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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
Registrar of Securities, Legal Registries Division, Department of Justice, Government of Nunavut

c/o John Stevenson, Secretary
Ontario Securities Commission
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c/o Anne-Marie Beaudoin, Directrice due secrétariat
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Dear Sirs/Mesdames:

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

This letter is in response to the Request for Comment published at (2008) 31 OSCB (Supp-3) concerning Proposed Repeal and Replacement of Multilateral Instrument 52-

109 *Certification of Disclosure in Issuers' Annual and Interim Filings* with National Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings* (NI 52-109).
Generally, we support the objective of the proposal to improve the quality, reliability and transparency of annual, interim and other materials that issuers file or submit under securities legislation. We also support the decision to more closely align our requirements with those of the Securities Exchange Commission (SEC) for non-venture issuers as we believe this will create less confusion in the marketplace.

We recognize that after cost benefit considerations were analyzed that mandating an audit of internal control over financial reporting (ICFR) was determined not to be appropriate in the Canadian marketplace and we support that decision. However, we are concerned that investors may inadvertently assume that the external auditor has audited management's assertions with respect to internal control over financial reporting which can expose external audit firm's to litigation. This concern arises because a significant number of profile non-venture issuers are cross-listed in the United States and investors are used to these non-venture issuers either providing investors with their external auditor's report on ICFR or disclosing that their external auditor has not completed an audit of ICFR. Thus, we believe there is a risk that without appropriate MD&A disclosure that Canadian investors may believe an audit on ICFR has been completed by the external auditor which inappropriately exposes external audit firms to litigation risk. We recommend that the following language be required disclosure in MD&A of non-venture issuers: "Management's report on internal control over financial reporting was not subject to audit by the Company's external auditor as permitted under NI 52-109."

Our specific comments are noted below.

Effective date
The rule indicates in Section 9 that NI 52-109 will come into force on December 15, 2008. Section 1.2(2) indicates it applies to interim and annual periods ending on or after December 15, 2008. We do not believe it is sufficiently clear for an issuer with a reporting period prior to December 15 (i.e., a reporting issuer with an interim or annual period ended November 30, 2008) but filing a certificate on or after December 15, 2008 whether they can file the certificate required under current MI 52-109 as this rule would be effectively repealed and replaced.

As well, it could be clarified whether a reporting issuer could elect to file the new form of certificate and comply with the guidance in the new Companion Policy. This might be desirable for reporting issuers wishing to avail themselves of the scope exemptions. We recommend that the CSA clarify which form should be filed by reporting issuers with periods ending prior to December 15, 2008 but filing subsequent to that date. We also recommend that early adoption of NI 52-109 be allowed.

MD&A disclosure

Venture-issuers electing to certify on design and effectiveness of DC&P and ICFR
We do not believe it is sufficiently clear, whether a venture who elects to file Form 52-109F1 or Form 52-109F2 should consider all the guidance applicable to a non-venture issuers contained within the CP. We recommend changing CP1.3 to indicate that if a Venture Issuer elected to file Form 52-109F1 or Form 52-109F2 they should consider the guidance in Parts 5 through 14.

Design of internal control
CP 6.6(2) and 6.6(10) discuss the application of a top-down risk-based approach to designing DC&P and ICFR. We believe proper context for this guidance has not been established as it leaves the impression that the only reason for designing DC&P and ICFR is to meet regulatory requirements. 6.6 (a) indicates "This approach will allow certifying officers to avoid unnecessary time and effort designing components of DC&P and ICFR that are not required to obtain reasonable assurance." We believe management should be encouraged to design DC&P and ICFR necessary to meet their business objectives but at a minimum the controls should comply with regulatory requirements. We also recommend altering the CP to clearly indicate that the approach recommended is for certifying design as opposed to a recommended approach to designing controls. .

Fraud risk
CP 6.6(3) discusses the identification of fraud risks. The statement is made that "certifying officers should be concerned with fraud that could cause a material misstatement in the financial statements". We recommend that this statement be expanded to include all 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.

ICFR design challenges
CP6.11 sets out certain ICFR design challenges issuers might face. We do not see the value in this section as solutions to the design challenges are not suggested for all the areas discussed.

