

Appendix B

Summary of Comments and CSA Responses

Proposed National Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings*

Table of Contents

General Comments

1. General Comments
 1. General support for the principles underlying the Instrument and Companion Policy as published
 2. General concern regarding the Instrument and Companion Policy as published

Instrument Comments

2. Part 1 – Definitions and Application
 1. Definitions
3. Part 3 – DC&P and ICFR
 1. Section 3.3 Limitations on scope of design
 2. Section 3.4 Use of a control framework for the design of ICFR
4. Part 4 – Certification of Annual Filings
 1. Section 4.3 Alternative form of annual certificate for first financial period after initial public offering
5. Part 9 – Effective Date
 1. General comments
6. Annual and Interim Certificates
 1. General certificate comments
 2. Annual certificates
 3. Interim certificates

Companion Policy Comments

7. Part 1 – General
8. Part 5 – Control Frameworks for ICFR
 1. Section 5.2 Scope of control frameworks
9. Part 6 – Design of DC&P and ICFR
 1. Section 6.1 General
 2. Section 6.3 Reasonable assurance
 3. Section 6.6 Risk considerations for designing DC&P and ICFR

4. Section 6.11 ICFR design challenges
5. Section 6.15 Documenting design
10. Part 7 – Evaluating Operating Effectiveness of DC&P and ICFR
 1. Section 7.5 Use of external auditor or other third party
 2. Section 7.8 Walkthroughs
 3. Section 7.10 Self-assessments
 4. Section 7.11 Timing of evaluation
11. Part 8 – Use of a Service Organization or Specialist for an Issuer’s ICFR
 1. Section 8.1 Use of a service organization
 2. Section 8.5 Use of a specialist
12. Part 9 – Material Weakness
 1. Section 9.1 Identifying a deficiency in ICFR
 2. Section 9.6 Disclosure of a material weakness
 3. Section 9.7 Disclosure of remediation plans and actions undertaken
13. Part 10 – Weakness in DC&P that is Significant
 1. Section 10.1 Conclusion on effectiveness of DC&P if a weakness exists that is significant
 2. Section 10.3 Certification of DC&P if a material weakness in ICFR exists
14. Part 11 – Reporting Changes in ICFR
 1. Section 11.1 Assessing materiality of a change in ICFR
15. Part 12 – Role of Board of Directors and Audit Committee
 1. Section 12.2 Audit committee
16. Part 13 – Certain Long Term Investments
 1. Section 13.3 Design and evaluation of DC&P and ICFR
17. Part 14 – Business Acquisitions
 1. Section 14.1 Access to acquired business
18. Part 15 – Venture Issuer Basic Certificates
 1. General comments
 2. Section 15.3 Voluntary disclosure regarding DC&P and ICFR

Legend:

CICA: Canadian Institute of Chartered Accountants

DC&P: disclosure controls and procedures

ICFR: internal control over financial reporting

IFRS: International Financial Reporting Standards

PCAOB: Public Company Accounting Oversight Board

SOX: Sarbanes-Oxley Act

VIE: variable interest entity

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| 1. GENERAL COMMENTS | | | |
| 1. | General support for the principles underlying the Instrument and Companion Policy as published | <p>Thirteen commenters express their general support for the approach taken.</p> <p>Four commenters express their support for the venture issuer basic certificate.</p> | We thank the commenters for their support. |
| 2. | General concern regarding the Instrument and Companion Policy as published | <p><u>Costs of Compliance</u> One commenter believes that costs of compliance outweigh any potential gains.</p> <p><u>Absence of Attestation Requirement</u> Two commenters do not support the absence of a requirement for an external audit opinion.</p> | <p>We believe that the proposed revisions to National Instrument 52-109 adequately address the concerns raised and the benefits to the marketplace as a whole outweigh the costs.</p> <p>We continue to believe the benefits associated with requiring an issuer to obtain from its auditor an opinion on the effectiveness of ICFR do not exceed the costs.</p> |
| INSTRUMENT COMMENTS | | | |
| 2. PART 1 – DEFINITIONS AND APPLICATION | | | |
| 1. | Definitions | <p><u>Weakness in DC&P</u> Two commenters question whether the term material weakness should apply to DC&P in addition to ICFR.</p> <p>Four commenters believe a definition should be provided for a weakness that is significant. One commenter requests clarification as to whether the term “significant” is a lower threshold than “material weakness”.</p> <p><u>Material Weakness</u> Four commenters express their support for aligning the definition of “material weakness”</p> | <p>We have proposed to adopt the term “material weakness” as defined by the SEC. This definition only relates to ICFR. The identification of weaknesses in DC&P and their relationship to ICFR is addressed in Part 10 of the Companion Policy.</p> <p>Guidance has been added to section 10.1 of the Companion Policy to assist certifying officers in determining the effectiveness of DC&P.</p> <p>We thank the commenters for their support.</p> |

