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By E-Mail

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission (NB)
Superintendent of Securities, Prince Edward Island
Nova Scotia Securities Commission
Securities Commission of Newfoundland and Labrador
Registrar of Securities, Northwest Territories
Registrar of Securities, Yukon Territory
Superintendent of Securities, Nunavut

Attention:

The Secretary
Ontario Securities Commission
20 Queen Street West
19th Floor, Box 55
Toronto ON M5H 3S8
comments@osc.gov.on.ca

Me Anne-Marie Beaudoin, Corporate Secretary
Autorité des marchés financiers
800, rue du Square-Victoria, 22e étage
C.P. 246, tour de la Bourse
Montréal QC H4Z 1G3
consultation-en-cours@lautorite.qc.ca

Dear Sirs/Mesdames:

Re: Proposed National Instrument 52-112 *Non-GAAP and Other Financial Measures Disclosure* and Related Proposed Companion Policy

This is our firm's response to your Request for Comment dated September 6, 2018 regarding proposed National Instrument 52-112 *Non-GAAP and Other Financial Measures Disclosure* (the "**Proposed Instrument**") and the related Proposed Companion Policy 52-112 of the same name (the "**Proposed Companion Policy**").

We support the overriding objective of the Canadian Securities Administrators to reduce instances of misleading disclosure of non-GAAP financial measures among Canadian issuers. More specifically, we agree with the CSA's view that issuers should:

- present non-GAAP financial measures consistently from period-to-period or explain changes in their components or method of calculation;
- label non-GAAP financial measures appropriately based on their components; and
- reconcile non-GAAP financial measures to the closest GAAP measures and explain and disaggregate reconciling items in sufficient detail for a reasonable investor to understand how non-GAAP measures are calculated.

However, we do not believe it is necessary to adopt the Proposed Instrument and Proposed Companion Policy to achieve these key objectives. Instead, we recommend that Staff Notice 52-306 be amended or additional guidance be published to highlight deficiencies in the disclosure of non-GAAP financial measures, provide clarity regarding what constitutes a non-GAAP financial measure and provide examples of best practices regarding such disclosure. This approach would provide clarity to issuers as to securities regulators' expectations and reinforce the imperative that non-GAAP financial measures must not be misleading, while preserving flexibility for issuers to present non-GAAP financial measures according to the expectations of their investor base and in a manner consistent with their industry peers. If the Proposed Instrument and Companion Policy are adopted as proposed, we believe this will result in the incurrence of unnecessary administrative, legal and accounting costs as issuers attempt to interpret and apply the new rules.

Below are our more specific comments on the Proposed Instrument and Proposed Companion Policy, organized as follows:

I. Non-GAAP Financial Measures

1. *Prohibition on Cross-Referencing*
2. *Financial Measures Specified by Other Regulatory Bodies*
3. *Reasonable Person vs. Reasonable Investor*
4. *Ratios*
5. *Prominence of Financial Measures*

II. Segment Measures and Capital Management Measures

III. Substantive Items in the Proposed Companion Policy

1. *Disaggregation*
2. *The Meanings of "Presented" and "Disclosed"*
3. *Definition of "Documents"*

IV. SEC Foreign Issuers and Designated Foreign Issuers

V. Oral Statements and Transcripts

VI. Transition Period

I. Non-GAAP Financial Measures

1. Prohibition on Cross-Referencing

Prohibiting issuers from cross-referencing from one document to another as a means of providing investors with access to reconciliations and related disclosures about non-GAAP financial measures is a significant change from Staff Notice 52-306. Sections 3(d), 6(a), 7(2)(b) and 8(a) of the Proposed Instrument, together with the Proposed Companion Policy guidance:

- are at odds with the general approach of securities regulation which permits incorporation by reference;
- will disrupt market practice and thereby impose unnecessary compliance burdens and costs on issuers;
- will result in more repetitive and voluminous disclosure documents; and
- will not impact the substance of the information that is readily available to investors.

We believe that many investors read issuers' financial information online, not in hard copy. Permitting issuers to cross-reference, including with hyperlinks, to a separate source of disclosure – which could be the MD&A or another core document - gives investors more contemporaneous, readable and user-friendly access to non-GAAP financial measures disclosure, as compared to requiring investors to scroll down to an appendix in every single document. Accordingly, the approach described on page 7 of the Proposed Companion Policy – allowing cross-referencing when non-GAAP financial measures are disclosed on an issuer's website – should be adopted for documents universally.