If the section is retained, we recommend CP 6.11(d) related to qualified personnel be amended. This section indicates that in certain circumstances, where independence rules allow, the auditor of the issuer may be engaged to provide expert advice. The CP indicates that "This type of arrangement should not be considered to be a component of the issuer's ICFR"; however, if it is not then we believe the issuer would not have adequate ICFR. We recommend deleting this statement.

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Safeguarding of assets
CP 6.15(4)(g) indicates that certifying officers should generally document controls over the safeguarding of assets. We don't believe it is necessary to separately distinguish such controls and recommend deleting this requirement.

Self-assessments
CP 7.10 indicates that when evaluating controls that self-assessment by individuals who operate the control would normally be supplemented by direct testing by individuals who are independent from the operation of the control being tested and who have an equal or higher level of authority to corroborate evidence from the self-assessment. We agree with the principle that corroboration is required by an individual independent from the operation of the control but do not believe that the testing must be from a person of equal or higher authority.

CP 7.10 also indicates that in situations where a certifying officer is involved in the operation of a control and performs a self-assessment that even if no other members of management independent from the operation of the control with equal or higher level of authority can perform direct testing, the certifying officer's self-assessment alone would normally provide sufficient evidence since the certifying officer signs the annual certificate. We believe this guidance should be clarified to indicate that both certifying officers need to be involved in the operation of the control in this situation; otherwise, one certifying officer will have no basis for signing their certificate. For example, if the CFO was directly involved in the review of various key account reconciliations then the CFO would have a basis for signing the certificate. However, if the CEO was not involved in the operation of this control then the CEO would have no basis for signing the certificate in this circumstance unless the CEO was the reviewer of the work of the CFO. By removing the requirement to have someone with an equal or higher level of authority corroborate evidence as suggested above this might alleviate the difficulty for smaller entities to obtain appropriate evidence to support their certifications.

Use of a specialist
CP 8.5 discusses the use of a specialist and certain controls, policies and procedures which should be in place. We recommend that the additional guidance be included that management accepts responsibility for the results of the service expert and as a consequence, if an error is found in the work of the specialist that management must evaluate the severity of the deficiency and consider whether it represents a material weakness.

Disclosure of a material weakness relating to the design or operation of ICFR
CP CP9.6 (1) and (2) discuss when a material weakness related to design or operation of ICFR should be disclosed. In practice it is difficult to differentiate between differences arising from design or operating effectiveness. We recommend that the CSA consider requiring disclosure of any material weakness known at a period end.

Compensating controls vs. mitigating controls and disclosure of mitigating procedures related to material weakness
CP9.7 indicates an issuer with a material weakness that is unable to remediate or which has chosen not to remediate the material weakness should identify mitigating procedures that reduce the impact of the material weakness and to disclose these procedures in their annual or interim MD&A in order to provide investors with an accurate and complete picture of the material weakness. We are concerned that investors may inappropriately conclude from such disclosures that a material weakness has been compensated for by such disclosures and thus, may diminish the impact of the material weakness disclosure. For this reason, we recommend deleting this guidance.

Alternatively, if this guidance remains we believe further clarification is required, through examples, which demonstrate the distinction between remediating and compensating controls in CP 9.1(3). Additionally, CP 9.1(3) indicates "If the certifying officers are unable to identify a compensating control, then the issuer would have a deficiency relating to the operation of ICFR". This wording may imply that if a compensating control did exist that a deficiency does not exist; however, we do not believe this in the case. We recommend clarifying that a control deficiency that has been compensated for remains a control deficiency.

Weakness in DC&P that is significant
CP 10.1 indicates that if a weakness in the design of operation of DC&P is significant and exists at the period end date, the certifying officers could not conclude that the issuer's DC&P is effective. We are uncertain whether the term "significant" is a lower threshold than "material weakness" which is applied to ICFR. We recommend adding language which indicates that conceptually the threshold for what constitutes a significant weakness in DC&P is meant to be equivalent to what constitutes a material weakness but in the context of the broader definition of DC&P which encompasses the financial statements and other materials filed with the regulator. .

