

Chapter 6

Request for Comments

6.1.1 Request for Comments - Proposed Amendments to Multilateral Instrument 52-109 Certification of Disclosure in Issuers' Annual and Interim Filings and Companion Policy 52-109CP

REQUEST FOR COMMENTS

PROPOSED AMENDMENTS TO MULTILATERAL INSTRUMENT 52-109 CERTIFICATION OF DISCLOSURE IN ISSUERS' ANNUAL AND INTERIM FILINGS AND COMPANION POLICY 52-109CP

Request for public comment

This Notice accompanies:

- a proposed amendment instrument (the Proposed Amendment Instrument) amending Multilateral Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings* (the Certification Instrument); and
- proposed amendments (the Proposed CP Amendments and together with the Proposed Amendment Instrument, the Proposed Amendments) to Companion Policy 52-109CP to the Certification Instrument (the Companion Policy).

The Proposed Amendments are being published for a 90-day comment period by the securities regulatory authorities in every province and territory in Canada, other than British Columbia (the Participating Jurisdictions or we).

The Proposed Amendment Instrument is expected to be made by each of the Participating Jurisdictions and will be implemented as:

- a rule in each of Alberta, Manitoba, Ontario, Nova Scotia and Newfoundland and Labrador;
- a Commission regulation in Saskatchewan and a regulation in the Northwest Territories;
- a policy in each of New Brunswick, Prince Edward Island and Yukon; and
- a code in Nunavut.

It is expected that the Proposed CP Amendments will be adopted as a policy in each of Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, Yukon, the Northwest Territories, Nunavut and Yukon.

In Québec, since the Certification Instrument and the Companion Policy have not been adopted yet, the Proposed Amendment Instrument is being published as Proposed Amendments to Proposed *Regulation 52-109 respecting Certification of Disclosure in Issuers' Annual and Interim Filings*, and the Proposed CP Amendments are being published as Proposed Amendments to Proposed Policy Statement 52-109 to *Regulation 52-109 respecting Certification of Disclosure in Issuers' Annual and Interim Filings*.

Background to the Certification Instrument and the Companion Policy

The Certification Instrument and the Companion Policy were initiatives of the Participating Jurisdictions.

The Certification Instrument and the Companion Policy came into force on March 30, 2004 in each of the Participating Jurisdictions, other than Québec. In Québec, the Certification Instrument will be adopted as a regulation made under section 331.1 of *The Securities Act* (Québec) once it is approved, with or without amendment, by the Minister of Finance, and will come into force on the date of its publication in the *Gazette officielle du Québec* or on any later date specified in the regulation. The Companion Policy will be implemented as a policy in Québec.

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The purpose of the Certification Instrument is to improve the quality and reliability of financial and other continuous disclosure reporting by reporting issuers. We believe that this in turn will help to maintain and enhance investor confidence.

Current filing requirements under the Certification Instrument

Under the Certification Instrument, issuers are required to file annual certificates for each financial year beginning on or after January 1, 2004. The form of annual certificate is Form 52-109F1 (the full annual certificate); however, issuers are permitted to file annual certificates in Form 52-109FT1 (the bare annual certificate) for financial years ending on or before March 30, 2005.

Issuers are also required to file interim certificates for each interim period beginning on or after January 1, 2004. The form of interim certificate is Form 52-109F2 (the full interim certificate); however, issuers are permitted to file interim certificates in Form 52-109FT2 (the bare interim certificate) for interim periods that occur before the end of the first financial year for which issuers are required to file full annual certificates.

