

6.1.4 Multilateral Instrument 52-109 Certification of Disclosure in Companies' Annual and Interim Filings

MULTILATERAL INSTRUMENT 52-109 CERTIFICATION OF DISCLOSURE IN COMPANIES' ANNUAL AND INTERIM FILINGS

Part 1 – Definitions, Application and Transition

1.1 Definitions¹ - In this Instrument,

"annual certificate" means the certificate required to be filed pursuant to Part 2 of this Instrument;

"annual filings" means the issuer's annual information form, and annual financial statements and annual MD&A, that have been most recently filed under provincial and territorial securities legislation, including for greater certainty all documents and information that are incorporated by reference in the annual information form;

"annual financial statements" means the annual financial statements required to be filed under National Instrument 51-102 *Continuous Disclosure Obligation*²;

"annual information form" means the AIF as defined under National Instrument 51-102 *Continuous Disclosure Obligations*³;

"filings" means annual filings and interim filings;

"interim certificate" means the certificate required to be filed pursuant to Part 3 of this Instrument;

"interim filings" means the issuer's interim financial statements and interim MD&A, that have been most recently filed under provincial and territorial securities legislation;

"interim financial statements" means the interim financial statements required to be filed under National Instrument 51-102 *Continuous Disclosure Obligations*⁴;

¹ National Instrument 14-101 *Definitions* defines certain terms that are used in more than one national or multilateral Instrument.

² Section 4.1 of NI 51-102 states:

4.1- Annual Financial Statements and Auditor's Report

- (1) Subject to subsection 4.8(6), a reporting issuer must file annual financial statements that include:
- (a) an income statement, a statement of retained earnings, and a cash flow statement for:
 - (i) the most recently completed financial year; and
 - (ii) the period covered by the financial year immediately preceding the most recently completed financial year, if any;
 - (b) a balance sheet as at the end of each of the periods referred to in paragraph (a); and
 - (c) notes to the financial statements.
- (2) Comparative annual financial statements filed under subsection (1) must be accompanied by an auditor's report.

³ In NI 51-102, "AIF" means a completed Form 51-102F1 *Annual Information Form* or, in the case of an SEC issuer, either a completed Form 51-102F1 or an annual report or transition report under the 1934 Act on Form 10-K, Form 10-KSB or on Form 20-F

⁴ NI 51-102 states:

4.3 - Interim Financial Statements

- (1) A reporting issuer must file:
- (a) if it has not completed its first financial year, interim financial statements for the interim periods of the reporting issuer's current financial year other than a period that is less than three months in length; or
 - (b) if it has completed its first financial year, interim financial statements for the interim periods of the reporting issuer's current financial year.
- (2) Subject to subsections 4.7(4), 4.8(7) and (8), the interim financial statements required to be filed under subsection (1) must include:
- (a) a balance sheet as at the end of the interim period and a balance sheet as at the end of the immediately preceding financial year, if any;
 - (b) an income statement, a statement of retained earnings and a cash flow statement, all for the year-to-date interim period and comparative financial information for the corresponding interim period in the immediately preceding financial year, if any;

"interim period" has the meaning ascribed to it in the definition of interim period under National Instrument 51-102 *Continuous Disclosure Obligations*⁵;

"investment fund"⁶ means a mutual fund, a non-redeemable investment fund or a scholarship plan;

"MD&A" has the meaning ascribed to it in the definition of MD&A under National Instrument 51-102 *Continuous Disclosure Obligations*⁷;

"non-redeemable investment fund"⁸ means an issuer:

- (a) whose primary purpose is to invest money provided by its securityholders;
- (b) that does not invest for the purpose of exercising effective control, seeking to exercise effective control, or being actively involved in the management of the issuers in which it invests, other than other mutual funds or non-redeemable investment funds; and
- (c) that is not a mutual fund;

"Sarbanes-Oxley Act" means the Sarbanes-Oxley Act of 2002, Pub.L. 107-204, 116 Stat. 745 (2002); and

"SEDAR" means the computer system for the transmission, receipt, acceptance, review and dissemination of documents filed in electronic format known as the System for Electronic Document Analysis and Retrieval.

