank subsidiaries and foreign bank branches operating in Canada and their 257,000 employees to advocate for efficient and effective public policies governing banks and to promote an understanding of the banking industry and its importance to Canadians and the Canadian economy.

The CBA appreciates the amount of time and effort that the Canadian Securities Administrators ("CSA") have devoted to revising the certification requirements and we welcome the opportunity to provide you with our comments on the proposed repeal and replacement of Multilateral Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings* and its related instruments that were published for comment on April 18, 2008 ("Proposed NI 52-109").

Our comments are set out below.

A. Identification and Disclosure of Material Weaknesses in Internal Control over Financial Reporting (ICFR)

Section 5.2 of proposed Form 52-109F2 requires issuers to provide disclosure in its interim Management's Discussion and Analysis ("MD&A") for each material weakness relating to design of ICFR existing at the end of the interim period. We note that the relevant rules under the U.S. Sarbanes-Oxley Act ("SOX") promulgated by the U.S. Securities and Exchange Commission ("SEC") 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 Interpretive Release No. 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] Thus, an U.S. issuer is permitted to report the interim material weakness to its audit committee and its external auditor, as required under the SOX 302 interim certification form, and can then work to remediate the material weakness prior to year end. Of course, the issuer must also comply on an interim basis with the requirement to disclose any changes in the issuer's ICFR that have materially affected, or are reasonably likely to materially affect, the issuer's ICFR. The SEC's approach recognizes that the issuer and its audit committee are in the best position to determine what disclosure is appropriate after analyzing and considering the material weakness in the context of the issuer's overall controls, including whether there are sufficient compensating controls.

Under both Proposed NI 52-109 and the applicable SEC rules, the evaluation of the effectiveness of ICFR is conducted on an annual basis. The proposed Form 52-109F2 section 5.2 requirement to disclose ICFR design material weaknesses and their impact on financial reporting and ICFR on an interim basis is a departure from the requirement under Proposed NI 52-109 to assess the effectiveness of the design of ICFR on an annual basis. Interim disclosure of material weaknesses in the design of ICFR will be particularly onerous for inter-listed 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. We submit that the section 5.2 requirement, as currently drafted, imposes an additional regulatory burden on inter-listed issuers that is unreasonable in light of its substantive divergence from the SEC's approach and the CSA's proposed goal of harmonizing the regulatory requirements within North America. We strongly urge the CSA to replace the section 5.2 requirement, as currently drafted, with a requirement to report any material weaknesses identified at the end of the interim period to the issuer's audit committee and external auditors at that time, and, if the material weaknesses are not remediated by year-end, to disclose them in the issuer's annual MD&A.

If the CSA chooses to maintain the section 5.2 requirement as currently drafted, we submit 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.* Part 1(e) instructs issuers as follows: "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

[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.

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 approach is consistent with an issuer's disclosure obligations under SOX 404 and the SEC's regulations thereunder. This is also consistent with disclosure obligations imposed by both the SEC and the Proposed NI 52-109 in respect of changes in ICFR in that the obligation is to disclose changes in ICFR is limited to those changes that have materially affected, or are reasonably likely to materially affect, an issuer's ICFR.

B. Weakness in Disclosure Controls and Procedures (DC&P)

Part 10.1 of the Companion Policy to the Proposed NI 52-109 states that if a weakness is identified in the design or operation of an issuer's DC&P that is significant and exists as at period end, the certifying officers cannot conclude that DC&P is effective. This must be disclosed in the annual MD&A.

We submit that this is not an appropriate standard upon which to assess the effectiveness of DC&P. The Proposed NI 52-109 does not provide any definition or guidance on how to interpret the concept of "weakness in DC&P that is significant"; furthermore, this concept is not part of the equivalent requirements under the relevant SOX rules. In the absence of any common understanding regarding the meaning of this concept, different issuers will interpret the standard differently. This will lead to inconsistent disclosure which will undermine the ability of users of the disclosure to properly assess the strength of DC&P among issuers.