The differences between the full certificates and the bare certificates under the current filing requirements are summarized in the table below:

Summary of Representations¹	Bare Interim Certificate	Bare Annual Certificate	Full Interim Certificate	Full Annual Certificate
The certifying officers have reviewed the annual filings or interim filings. <i>Paragraph 1</i>	Required	Required	Required	Required
Based on the certifying officers' knowledge, the issuer's annual filings or interim filings do not contain any misrepresentations. <i>Paragraph 2</i>	Required	Required	Required	Required
Based on the certifying officers' knowledge, the financial statements and other financial information in the annual filings or interim filings fairly present the financial condition, results of operations and cash flows of the issuer for the relevant period. <i>Paragraph 3</i>	Required	Required	Required	Required
The certifying officers are responsible for establishing and maintaining disclosure controls and procedures and have designed (or caused to be designed) such disclosure controls and procedures. <i>Introductory language to paragraph 4 and paragraph 4(a)</i>	Not required	Not required	Required	Required
The certifying officers are responsible for establishing and maintaining internal control over financial reporting and have designed (or caused to be designed) such internal control over financial reporting. <i>Introductory language to paragraph 4 and paragraph 4(b)</i>	Not required	Not required	Required	Required
The certifying officers have evaluated the effectiveness of disclosure controls and procedures and caused the issuer to disclose their conclusions. <i>Paragraph 4(c)</i>	Not required	Not required	Not Required	Required
The certifying officers have caused the issuer to disclose certain changes in internal control over financial reporting. <i>Paragraph 5</i>	Not required	Not required	Required	Required

¹ Please see Forms 52-109F1, 52-109FT1, 52-109F2 and 52-109FT2 for the prescribed wording of the required representations.

Substance and purpose of the Proposed Amendments

The Proposed Amendments contain the following changes to the Certification Instrument and the Companion Policy:

1. ***Deferral of certification regarding internal control over financial reporting***

The Proposed Amendments allow certifying officers to omit the following representations from their full annual certificates filed for financial years ending on or before June 29, 2006 and their full interim certificates filed for certain permitted interim periods:

- (a) the representation that the certifying officers are responsible for establishing and maintaining internal control over financial reporting;
- (b) the representation that the certifying officers have designed internal control over financial reporting, or caused it to be designed under their supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with GAAP; and
- (c) the representation that they have caused the issuer to disclose in the issuer's MD&A any change in the issuer's internal control over financial reporting that occurred during the issuer's most recent period that materially affected, or is reasonably likely to materially affect, the issuer's internal control over financial reporting.

The permitted interim periods are those interim periods that occur before the end of the first financial year for which an issuer is required to file full annual certificates that include the representations described in paragraphs (a), (b) and (c) above.

If the Proposed Amendments are made, issuers will be permitted to file annual certificates and interim certificates for the specified financial years and interim periods in the forms set out in Appendices A and B to this Notice.

2. ***Appendix A to the Companion Policy***

In light of the changes to the Certification Instrument described above, the Proposed Amendments also include consequential changes to Appendix A to the Companion Policy.

We believe that it is critical for our markets that all reporting issuers have sound internal control over financial reporting. The Proposed Amendments will allow additional time for certifying officers to satisfy themselves that they have an appropriate basis for providing the representations regarding internal control over financial reporting in their full annual certificates and full interim certificates.

Authority – Ontario

In Ontario, securities legislation provides the Ontario Securities Commission (the Commission) with rule-making or regulation-making authority regarding the subject matter of the Certification Instrument.

Paragraph 143(1) 22 of the *Securities Act* (Ontario) (the Act) authorizes the Commission to make rules prescribing requirements in respect of the preparation and dissemination and other use, by reporting issuers, of documents providing for continuous disclosure that are in addition to the requirements under the Act.

Paragraph 143(1) 25 of the Act authorizes the Commission to make rules prescribing requirements in respect of financial accounting, reporting and auditing for the purposes of the Act, the regulations and the rules.

Paragraph 143(1) 39 of the Act authorizes the Commission to make rules requiring or respecting the media, format, preparation, form, content, execution, certification, dissemination and other use, filing and review of all documents required under or governed by the Act, the regulations or the rules and all documents determined by the regulations or the rules to be ancillary to the documents, including financial statements, proxies and information circulars.

Paragraphs 143(1) 58 and 59 of the Act authorize the Commission to make rules requiring reporting issuers to devise and maintain systems of disclosure controls and procedures and internal controls, the effectiveness and efficiency of their operations, including financial reporting and assets control.