1.2 Application – This Instrument applies to all reporting issuers other than investment funds.

1.3 Transition Period – Notwithstanding Parts 2 and 3 of this Instrument, issuers may exclude paragraphs 4, 5 and 6 from any annual and interim certificates required to be filed prior to **[January 1, 2005]**.

Part 2 – Certification of Annual Filings

2.1 Every issuer must file a separate annual certificate, in the form specified in Form 52-109F1, in respect of and personally signed by each of the following persons:

1. each chief executive officer;
2. each chief financial officer; and
3. in the case of an issuer that does not have a chief executive officer or chief financial officer, each person who performs similar functions to a chief executive officer or a chief financial officer, as the case may be.

2.2 The annual certificate must be filed by the issuer at the same time as it files the last of the following annual filings:

1. its annual information form; and

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- (c) for interim periods other than the first interim period in a reporting issuer's financial year, an income statement and cash flow statement for the three month period ending on the last day of the interim period and comparative financial information for the corresponding period in the preceding financial year, if any; and
 - (d) notes to the financial statements.

⁵ In NI 51-102, "interim period" means:

- (a) a period commencing on the first day of a financial year and ending nine, six or three months before the end of a financial year, or
- (b) in the case of a reporting issuer's transition year, a period commencing on the first day of the transition year and ending either:
 - (i) three, six, nine or twelve months, if applicable, after the end of its old financial year, or
 - (ii) twelve, nine, six or three months, if applicable, before the end of the transition year,

and in the case of (b)(ii), the first interim period must not exceed four months

⁶ This definition is taken from subsection 1.1 of proposed National Instrument 81-106 *Investment Fund Continuous Disclosure*.

⁷ In NI 51-102, "MD&A" means a completed Form 51-102F2 *Management's Discussion & Analysis* or, in the case of an SEC issuer, either a completed Form 51-102F2 or management's discussion and analysis prepared in accordance with Item 303 of Regulation S-K or item 303 of Regulation S-B under the 1934 Act

⁸ This definition is taken from OSC Rule 14-501 *Definitions*.

2. its annual financial statements and annual MD&A.

Part 3 - Certification of Interim Filings

- 3.1 Every issuer must file a separate interim certificate, in the form specified in Form 52-109F2, in respect of and personally signed by each of the following persons:
 1. each chief executive officer;
 2. each chief financial officer; and
 3. in the case of an issuer that does not have a chief executive officer or chief financial officer, each person who performs similar functions to a chief executive officer or a chief financial officer, as the case may be.
- 3.2 The interim certificate must be filed by the issuer at the same time as it files its interim filings.

Part 4 - Exemptions

- 4.1 Exemption for Issuers that comply with U.S. laws –
 - (1) Subject to subsection (4), an issuer is exempt from Part 2 of this Instrument with respect to the relevant period if:
 - (a) the issuer is in compliance with U.S. federal securities laws⁹ implementing the annual report certification requirements in section 302(a) of the Sarbanes-Oxley Act; and
 - (b) the issuer's most recent annual report and signed certificates are filed on SEDAR as soon as reasonably practicable after they are filed with the SEC.
 - (2) Subject to subsection (5), an issuer is exempt from Part 3 of this Instrument with respect to the relevant interim period if:
 - (a) the issuer is in compliance with U.S. federal securities laws implementing the quarterly report certification requirements in section 302(a) of the Sarbanes-Oxley Act; and
 - (b) the issuer's most recent quarterly report and signed certificates are filed on SEDAR as soon as reasonably practicable after they are filed with the SEC.
 - (3) An issuer is exempt from Part 3 of this Instrument with respect to the relevant interim period if:
 - (a) the issuer furnishes to the SEC a current report on Form 6-K containing the issuer's quarterly financial statements and MD&A;
 - (b) the Form 6-K is accompanied by signed certificates that are furnished to the SEC in the same form required by U.S. federal securities laws implementing the quarterly report certification requirements in section 302(a) of the Sarbanes-Oxley Act; and
 - (c) the Form 6-K and signed certificates are filed on SEDAR as soon as reasonably practicable after they are furnished to the SEC.
 - (4) Notwithstanding subsection 4.1(1), Part 2 of this Instrument applies to an issuer with respect to the relevant period if the issuer files annual financial statements prepared in accordance with Canadian generally accepted accounting principles, unless the issuer files those statements with the SEC in compliance with U.S. federal securities laws implementing the annual report certification requirements in section 302(a) of the Sarbanes-Oxley Act.
 - (5) Notwithstanding subsection 4.1(2), Part 3 of this Instrument applies to an issuer with respect to the relevant interim period if the issuer files interim financial statements prepared in accordance with Canadian generally accepted accounting principles, unless the issuer files those statements with the SEC in compliance with U.S. federal securities laws implementing the quarterly report certification requirements in section 302(a) of the Sarbanes-Oxley Act.