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| | | <p>with the SEC’s definition and not requiring remediation of a material weakness.</p> <p>One commenter suggests amending the definition of material weakness to clarify what is meant by “material”.</p> | <p>We believe the guidance in Part 9 of the Companion Policy is sufficient for the certifying officers of an issuer to determine whether a material weakness exists in the context of the issuer’s business.</p> |
| <p>3. <u>PART 3 – DC&P AND ICFR</u></p> | | | |
| 1. | <p>Section 3.3 Limitations on scope of design</p> | <p>Four commenters express their support for the scope limitation of 365 days.</p> <p>Two commenters believe the scope limitation of 365 days for a newly acquired business is not sufficient. Reasons cited include:</p> <ul style="list-style-type: none"> - acquired businesses may have significantly different processes, procedures and technologies - resources are limited and focused on integration of the business - complexities of cross-border acquisitions require additional time <p>One commenter noted an inconsistency between the requirements of section 3.3 of the Instrument and the guidance in subsection 13.3(4) of the Companion Policy. The guidance states that the scope limitation is only available in cases where the certifying officers do not have sufficient access to design and evaluate the controls, policies and procedures carried out by the underlying entity.</p> | <p>We thank the commenters for their support.</p> <p>We do not believe a further extension of the scope limitation is necessary or appropriate.</p> <p>We agree and have amended section 3.3 of the Instrument.</p> |
| 2. | <p>Section 3.4 Use of a Control Framework for the design of ICFR</p> | <p>Four commenters express their support for the requirement to use a control framework to design ICFR.</p> <p>One commenter believes the absence of a suitable control framework for smaller issuers will pose a significant challenge for them. The commenter suggests the CSA create or support a task force to develop a principles-based internal control framework for smaller issuers.</p> | <p>We thank the commenters for their support.</p> <p>We believe that all issuers will be able to comply with the certification requirements, including the requirement to use a control framework to design ICFR. We do not believe the CSA is the appropriate body to create a task force to develop a control framework.</p> |
| <p>4. <u>PART 4 – CERTIFICATION OF ANNUAL FILINGS</u></p> | | | |
| 1. | <p>Section 4.3</p> | <p>One commenter expresses support for the 90-day scope limitation for IPOs and RTOs.</p> | <p>We thank the commenter for the support.</p> |

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| | Alternative form of annual certificate for first financial period after initial public offering | One commenter notes that there is a tremendous level of effort required to complete an initial public offering and permitting a delay of greater than 90 days for filing a full certificate may have some merit. | We continue to propose that certifying officers be required to certify the design of ICFR for the annual or interim period that follows the first filing after an issuer becomes a reporting issuer. Since certifying officers have access to design ICFR prior to the issuer becoming a reporting issuer, we believe investors are entitled to expect that the certifying officers will be able to comply with the certification requirements within a relatively short period of time after the issuer becomes a reporting issuer. |
| 5. <u>PART 9 – EFFECTIVE DATE</u> | | | |
| 1. | General comments | <u>Effective Date</u> Eighteen commenters believe the effective date should be extended. Reasons cited include: <ul style="list-style-type: none"> • Eleven commenters indicate that it will be difficult for them to properly plan, resource and execute an efficient and cost-effective compliance program for 2008. • Six commenters indicate that because of scarce resources, competing priorities and uncertainties around the finalization of NI 52-109 they have been reluctant to do all of the work necessary to comply with NI 52-109 until it is finalized. • Four commenters note that the transition to IFRS is a competing priority for scarce resources. • Two commenters raise the concern that additional effort will be required due to the requirement to use a control framework. | We acknowledge the concerns related to timing. In response to these concerns we published CSA Staff Notice 52-322 to provide issuers with advanced notice of our intentions. In addition, we accelerated our publication timelines for the finalization of NI 52-109. We continue to propose an effective date of December 15, 2008 for the following reasons: <ul style="list-style-type: none"> • We expect most issuers to do the bulk of their work relating to IFRS conversion in 2009 and 2010, so it would be better for issuers to have completed the work relating to implementing NI 52-109 in 2008. • Certifying officers of non-venture issuers are currently required to certify that they have evaluated the effectiveness of DC&P. There is substantial overlap between DC&P and ICFR. NI 52-109 will close the gap in current certification requirements relating to the evaluation of DC&P and ICFR. • We believe there is adequate time to prepare the last piece of the certification requirement between now and the first filing deadline, which will be in March 2009. |

