77 King St W
TD North Tower
Suite 4030 PO Box 147
Toronto ON M5K 1H1
Canada

t 416.642.2700
tf 1.855.REALPAC (732.5722)
w realpac.ca

The Secretary
Ontario Securities Commission
20 Queen Street West, 22 Floor
Toronto, ON M5H 3S8

November 26, 2019

Submitted via electronic email

Re: CSA Notice and Request for Comment – Proposed Amendments to National Instrument 51-102 Continuous Disclosure Obligations and Changes to Certain Policies Related to the Business Acquisition Report Requirements

Dear Ontario Securities Commission,

Thank you for the opportunity to comment on the *CSA Notice and Request for Comment – Proposed Amendments to National Instrument 51-102 Continuous Disclosure Obligations and Changes to Certain Policies Related to the Business Acquisition Report Requirements*.

The Real Property Association of Canada ("REALPAC") is Canada's senior-most voice for Canada's commercial investment real estate industry. Our members include the largest publicly traded real estate companies (including real estate operating companies, or "REOCs" and real estate investment trusts, or "REITs") – collectively "real estate entities" – in Canada.

REALPAC and its members are very supportive of the CSA's initiative to ease the regulatory burden imposed by business acquisition report (BAR) requirements. In particular, we support:

1. Increasing the significance test for filing a BAR to 50% or higher; and
2. Reducing the threshold for filing a BAR from meeting 3 tests, to only having to meet 2 of the 3 tests

In addition, we encourage the CSA to consider further amendments, including:

- Reducing regulatory burdens associated with the prospectus rules and offering process; and
- Providing an option to permit semi-annual reporting

Our specific comments on the proposed amendments follow.

1. Increasing the significance test threshold for reporting issuers that are not venture issuers:

Ideally, the threshold of 20% should be increased to 50% or 75%. Using a low threshold of 30% still results in most acquisitions for smaller, growing entities being subject to

filing a BAR. As the costs associated with meeting the BAR requirements are very significant, they act as a hindrance to raising capital.

As acknowledged in the Request for Comments, the cost of filing a BAR (as well as the BAR cross-over rules relating to a Short Form Prospectus) are very high.

This is due to the fact that:

- audited financial statements are required for one year of the financial statements prepared;
- the property being acquired normally does not have historical separate financial statements available, thus requiring that the statements be carved out from the vendor's financial statements (i.e. start from scratch to create);
- there is no legal obligation for vendors to supply 3 years of information, and for real estate, it is customary practice to sell "as is, where is";
- it requires cooperation from the vendor and typically from the vendor's auditor/accountant who generally will extract some "premium" fee for getting the work done, if they agree at all;
- there is the additional cost of the real estate entity's auditors who would normally be engaged to review the pro forma statements prepared for the BAR; and,
- there are duplicate costs for audits and reviews that arise when the BAR information must be incorporated in a prospectus initially and then updated when the acquisition actually closes.

While it is important to provide investors with appropriate information when a significant transaction takes place, increasing the threshold above 50% will arguably provide investors with better information as it will only highlight transactions that are actually significant to real estate entities, rather than focusing on every single time a smaller, growing real estate entity is simply adding a property to its portfolio. It distracts the management team from building a stronger operating base.

Aside from increasing the significance threshold, consideration should be given to providing a time frame threshold for newly formed reporting issuers. During the earlier months after the initial public offering (IPO) process, there is typically a ramp up phase where entities continue to acquire assets to grow the business. Requiring a newly formed reporting issuer to continually file BAR reports for each asset they acquire is very onerous and can impede the ability of the entity to grow at the pace required to be competitive. Allowing a time frame of 36 months, for example, would not deny investors key information, given the extensive information that was already included in the recently filed prospectus and the continuous disclosures included in quarterly reports.

2. Alter the determination of significance for reporting issuers that are not venture issuers, such that an acquisition of a business or related business is a significant acquisition only if at least two of the existing significance tests are triggered

The proposed amendment to allow the use of only two of the significance tests is a noticeable improvement, as it will allow real estate entities to focus on the investment and asset tests rather than the profit and loss test.

As noted in previous comment letters to the CSA and OSC, the most significant issue with the existing BAR rules for real estate entities is the profit and loss test due to various amounts that are included in the calculation of net income under IFRS that are not reflective of a real estate entity's operating performance and are subject to significant fluctuations and inconsistencies among similar entities.