⁹ "U.S. federal securities laws" is defined in National Instrument 14-101 *Definitions*.

- 4.2 Exemption for Foreign Issuers – An issuer is exempt from the requirements in this Instrument so long as it qualifies for the relief contemplated by, and is in compliance with the requirements and conditions set out in, sections 5.4¹⁰ and 5.5¹¹ of National Instrument 71-102 *Continuous Disclosure and Other Exemptions Relating to Foreign Issuers*.
- 4.3 Exemption for Issuers of Exchangeable Securities – An issuer is exempt from the requirements in this Instrument so long as it qualifies for the relief contemplated by, and is in compliance with the requirements and conditions set out in, section 13.3¹² of National Instrument 51-102 *Continuous Disclosure Obligations*.
- 4.4 Exemption for Issuers of Guaranteed Securities – An issuer is exempt, in a jurisdiction, from the requirements in this Instrument if:
- (a) it does not have any securities outstanding other than debt securities or preferred shares, and all payments to be made in respect of those securities are fully and unconditionally guaranteed by another issuer (the guarantor issuer); and
 - (b) it has been granted an exemption in that jurisdiction (the exemption order) from filing its annual financial statements, annual MD&A, interim financial statements, and interim MD&A on the condition that, among other things, the equivalent annual and interim disclosure documents of the guarantor issuer be filed;
- so long as at the time that the issuer would otherwise be required to comply with this Instrument the exemption order is in effect and the parties to the exemption order are in compliance with its requirements and conditions.
- 4.5 General Exemption –
- (1) The regulator or securities regulatory authority may grant an exemption from this Instrument, in whole or in part, subject to such conditions or restrictions as may be imposed in the exemption.
 - (2) Despite subsection (1), in Ontario only the regulator may grant such an exemption.

Part 5 - Effective Date

- 5.1 This Instrument comes into force on **[January 1, 2004]**.

¹⁰ NI 71-102 states:

5.4 - Financial Statements

A designated foreign issuer satisfies securities legislation requirements relating to the preparation, filing and delivery of its interim financial statements, annual financial statements and auditor's reports on annual financial statements if it:

- (a) complies with the foreign disclosure requirements relating to interim financial statements, annual financial statements and auditor's reports on annual financial statements;
- (b) files the interim financial statements, annual financial statements and auditor's reports on annual financial statements required to be filed with or furnished to the foreign regulatory authority;
- (c) sends each document filed under paragraph (b) to securityholders in the local jurisdiction, in the manner and at the time such documents are required to be sent to securityholders of the issuer by the foreign disclosure requirements; and
- (d) complies with NI 52-107 as it relates to financial statements of the issuer that are included in any documents specified in paragraph (b).

¹¹ NI 71-102 states:

5.5 - Annual Reports, AIFs, Business Acquisition Reports & MD&A

A designated foreign issuer satisfies securities legislation requirements relating to the preparation, filing and delivery of annual reports, AIFs, business acquisition reports and MD&A if it:

- (a) complies with the foreign disclosure requirements relating to annual reports, quarterly reports, business acquisitions and management's discussion and analysis;
- (b) files each annual report, quarterly report, report in respect of a business acquisition and management's discussion and analysis required to be filed with the foreign regulatory authority;
- (c) sends each document filed under paragraph (b) to securityholders in the local jurisdiction, in the manner and at the time such documents are required to be sent to securityholders of the issuer by the foreign disclosure requirements; and
- (d) complies with NI 52-107 as it relates to financial statements of the issuer that are included in any documents specified in paragraph (b).