2. Financial Measures Specified by Other Regulatory Bodies

Section 2(2) of the Proposed Instrument provides a general exemption for financial measures that are disclosed in accordance with a requirement of securities legislation or the laws of a jurisdiction of Canada. Some issuers, such as banks and insurance companies, are regulated and supervised by administrative bodies that require or recommend reporting to the regulator and the public of certain measures calculated in accordance with regulatory guidelines or best practices. These measures are not required to be disclosed in accordance with the laws of a jurisdiction of Canada but it is a common industry practice for issuers to disclose these measures in their continuous disclosure filings. An example is the Life Insurance Capital Adequacy Test (LICAT) specified by the Office of Superintendent of Financial Institutions (OSFI) and OSFI's LICAT Public Disclosure Requirements Guideline.

In deference to the specialized expertise and authority of such regulatory bodies, and in light of the fact that these regulated issuers do not have discretion in how certain measures are to be calculated, the general exemption in Section 2(2) should be broadened to cover (i) financial measures that are disclosed in accordance with a requirement of securities legislation or the laws of a jurisdiction of Canada and (ii) financial measures that are required or recommended to be reported to any regulatory agency or to the public by any regulatory agency. Since the concerns about lack of standardized meanings and comparability across issuers are not applicable in this context, we believe that the benefits of applying the Proposed Instrument to these financial measures would not outweigh the significant additional compliance burden on

issuers.

3. Reasonable Person vs. Reasonable Investor

The Proposed Instrument refers to a "reasonable person" in respect of various disclosure requirements, e.g., the requirement to explain how a non-GAAP financial measure is useful to a reasonable person and the requirement for a reconciliation to be disaggregated in such a way that it provides a reasonable person with an understanding of the reconciling items.

Adopting a "reasonable person" standard is a change from Staff Notice 52-306, which focusses on investors. If this was a drafting error, it should be corrected before the final version of the Proposed Rule and Proposed Companion Policy are adopted. If this was not a drafting error but an intentional change, we believe additional explanation and guidance is required as to whether securities regulators meant to impose a different and more onerous standard.

To maintain consistency with the general scheme of securities laws. which are aimed at protecting investors (e.g., the MD&A form advises issuers, in considering the materiality of information, to consider whether a reasonable investor's decision to buy, sell or hold securities would be affected), we believe that references to "reasonable person" in the Proposed Instrument should be replaced by "reasonable investor."

4. Ratios

Under Section 4(2) of the Proposed Instrument, ratios do not have to be identified as non-GAAP financial measures if all financial components of the ratio

- are disclosed or presented in the financial statements, or
- constitute disaggregations, calculated in accordance with IFRS, of line items presented in the primary financial statements.

In these circumstances, it also makes sense not to require issuers to state that the ratio does not have a standardized meaning and may not be comparable to ratios of other issuers. Accordingly, the lead-in to Section 4(2) would be "Subparagraphs 3(d)(i) and 3(d)(ii) does not apply if..."

5. Prominence of Financial Measures

Market practices regarding the presentation of non-GAAP financial measures have developed over time in part because investors view such measures as material and often view them as more meaningful than the financial measures disclosed in an issuer's financial statements. If adopted, we believe that the Proposed Instrument and Proposed Companion Policy needs to strike the right balance between allowing issuers to present information in an investor-friendly manner and curbing misleading disclosure practices.

In particular, we believe that the comments in the Proposed Companion Policy about prominence are overly prescriptive. We believe that issuers should be permitted to exercise their best judgment as to prominence and other style elements of non-GAAP disclosure, taking into account the context and circumstances under which the financial measures are disclosed, including the particular document or other location where they appear and the particular audience.