We submit that the objective of DC&P is to provide reasonable assurance that material information about an issuer is disclosed completely, accurately and in a timely fashion. A consideration of whether DC&P are effective should therefore focus on this objective. We submit that the appropriate standard should be drawn from the concept of a material weakness and focus on material information. We suggest that an issuer should not be able to conclude that its DC&P are effective if there is a deficiency, or combination of deficiencies, in DC&P such that there is a reasonable possibility that material information required to be disclosed by the issuer in its annual filings, interim filings or other reports filed or submitted by it under securities legislation is not disclosed within the time periods specified in the securities legislation.

Part 10.2 of the Companion Policy imposes a disclosure requirement in respect of a weakness in the design of DC&P that is significant at the time of filing an interim certificate. The concerns outlined above regarding the meaning of a "weakness in DC&P that is significant" also apply here and, again, we strongly urge the CSA to change "significant" and refer to a standard of materiality. The adoption of a materiality standard will provide greater clarity to issuers in their application of this provision and will result in increased consistency in disclosure to investors.

C. Scope Limitations

Part 6.6 of the Companion Policy to the Proposed NI 52-109 indicates that the approach outlined in Proposed NI 52-109 is a top-down, risk-based approach which is intended to assist certifying officers to focus their resources on the areas of greatest risk and avoid expending unnecessary resources on areas with little or no risk. In line with this risk-based approach, we encourage the CSA to adopt the recommendations relating to Parts 13 and 14 below which would clarify or confirm that when an issuer has determined that an entity is "out of scope" – that is, in an area of little or no risk to the issuer – that the issuer need not do anything further.

Part 13.3(4) of the Companion Policy to the Proposed NI 52-109 provides additional guidance regarding disclosure of a scope limitation relating to a proportionately consolidated entity (PCE) or variable interest entity (VIE). In order for this guidance to provide greater clarity and be better harmonized with the rest of the Proposed NI 52-109, we recommend that the phrase "material misstatement" in the second, third and fourth paragraphs of the subsection be qualified by the phrase "that will not be prevented or detected on a timely basis".

We submit that Part 14.1 of the Companion Policy to the Proposed NI 52-109 should be revised to make explicit that it only applies to material recent business acquisitions in order to provide greater clarity to issuers. If the business acquisition is not material to the total entity (considering both quantitative and qualitative factors), under the risk-based approach supported by the CSA, by definition it would be out of scope.

Part 14.2 of the Companion Policy provides the requirements surrounding disclosure of a scope limitation relating to business acquisitions. Where a scope limitation is applied because of a business acquisition, there should be no requirement to summarise certain financial information about the acquired business as required under Part 14.2 as currently drafted. Rather, we submit that this disclosure requirement should be subject to the same materiality standard as Part 14.1. Without a materiality standard, issuers would be obligated to disclose immaterial financial information for an acquired business that is scoped-out because it is immaterial, which would only serve to confuse investors who are accustomed to receiving material information in disclosure documents. In addition, if a particular material business acquisition is subject to a scope limitation for up to 360 days, the issuer's disclosure should focus on what is material and within the scope of the disclosure. We note that if an acquisition is "significant" within the meaning of National Instrument 51-102 *Continuous Disclosure Requirements* ("NI 51-102"), then financial information is required to be provided to investors; where the "significant acquisition" threshold is not met, no financial information is required to be disclosed under NI 51-102. Mandating the provision of summary financial information for an acquisition under Part 14.2 of the Proposed NI 52-109, regardless of the significance of the acquisition, creates an inconsistency with NI 51-102 that will be unduly confusing for investors and not provide meaningful or consistent disclosure. In this regard, we also note that the similar requirement in subsection 13.3(4) of the Companion Policy regarding the disclosure of a scope limitation relating to a PCE or VIE is subject to a materiality standard.

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

Yours truly,