¹² Section 13.3 of NI 51-102 provides relief for certain exchangeable security issuers.

FORM 52-109F1 - CERTIFICATION OF ANNUAL FILINGS

I, *identify the certifying officer, the issuer, and his or her position at the issuer*, certify that:

1. I have reviewed the annual filings (as this term is defined in Multilateral Instrument 52-109 Certification of Disclosure in Companies' Annual and Interim Filings) of *identify issuer* (the issuer) for the period ending *state the reporting period covered by the annual filings*;
2. Based on my knowledge, the annual filings do not contain any untrue statement of a material fact or omit to state a material fact required to be stated or that is necessary to make a statement not misleading in light of the circumstances under which it was made, with respect to the period covered by the annual filings;
3. Based on my knowledge, the annual financial statements together with the other financial information included in the annual filings fairly present in all material respects the financial condition, results of operations and cash flows of the issuer as of the date and for the periods presented in the annual filings;
4. The issuer's other certifying officers and I are responsible for establishing and maintaining disclosure controls and procedures and internal controls for the issuer, and we have:
 - (a) designed those disclosure controls and procedures, or caused them to be designed under our supervision, and implemented those disclosure controls and procedures, to provide reasonable assurances that material information relating to the issuer, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which the annual filings are being prepared, and that such material information is disclosed within the time periods specified under applicable provincial and territorial securities legislation;
 - (b) designed those internal controls, or caused them to be designed under our supervision, and implemented those internal controls, to provide reasonable assurances that the issuer's financial statements are fairly presented in accordance with generally accepted accounting principles;
 - (c) evaluated the effectiveness of the issuer's disclosure controls and procedures and internal controls as of the end of the period covered by the annual filings; and
 - (d) disclosed in the annual MD&A our conclusions about the effectiveness of the disclosure controls and procedures and internal controls, in each case based on our evaluation as of the end of the period covered by the annual filings;
5. I have disclosed, based on my most recent evaluation, to the issuer's auditors and the audit committee of the issuer's board of directors or persons performing the equivalent function:
 - (a) all significant deficiencies and material weaknesses in the design or operation of internal controls that could adversely affect the issuer's ability to disclose information required to be disclosed by the issuer under applicable provincial and territorial securities legislation, within the time periods specified under applicable provincial and territorial securities legislation; and
 - (b) any fraud, whether or not material, that involves management or other employees who have a significant role in the issuer's internal controls; and
6. I have disclosed in the annual MD&A whether there were significant changes in the issuer's internal controls or in other factors that could significantly affect internal controls, made during the period covered by the annual filings, including any actions taken to correct significant deficiencies and material weaknesses in the issuer's internal controls.

Date:.....

[Signature]
[Title]

FORM 52-109F2 - CERTIFICATION OF INTERIM FILINGS

I *identify the certifying officer, the issuer, and his or her position at the issuer*, certify that:

1. I have reviewed the interim filings (as this term is defined in Multilateral Instrument 52-109 Certification of Disclosure in Companies' Annual and Interim Filings) of *identify the issuer*, (the issuer) for the interim period ending *state the reporting period covered by the interim filings*;
2. Based on my knowledge, the interim filings do not contain any untrue statement of a material fact or omit to state a material fact required to be stated or that is necessary to make a statement not misleading in light of the circumstances under which it was made, with respect to the period covered by the interim filings;
3. Based on my knowledge, the interim financial statements together with the other financial information included in the interim filings fairly present in all material respects the financial condition, results of operations and cash flows of the issuer as of the date and for the periods presented in the interim filings;
4. The issuer's other certifying officers and I are responsible for establishing and maintaining disclosure controls and procedures and internal controls for the issuer, and we have:
 - (a) designed those disclosure controls and procedures, or caused them to be designed under our supervision, and implemented those disclosure controls and procedures, to provide reasonable assurances that material information relating to the issuer, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which the interim filings are being prepared, and that such material information is disclosed within the time periods specified under applicable provincial and territorial securities legislation; and
 - (b) designed those internal controls, or caused them to be designed under our supervision, and implement those internal controls, to provide reasonable assurances that the issuer's financial statements are fairly presented in accordance with generally accepted accounting principles;
5. I have disclosed, based on my most recent evaluation, to the issuer's auditors and the audit committee of the issuer's board of directors or persons performing the equivalent function:
 - (a) all significant deficiencies and material weaknesses in the design or operation of internal controls that could adversely affect the issuer's ability to disclose information required to be disclosed by the issuer under applicable provincial and territorial securities legislation, within the time periods specified under applicable provincial and territorial securities legislation; and
 - (b) any fraud, whether or not material, that involves management or other employees who have a significant role in the issuer's internal controls; and
6. I have disclosed in the interim MD&A whether there were significant changes in the issuer's internal controls or in other factors that could significantly affect internal controls, made during the period covered by the interim filings, including any actions taken to correct significant deficiencies and material weaknesses in the issuer's internal controls.