II. Segment Measures and Capital Management Measures

We believe that the addition of "segment measures" and "capital management measures" to the regulatory scheme governing non-GAAP financial measures will impose unnecessary compliance burdens and administrative costs for issuers, with little to no benefit for investors. These measures are, by definition, disclosed in the notes to the financial statements and are thus required or permitted to be disclosed under IFRS-IASB. Accordingly, we do not believe that securities regulations need to impose additional requirements when totals of segment measures or capital management measures are disclosed outside the notes. Instead, it should suffice for the Companion Policy to remind issuers that all financial measures - whether or not they fall within the definition of non-GAAP financial measures and regardless of whether they are derived from the financial statements or notes – must be presented in a manner that is not misleading. This reminder could be accompanied by a caution that segment measures and capital management measures, when presented outside the notes, may need to be accompanied by additional explanatory disclosure (or presented with a cross-reference to the applicable note in the financial statements) to prevent them from being misleading.

III. Substantive Items in the Proposed Companion Policy

Our comments below are in response to your question #3 *"Is specific content in the Proposed Companion Policy unclear or inconsistent with the Proposed Instrument?"*

1. Disaggregation

A definition of "disaggregation" should be added to the Proposed Instrument because disaggregation is a significant component of several of the proposed definitions and rules, constituting more than interpretive guidance.

2. The Meanings of "Presented" and "Disclosed"

In plain English, the words "presented" and "disclosed" have similar meanings and their explanation should be moved from the Companion Policy to the Definitions section of the Proposed Instrument so as to avoid confusion among non-accountants. An even better approach would be to simplify the confusingly similar phrases that include these two words. For example, the phrase "presented or disclosed in the financial statements" could be replaced by "in the financial statements" and the phrase "presented in the primary financial statements" could be replaced by "on the face of the financial statements."

3. Definition of "Documents"

The Proposed Companion Policy indicates that the rules will apply to materials beyond traditional documents, such as website pages, social media postings and other electronic communications. Such a broad interpretation of "documents" is significant in terms of issuers' disclosure obligations and should appear in the Application section of the Proposed Instrument and not just in the Companion Policy.

IV. SEC Foreign Issuers and Designated Foreign Issuers

This is in response to your question #4 *"Is the proposed exemption for SEC foreign issuers appropriate?"*

The proposed exemption for SEC foreign issuers is appropriate because it is consistent with the overall scheme of extra-territorial application of Canadian securities laws as reflected in National Instruments 71-101 and 71-102. For the same reason, an exemption should be provided for designated foreign issuers. Sound policy reasons underlie the exemptions provided to designated foreign issuers from compliance with Canadian rules on preparing AIFs, MD&A and many other disclosures. Non-GAAP financial measures should not be an anomaly that disrupts our existing regulatory scheme, imposing potentially significant burdens on designated foreign issuers in having to comply with both their home country requirements and Canadian requirements. A sensible alternative would be to add a caution in National Policy 71-102 that non-GAAP financial measures, like other disclosures, are not permitted to be misleading.

Similarly, we believe that an exemption should be provided for non-GAAP financial measures that are included in offering materials delivered to permitted clients in connection with distributions of eligible foreign securities. This would be consistent with regulatory accommodations that were introduced with the intention of removing disincentives to extend these offerings to Canadian purchasers. Foreign issuers and/or international dealers may not be prepared to undertake a separate Canadian compliance review in relation to non-GAAP financial measures. The result would likely be reduced access to these offerings by Canadian institutional investors, who we believe are capable of assessing non-GAAP financial measures themselves.

V. Oral Statements and Transcripts

This is in response to your questions #5 and #6 *"Is the proposed exclusion of oral statements appropriate?" and "Is the proposed inclusion of all documents appropriate?"*

We agree that oral statements should be excluded from the rules as it would not be practical for issuers to comply with the rules orally. Moreover, the rules should not apply to transcripts of oral statements. Transcripts are, by definition, recordings of oral proceedings and their purpose should remain limited to capturing exactly what was said. Applying the rules to transcripts will incent issuers not to provide transcripts to the marketplace. Alternatively, it should suffice for issuers to cross-reference from their transcripts to another source where the non-GAAP financial measures disclosure appears.

VI. Transition Period

We believe that a substantial transition period, e.g., at least one financial year, should be provided to enable issuers to prepare for implementation of the new requirements. This is especially the case in respect of the matters addressed in Sections I and II above, should you determine that you disagree with some or all of our comments on those matters and decide against adopting the revisions we have suggested.

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We would be happy to discuss any of our above comments with you by phone or e-mail.

Yours truly,

Torys LLP

Torys LLP