Paragraphs 143(1) 60 and 61 of the Act authorize the Commission to make rules requiring chief executive officers and chief financial officers of reporting issuers to provide certification relating to the establishment, maintenance and evaluation of the systems of disclosure controls and procedures and internal controls.

Related instruments

The Certification Instrument is related to:

- National Instrument 51-102 *Continuous Disclosure Obligations*;
- National Instrument 71-102 *Continuous Disclosure and Other Exemptions Relating to Foreign Issuers*; and
- National Instrument 52-107 *Acceptable Accounting Principles, Auditing Standards and Reporting Currency*.

Alternatives

We did not identify any alternatives that we believed accomplished the purposes of the Certification Instrument, as discussed above, while allowing additional time for certifying officers to satisfy themselves that they have an appropriate basis for providing the representations regarding internal control over financial reporting.

Anticipated costs and benefits

The anticipated costs and benefits of implementing the Certification Instrument were previously outlined in the paper entitled *Investor Confidence Initiatives: A Cost-Benefit Analysis*, which was published on June 27, 2003. The Proposed Amendments do not impose any additional requirements upon reporting issuers. As a result, we believe that the benefits of the Proposed Amendments outweigh the costs, if any.

Reliance on unpublished studies, etc.

In developing the Proposed Amendments, we did not rely upon any significant unpublished study, report or other written materials.

Comments

Interested parties are invited to make written submissions on the Proposed Amendments. Submissions received by February 24, 2005 will be considered. **Due to timing concerns, comments received after the deadline will not be considered.**

Submissions should be addressed to the following securities regulatory authorities:

Alberta Securities Commission
Saskatchewan Securities Commission
Manitoba Securities Commission
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

Please deliver your comments to the addresses below. Your comments will be distributed to the other participating CSA members.

John Stevenson, Secretary
Ontario Securities Commission
20 Queen Street West
Suite 1900, Box 55
Toronto, Ontario M5H 3S8
Fax: (416) 593-2318
E-mail: jstevenson@osc.gov.on.ca

Anne-Marie Beaudoin, Directrice du secrétariat
Autorité des marchés financiers
Tour de la Bourse
800, square Victoria

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C.P. 246, 22e étage
Montréal, Québec, H4Z 1G3
Fax: (514) 864-6381
E-mail: consultation-en-cours@lautorite.com

A diskette containing the submissions (in Windows format, preferably Word) should also be submitted.

Comment letters submitted in response to requests for comments are placed on the public file in certain jurisdictions and form part of the public record, unless confidentiality is requested. Comment letters will be circulated among the securities regulatory authorities, whether or not confidentiality is requested. Although comment letters requesting confidentiality will not be placed in the public file, freedom of information legislation in certain jurisdictions may require securities regulatory authorities in those jurisdictions to make comment letters available. Persons submitting comment letters should therefore be aware that the press and members of the public may be able to obtain access to any comment letters.

Questions

Please refer your questions to any of:

Ontario Securities Commission

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Manitoba Securities Commission

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Text of the Proposed Amendments

The text of the Proposed Amendments follows.

Date: November 26, 2004

APPENDIX A

Sample annual certificate permitted to be filed
for financial years ending on or before June 29, 2006
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 Issuers' Annual and Interim Filings*) of ~~identify issuer~~ (the issuer) for the period ending ~~state the relevant date~~;
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 control over financial reporting~~ for the issuer, and we have:
 - (a) designed such disclosure controls and procedures, or caused them to be designed under our supervision, to provide reasonable assurance 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;
 - ~~(b) designed such internal control over financial reporting, or caused it to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with the issuer's GAAP; and~~
 - (c) evaluated the effectiveness of the issuer's disclosure controls and procedures as of the end of the period covered by the annual filings and have caused the issuer to disclose in the annual MD&A our conclusions about the effectiveness of the disclosure controls and procedures as of the end of the period covered by the annual filings based on such evaluation; and
- ~~5. I have caused the issuer to disclose in the annual MD&A any change in the issuer's internal control over financial reporting that occurred during the issuer's most recent interim period that has materially affected, or is reasonably likely to materially affect, the issuer's internal control over financial reporting.~~