Date:.....

[Signature]
[Title]

COMPANION POLICY 52-109CP – TO MULTILATERAL INSTRUMENT 52-109 CERTIFICATION OF DISCLOSURE IN COMPANIES' ANNUAL AND INTERIM FILINGS

Part 1 – General

This Companion Policy provides information about how the Canadian securities regulatory authorities interpret Multilateral Instrument 52-109, and should be read in conjunction with it.

Part 2 – Form and Filing of Certificates

The annual and interim certificates must be filed in the exact language prescribed in Forms 52-109F1 and F2. Each certificate must be separately filed on SEDAR under the issuer's profile in the appropriate annual or interim certificate filing type:

Category of Filing - Continuous Disclosure
Folder for Filing Type - General

Filing Type - Annual Certificates
Document Type:
Form 52-109F1 - Certification of Annual Filings - CEO
Form 52-109F1 - Certification of Annual Filings - CFO

or

Filing Type - Interim Certificates
Document Type:
Form 52-109F2 - Certification of Interim Filings - CEO
Form 52-109F2 - Certification of Interim Filings - CFO

An issuer that is in compliance with U.S. federal securities laws implementing the certification requirements in section 302(a) of the Sarbanes-Oxley Act and that uses the exemption in section 4.1 of the Instrument, must file on SEDAR the CEO and CFO certificates that it filed with SEC with respect to the relevant reporting period. Where those certificates are "in" the annual or quarterly report filed with the SEC ("in" as opposed to being attached as "exhibits"), the issuer should file the report containing the certificates in the appropriate filing type described above. Where the officers' certificates are attached as exhibits to the issuer's annual or quarterly report, the issuer should file the report, together with the attached certificates, in the appropriate filing type described above.

An issuer relying on the exemption in section 4.1 of the Instrument need not file the signed paper copies of the reports and certificates that it filed with, or furnished to, the SEC.

Part 3 – Internal and Disclosure Controls

The Canadian securities regulatory authorities believe that CEOs and CFOs should be required to certify that their issuers have adequate internal and disclosure controls. We believe that this is an important factor in maintaining integrity in our capital markets and thereby enhancing investor confidence in our capital markets. The Instrument does not, however, formally define those controls nor does it prescribe the degree of complexity or any specific policies or procedures that must make up those controls. This is intentional. In our view, these considerations are best left to management's judgement based on various factors that may be particular to their issuer, including its size and the nature of its business.

Part 4 – Fair Presentation

Pursuant to the third paragraph in each of the annual and interim certificates, the CEO and CFO must each certify that their issuer's financial statements "fairly present" the financial condition of the issuer for the relevant time period. Those representations are not qualified by the phrase "in accordance with generally accepted accounting principles" (GAAP) which Canadian auditors typically include in their financial statement audit reports. This qualification has been specifically excluded from the Instrument to prevent management from relying entirely upon compliance with GAAP procedures in this representation, particularly where the results of a GAAP audit may not reflect the financial condition of a company (since GAAP may not always define all the components of an overall fair presentation).