Net income of a real estate entity has traditionally been and continues to be an irrelevant operating metric. For this reason, the real estate industry created non-GAAP/non-IFRS measures to assess the operating performance of a real estate entity nearly forty years ago. Globally, the industry has widely adopted operating measures such as net operating income ("NOI"), Funds From Operations ("FFO") and Adjusted Funds From Operations ("AFFO") as appropriate and relevant operating metrics.

In real estate, NOI is a profit or loss measure commonly used and widely-accepted across the industry. NOI is reported by virtually all real estate entities and is also a key component in driving a property acquisition's value and price. For example, when analyzing a potential purchase, NOI is used by capitalizing it at the property's capitalization rate to arrive at the property's value; thus, NOI is highly relevant to real estate entities. Further, by referencing NOI, it excludes any financing impact relating to debt the seller may have placed on the sold property, which in most cases will not be assumed by the acquiring entity nor reflect the acquiring entity's cost of borrowing.

Additionally, in most cases, the significance of an acquisition measured using NOI for the profit and loss test tracks virtually in the same proportion as the significance of an acquisition using the asset test or investment test. That is, if an acquisition represents 20% of a real estate entity's assets, the NOI of the property will represent approximately 20% of the real estate entity's NOI. As such, when using the appropriate income test for real estate entities, the resulting impact on a threshold is essentially the same as per an asset test. Therefore, completing both the income test and the asset test is redundant when related to applying a threshold test.

3. Additional comments

Reducing the regulatory burdens associated with the prospectus rules and offering process

The BAR rules that cross-over to the rules relating to Short Form Prospectuses per National Instrument 44-101 ("NI 44-101") are onerous. The rules of NI 44-101 (specifically Section 10.2 of Form 44-101F1) state that the reporting issuer must include in the prospectus information about significant acquisitions that have either been completed or are highly likely to be completed. In order to satisfy this requirement, the financial statements or financial information provided in the prospectus must include the information that will be required for a BAR filed under Part 8 of NI 51-102.

Therefore, if a BAR has already been filed, then the BAR may simply be incorporated by

reference in the prospectus. However, if no BAR has been filed, as may be the case if a reporting issuer is raising capital before an acquisition is completed, the BAR information must be created to be placed within the body of the prospectus. This creates a significant amount of work and cost and significantly complicates the process of raising capital.

Most smaller and growth-oriented real estate entities need to raise capital in order to finance proposed acquisitions. The prospectus requires that detailed information be provided on proposed acquisitions. This also means that the BAR requirements are included in the prospectus. Therefore, in order to meet the requirements of the BAR, the real estate entity must obtain the necessary audited financial statements from the vendor before the prospectus can be filed. This can take weeks to complete and could delay the real estate entity's plans to raise capital when markets are favourable. It leads to uncertainty of market execution which affects every "bought deal" financing as investment banks need assurance that no regulatory obstacle will impact the execution of an offering. Several REITs have noted instances where deals have been delayed or abandoned as a result of the onerous requirements of filing a BAR.

In many circumstances, in respect of the acquired business, financial statements are not readily available, in particular where the acquired business has been held by private entities. Financial statements of the business acquired, as well as pro forma financial statements are not reflective of the combined business afterwards. This is simply a historical mathematical exercise that does not accurately represent the future state of the combined business.

Providing an option to permit semi-annual reporting

While we applaud proposing amendments to reduce regulatory burden, we encourage the changes to go further. In Canada, reporting issuers are still burdened with significant reporting requirements as a result of the requirements for quarterly reporting. In our consultations with investors, we heard strong support for less frequent reporting from real estate entities. Many noted that information included in quarterly reports was of little use because of how little changes in a 3-month period. Some argue that companies are choosing the private market over public markets when faced with the prospect of producing onerous quarterly reports.

Further, as a result of on-going disclosure obligations required by securities regulation, issuers will report any transactions or events deemed material to their business, thus keeping investors and other stakeholders apprised in the interim time between reporting periods.

We support further initiatives to reduce the frequency of extensive reporting requirements that encourages reporting issuers and the users of these reports to focus too heavily on short-term financial results.

We thank the OSC for the opportunity to provide our input on the *CSA Notice and Request for Comment – Proposed Amendments to National Instrument 51-102 Continuous Disclosure Obligations and Changes to Certain Policies Related to the Business Acquisition Report Requirements*. If you would like to discuss our comments,

please contact Nancy Anderson, REALPAC's Vice President Financial Reporting and Chief Financial Officer, at 416-642-2700 x226.

Respectfully submitted,

Nancy Anderson, Vice President, Financial Reporting and Chief Financial Officer
REALPAC