

June 29, 2020

Without Prejudice
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 (New Brunswick)
Superintendent of Securities, Department of Justice and Public Safety, 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

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Dear Sirs/Mesdames:

Re: CSA Second Notice and Request for Comment
Proposed National Instrument 52-112 *Non-GAAP and Other Financial Measures Disclosure*
Proposed Companion Policy 52-112 *Non-GAAP and Other Financial Measures Disclosure*

We submit the following comments in response to the CSA Second Notice and Request for Comment (the “**Request for Comment**”) published by the Canadian Securities Administrators (the “**CSA**”) on February 13, 2020 with respect to proposed National Instrument 52-112 *Non-GAAP and Other Financial Measures Disclosure* (“**NI 52-112**”) and proposed Companion Policy 52-112 *Non-GAAP and Other Financial Measures Disclosure* (“**CP 52-112**”, and together with NI 52-112, the “**Proposed Instrument**”).

We have organized our comments below with reference to the proposed rule or policy to which the comments relate. All references to parts and sections are to the relevant parts or sections of the applicable rule or policy. Where our comments are responsive to the specific questions posed in the Request for Comment, we have included the text of such question below for ease of reference.

Thank you for the opportunity to comment on the Proposed Instrument. This letter represents the general comments of certain individual members of our securities practice group (and not those of the firm generally or of any client of the firm) and is submitted without prejudice to any position taken, or that may be taken, by our firm on its own behalf or on behalf of any client.

1. Proposed National Instrument 52-112

a. Section 4 - Application – exceptions

SEC Issuers

We acknowledge that the CSA noted in the Request for Comment that the Proposed Instrument has not been revised to exempt SEC issuers from the application of NI 52-112 on the basis that the exemption for SEC foreign issuers is consistent, and based on similar rationale, to other exemptions provided to SEC foreign issuers under current Canadian securities legislation. However, we respectfully submit that consideration should be given as to whether SEC issuers should be exempt from the requirements of NI 52-112 to the extent that they are complying with Canadian disclosure obligations through the filing of a U.S. equivalent document. For example, National Instrument 51-102 *Continuous Disclosure Obligations* (“NI 52-102”) defines an “AIF” to include “an annual report under the 1934 Act on Form 10-K or Form 20-F” in the case of an SEC issuer and defines an “MD&A” to include a management’s discussion and analysis prepared in accordance with Item 303 of Regulation S-K under the 1934 Act. To the extent that the U.S. equivalent disclosure document satisfies the Canadian disclosure requirements, additional Canadian requirements under NI 52-112 should not be required. Additional burden imposed upon SEC issuers will make the Canadian capital markets less attractive to these issuers and is not consistent with the CSA’s goal of reducing regulatory burden.

Fairness Opinions

We submit that fairness opinions should be explicitly excluded from the application of the Proposed Instrument, similar to how valuations and pro forma financial statements are currently excluded.

Information Derived from a Material Contract

Given that material contracts are explicitly exempted from the application of NI 52-112, we submit that disclosure of a definition or financial covenant derived from a material agreement in a document other than the material agreement itself should be excluded from the application of the Proposed Instrument as well.

b. Subsection 5(3) - Incorporating information by reference

As currently drafted, subsection 5(3) of NI 52-112 does not permit an issuer to incorporate by reference the information specified in subsection 5(1) in a news release issued or filed by the issuer. Given the nature of press releases, we respectfully submit that issuers should be permitted to incorporate by reference the information required under NI 52-112 in a news release issued or filed by the issuer if the reference is to the MD&A of the issuer. Reporting issuers typically press release quarterly and annual financial results and having to include the prescribed disclosure under NI 52-112 would result in such press releases being lengthy, complex and impracticable. The increased burden of the added disclosure would not be outweighed by the benefit to investors and is contrary to the CSA’s burden reduction initiatives.

c. Subsection 6(c) – Non-GAAP financial measures that are historical information

Section 6(c) of NI 52-112 requires that the non-GAAP financial measure be presented with “no more prominence” in the document than that of the most comparable financial measure. The same concept is used elsewhere in NI 52-112 (i.e., section 7(2)(c) with respect to forward-looking information, section 8(b) with respect to non-GAAP ratios, and section 10(b) with respect to capital management measures). Section 6(c) of CP 52-112 suggests that the most comparable measure must be presented with “equal or greater prominence” than the non-GAAP financial measure in order to meet this standard. We submit that this standard is difficult for issuers to satisfy as one measure will always have to appear first in a

document and in the case of an MD&A, for example, the non-GAAP financial measure may be more relevant than the GAAP measure. A materiality standard may be appropriate in this regard.

2. Companion Policy 52-112

a. Section 2 – Application to reporting issuers – Websites and Social Media

We acknowledge that the Proposed Instrument will apply to disclosure on websites and social media. We are concerned, however, that publications that an issuer links in social media will become subject to the requirements of NI 52-112 given that these are third party publications that are not within the control of the issuer.

b. Section 6(d) – Comparative information – Impracticable

Section 6(d) of NI 52-112 allows an issuer to exclude comparative information if it is impracticable to present the measure for the comparative period. In CP 52-112, paragraph 6(d) explicitly provides that the CSA will not consider the cost or time involved in preparing comparative information as sufficient rationale for an issuer to assert that it is impracticable to present comparative period information. We submit that this is inappropriate, particularly as section 2.1 6 of the *Securities Act* (Ontario) requires that “business and regulatory costs... of market participants should be proportionate to the significant of the regulatory objectives sought to be realized.” We respectfully submit that the CSA should consider cost and time.

In addition, the requirement that the prior period comparative information use the “same composition” may be too onerous for issuers given that composition can change for a number of valid reasons and that such changes will have to be described under section 6(e)(vi) of NI 52-112. As such, there should be no requirement to restate prior periods.

c. Section 6(d) – Comparative information – Changes in Accounting Standards

The suggested approach for adjustments that do not apply every period (e.g., transactions costs for mergers and acquisitions) or that are not anticipated is not practical as it implies that an issuer should include all potential adjustments that may occur or recur in the definition and description of the measure all potential adjustments that may occur or recur in the future.

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Thank you for the opportunity to comment on the Proposed Instrument. Please do not hesitate to contact any of the undersigned if you have any questions in this regard.

Yours truly,

Laura Levine
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David Tardif