At page 7 of its adopting release,¹³ the SEC states:

¹³ SEC Release No. 33-8124 *Final Rule: Certification of Disclosure in Companies' Quarterly and Annual Reports* dated August 29, 2002.

The certification statement regarding fair presentation of financial statements and other financial information is not limited to a representation that the financial statements and other financial information have been presented in accordance with “generally accepted accounting principles” (GAAP) and is not otherwise limited by reference to GAAP. We believe that Congress intended this statement to provide assurances that the financial information disclosed in a report, viewed in its entirety, meets a standard of overall material accuracy and completeness that is broader than financial reporting requirements under GAAP. ... Presenting financial information in conformity with generally accepted principles may not necessarily satisfy obligations under the antifraud provisions of the federal securities law.

In our view, fair presentation includes but is not necessarily limited to:

- the selection of appropriate accounting policies
- proper application of appropriate accounting policies
- disclosure of financial information that is informative and reasonably reflects the underlying transactions
- inclusion of additional disclosure necessary to provide investors with a materially accurate and complete picture of financial conditions, results of operations and cash flows

For additional commentary on what constitutes fair presentation we refer you to case law in this area. The leading U.S. case in this area is *U.S. v. Simon* (425 F.2d 796); the leading Canadian case in this area is the B.C. Court of Appeal decision in *Kripps v. Touche Ross and Co.* [1997] B.C.J. No. 968.

Part 5 – Exemptions

The exemptions in section 4.1 of the Instrument are based on our view that the investor confidence aims of the Instrument do not justify requiring issuers to comply with the certification requirements in the Instrument if such issuers already comply with substantially similar requirements in the U.S.

As a condition to being exempt from the annual certificate and interim certificate requirements in subsections 4.1(1) and (2) respectively, issuers must file on SEDAR the CEO and CFO certificates that they filed with the SEC in compliance with its rules implementing the certification requirements prescribed in section 302(a) of the Sarbanes-Oxley Act.

Pursuant to National Instrument 52-107 *Acceptable Accounting Principles, Auditing Standards and Reporting Currency* certain Canadian issuers are able to satisfy their requirements to file financial statements prepared in accordance with Canadian GAAP by filing statements prepared in accordance with U.S. GAAP. However, it is possible that some Canadian companies may still continue to prepare two sets of financial statements and continue to file their Canadian GAAP statements in the applicable jurisdictions. In order to ensure that the Canadian GAAP financial statements are certified (pursuant to either SOX or the Instrument) those issuers will not have recourse to the exemptions in subsections 4.1(1) and (2).

Part 6 – Liability for False Certification

An officer providing a false certification potentially could be subject to quasi-criminal, administrative or civil proceedings under securities law.

Officers providing a false certification could also potentially be subject to private actions for damages either at common law or under the *Securities Act* (Ontario) when amendments which create statutory civil liability for misrepresentations in continuous disclosure are proclaimed in force.¹⁴ The liability standard applicable to a document required to be filed with the Ontario Securities Commission, including an annual or interim certificate, will depend on whether the document is a “core” document as defined under Part XXIII.1.¹⁵ Annual and interim certificates are currently not included in the definition of “core document” but would be caught by the definition of “document”.

In any action commenced under Part XXIII.1 of the *Securities Act* (Ontario) a court has the discretion to treat multiple misrepresentations having common subject matter or content as a single misrepresentation.¹⁶ This provision would permit a

¹⁴ These amendments were enacted on December 9, 2002.

¹⁵ Where an action is brought for a misrepresentation contained in a non-core document, a defendant is not liable unless the plaintiff proves that the defendant: (i) knew of the misrepresentation; (ii) deliberately avoided acquiring knowledge of the misrepresentation; or (iii) by acting or failing to act, was guilty of gross misconduct in connection with the release of the document containing the misrepresentation. Where an action is brought for a misrepresentation contained in a core document, the onus is on the defendant to show that he or she was duly diligent.

¹⁶ Subsection 138.3(6) of the *Securities Act* (Ontario).

Request for Comments

court in appropriate cases to treat a misrepresentation in a company's financial statements and a misrepresentation made by an officer in an annual or interim certificate that relate to the underlying financial statements as a single misrepresentation.