Date:

[Signature]
[Title]

APPENDIX B

Sample interim certificate permitted to be filed
for permitted interim periods
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 Issuers' Annual and Interim Filings*) of **identify the issuer**, (the issuer) for the interim period ending **state the relevant date**;
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 control over financial reporting~~ for the issuer, and we have:
 - (a) designed such disclosure controls and procedures, or caused them to be designed under our supervision, to provide reasonable assurance 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
 - ~~(b) designed such internal control over financial reporting, or caused it to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with the issuer's GAAP; and~~
- ~~5. I have caused the issuer to disclose in the interim MD&A any change in the issuer's internal control over financial reporting that occurred during the issuer's most recent interim period that has materially affected, or is reasonably likely to materially affect, the issuer's internal control over financial reporting.~~

Date:

[Signature]

[Title]

**MULTILATERAL INSTRUMENT 52-109
CERTIFICATION OF DISCLOSURE IN ISSUERS' ANNUAL AND INTERIM FILINGS
AMENDMENT INSTRUMENT**

1. Multilateral Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings* is amended by this Instrument.
2. Subsection 5.2(1) is amended by adding the following after paragraph (b):
 - “(c) Notwithstanding Part 2 or paragraphs 5.2(1)(a) and (b), an issuer that is required to file an annual certificate in Form 52-109F1 in respect of a financial year ending on or before June 29, 2006 may omit from the Form 52-109F1:
 - (i) the words “and internal control over financial reporting” in the introductory language in paragraph 4;
 - (ii) paragraph 4(b); and
 - (iii) paragraph 5.”
3. Subsection 5.2(2) is amended by adding the following after paragraph (b):
 - “(c) Notwithstanding Part 3 or paragraphs 5.2(2)(a) and (b), an issuer that is required to file an interim certificate in Form 52-109F2 for a permitted interim period may omit from the Form 52-109F2:
 - (i) the words “and internal control over financial reporting” in the introductory language in paragraph 4;
 - (ii) paragraph 4(b); and
 - (iii) paragraph 5.
 - (d) For the purpose of paragraph 5.2(2)(c), a permitted interim period is an interim period that occurs prior to the end of the first financial year in respect of which an issuer is required to file an annual certificate in Form 52-109F1 that includes:
 - (i) the words “and internal control over financial reporting” in the introductory language in paragraph 4;
 - (ii) paragraph 4(b); and
 - (iii) paragraph 5.”
4. This Instrument comes into force on ●.

**COMPANION POLICY 52-109CP
CERTIFICATION OF DISCLOSURE IN ISSUERS' ANNUAL AND INTERIM FILINGS
AMENDMENTS**

1. Appendix A to 52-109CP is amended by adding the following at the end of footnote 4:

“In accordance with subsection 5.2(1) of the Instrument, an issuer that is required to file a full annual certificate in respect of any financial year ending on or before June 29, 2006 may omit from the full annual certificate:

- (i) the words “and internal control over financial reporting” in the introductory language in paragraph 4;
- (ii) paragraph 4(b); and
- (iii) paragraph 5.”

2. Appendix A to 52-109CP is amended by adding the following at the end of footnote 5:

“In accordance with subsection 5.2(2) of the Instrument, an issuer that is required to file a full interim certificate in respect of any permitted interim period may omit from the full interim certificate:

- (i) the words “and internal control over financial reporting” in the introductory language in paragraph 4;
- (ii) paragraph 4(b); and
- (iii) paragraph 5.

A permitted interim period is an interim period that occurs prior to the end of the first financial year in respect of which an issuer is required to file a full annual certificate that includes the items set out in paragraphs (i), (ii) and (iii) in footnote 4 above.”

3. These amendments are effective on •.