Overlap of conclusions on ICFR effectiveness with conclusion on DC&P effectiveness
CP10.3 indicates that if a material weakness in the issuer's ICFR exists this will "often" represent a significant DC&P weakness. Given that a material weakness only exists when there is a reasonable possibility of material misstatement in the annual or interim financial statements and the financial statements are a key component in the disclosures covered by disclosure controls and procedures, we believe "often" should be replaced

with "always" or "almost always". Alternatively, we recommend the CSA encourage issuer's to provide disclosure to explain why they have concluded that DC&P is effective when ICFR is ineffective given the apparent contradiction as this would be useful information for investors.

Business acquisition scope limitation disclosures
We believe that an issuer should not be required to disclose a scope limitation if a business acquisition, individually or in combination with another such acquisition, does not include risks that could reasonably result in a material misstatement, and that the summary financial information when a scope limitation applies may be disclosed in aggregate or individually, for each business acquisition. We believe this should be stated in CP14.1 similar to the statements made in 13.3(4) related to scope limitations for proportionately consolidated entities or variable interest entities. We see no reason to apply a different disclosure regimen for scope exemptions for business acquisition as compared to proportionately consolidated entities or variable interest entities.

Selective disclosure of material weaknesses by venture issuers
We believe the recommended disclosures in CP15.3 will not achieve the intended objective of mitigating the risks of selective disclosure by non-venture issuers. We believe if either positive assertions regarding effectiveness of DC&P or ICFR or selective disclosures of known weaknesses are made, the basis for such disclosures should be articulated. Merely stating that the issuer was not required to certify on the design and evaluation of DC&P and ICFR as currently recommended does not address the risk that the disclosures may be based on incomplete analysis. As a result, we recommend the first statement be changed to add the words in italics "the venture issuer is not required to certify the design and evaluation of the issuer's DC&P and ICFR *and has not completed such an evaluation".*

Other minor editorial comments include the following:
- CP1.3 We believe "though" should be "through".
- CP6.5 We believe "may conduct the design" should be "may conduct the evaluation of the design"
- CP 6.7(1) We suggest "create systematic problems which are difficult to resolve" be replaced with "increase the likelihood of misstatement"
- CP6.7(2)(a) We suggest that "centralized" be replaced with "formalized" and "decentralized" with "less formalized". We also recommend deleting the word "smaller" as we believe this comment may apply to all issuers.
- CP 6.7(2)(d) We recommend deleting "preventative and detective" controls.
- CP 6.7(2)(d) We recommend deleting "insurance coverage" as we don't believe this impacts DC&P and ICFR.
- CP 6.7(3) We suggest "designing" instead of "assessing".

- CP 6.7(5) We recommend deleting "balance" from "significant account balance or disclosure". We also recommend changing "existence and completeness are always relevant" to "existence and completeness *might* always *be* relevant".
- CP 6.13(d) We recommend inserting "external" in front of "auditors".
- CP9.1 (1) We believe the guidance would be improved if the period of evaluation was clear. "A deficiency relating to the design of ICFR exists when as *of the current balance sheet date of the interim or annual period…*"
- CP9.1 (2) We believe the guidance would be improved if the period of evaluation was clear. "A deficiency relating to the operation of ICFR exists when as *of the current balance sheet date of the interim or annual period…*"
- CP 9.2 We recommend changing the wording as follows "certifying officers should assess the significance of the deficiency or combination*(s)* of deficiencies, to determine whether they *individually or* collectively result in *one or more* material weaknesse*s"*. We also recommend adding "on a timely basis" at the end of point (a) in the second paragraph.
- CP 9.3(a) We recommend changing the word "relating" to "exposed".
- CP 12.1 We recommend adding "or significant weakness in DC&P" after "did not constitute a material weakness".
- CP 12.3(3) We recommend adding "or significant weakness in DC&P" after "material weakness" in the second paragraph.
- Form 52-109 F1 and F2 – IPO/RTO The wording in the second paragraph is not clear as the sentence is too long. We suggest changing breaking the information into two sentences with the second sentence being "These inherent limitations may result in additional risks to the quality, reliability, transparency and timeliness of interim and annual filings and other reports provided under securities legislation."

Thank you for the opportunity to comment on NI 52-109. We look forward to its implementation, and your consideration of our comments above. Should you wish to discuss them in more detail, we would be pleased to respond.

Yours truly,

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cc James Newton