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| | | <p>One commenter suggests guidance be provided for issuers filing a certificate after the effective date for a financial period ending prior to the effective date.</p> <p><u>Early Adoption</u> One commenter believes early adoption of the instrument should be allowed.</p> | <ul style="list-style-type: none"> We published this date in April 2008 and have consistently referred to this date since then. <p>We believe subsection 1.2(2) of the Instrument provides sufficient clarity regarding the effective date.</p> <p>We expect few, if any, issuers will want to adopt the new instrument early. Therefore we do not think it is appropriate to change the instrument to permit early adoption .</p> |
| 6. <u>ANNUAL AND INTERIM CERTIFICATES</u> | | | |
| 1. | General Certificate Comments | <p><u>Modification to Certificates</u> One commenter believes paragraph 5(b) of Forms 52-109F1 and 52-109F2 should refer to accounting standards as opposed to GAAP in preparation for Canada’s convergence to IFRS.</p> <p>One commenter questions why Forms 52-109F1, 52-109F1-IPO/RTO and 52-109FV1 contain the phrase “AIF, if any” when only venture issuers have the option to file an AIF and would then file Form 52-109F1-AIF.</p> <p><u>Reporting Changes in ICFR</u> One commenter believes that changes in ICFR that have no material impact on ICFR should not be disclosed in the MD&A.</p> <p>One commenter believes a material change in ICFR should not be reported where the risk is low or non-existent that a material misstatement will not be prevented or detected on a timely basis.</p> | <p>Paragraph 5(b) of Forms 52-109F1 and 52-109F2 refers to the “issuer’s GAAP” which is a defined term that is broad enough to include IFRS.</p> <p>A venture issuer may voluntarily file Form 52-109F1 even if it does not prepare an AIF. Form 52-109F1-AIF is only used if a venture issuer voluntarily files an AIF after filing its annual financial statements, MD&A and certificates.</p> <p>Under paragraph 7 of Form 52-109F1 and paragraph 6 of Form 52-109F2, “Reporting changes in ICFR”, the certifying officers are only required to report a change that has “materially affected or is reasonably likely to materially affect the issuer’s ICFR”.</p> |
| 2. | Annual Certificates | One commenter suggests that an issuer with no material weaknesses should be able to mark subsections (ii), (iii) and (iv) of paragraph 6(b) in Form 52-109F1 as “n/a”. | We agree with the comment and have amended Form 52-109F1. |
| 3. | Interim Certificates | One commenter notes that SOX does not require disclosure of material weaknesses on an interim basis. The commenter believes interim disclosure of material weaknesses in the | We believe the disclosure requirements in paragraph 5.2 of Form 52-109F2 are a logical extension of the requirement |

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| | | design of ICFR will be onerous for inter-listed issuers. | to certify design in paragraph 5. |
| COMPANION POLICY COMMENTS | | | |
| 7. <u>PART 1 – GENERAL</u> | | | |
| 1. | | One commenter believes the guidance in section 1.3 of the Companion Policy should be clarified so that venture issuers electing to file a Form 52-109F1 or 52-109F2 know they should follow the guidance in Parts 5 through 14 of the Companion Policy. | We believe the guidance is sufficiently clear. |
| 2. | | One commenter recommends there be specific guidance requiring the implementation of an ethics hot line as a cost effective way to promote and enforce accountability within an organization. | We believe this concern is addressed by subsection 2.3(7) of NI 52-110 <i>Audit Committees</i> which states “(a) the receipt, retention and treatment of complaints received by the issuer regarding accounting, internal controls, or auditing matters; and (b) the confidential anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters”. |
| 3. | | One commenter believes that issuers should clearly state in the MD&A that “Management’s report on internal control over financial reporting was not subject to audit by the Company’s external auditor”. The commenter believes this will help reduce confusion in the marketplace as cross-listed issuers will be subject to an audit. | We believe the Canadian marketplace is well aware that a Canadian company that is not cross-listed is not required to obtain an audit of internal control over financial reporting. |
| 8. <u>PART 5 – CONTROL FRAMEWORKS FOR ICFR</u> | | | |
| 1. | Section 5.2 Scope of control frameworks | One commenter believes the guidance in section 5.2 of the Companion Policy should make reference to principle 14 and the tools found in COSO’s guidance for smaller public companies and believes too much prominence has been given to the publication from IT Governance Institute. | Section 5.1 of the Companion Policy includes a reference to the COSO’s guidance for smaller public companies. |
| 9. <u>PART 6 – DESIGN OF DC&P AND ICFR</u> | | | |
| 1. | Section 6.1 General | One commenter recommends that the Companion Policy indicate where internal audit could assist with the design and evaluation of DC&P and ICFR. | We do not believe additional guidance is needed. Consideration of the internal audit function is noted in paragraph 6.13(c) of the Companion Policy. |

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| 2. | Section 6.3 Reasonable assurance | One commenter recommends expanding the guidance in section 6.3 of the Companion Policy relating to reasonable assurance. | With the adoption of “material weakness” we have revised our guidance to be similar to that included in the SEC’s <i>Commission Guidance Regarding Management’s Report on ICFR</i> . We believe the guidance relating to reasonable assurance in section 6.3 of the Companion Policy is sufficiently clear. |
| 3. | Section 6.6 Risk considerations for designing DC&P and ICFR | <p>One commenter believes the guidance provided in section 6.6 of the Companion Policy only focuses on the regulatory requirements rather than designing controls.</p> <p>One commenter suggests that further guidance should be provided relating to fraud risk to include “all information required to be disclosed by the issuer in its annual filings, interim filings or other reports filed or submitted by it under securities regulation.</p> <p>One commenter continues to believe guidance around an adequate assessment of fraud would be helpful to issuers.</p> | <p>We disagree. The guidance was developed using various auditing standards, including CICA handbook section 5925 and PCAOB Auditing Standards No. 2 and No. 5. In addition, section 6.14 of the Companion Policy discusses how to enhance the efficiency and effectiveness of the designs.</p> <p>We agree and have amended the guidance in subsection 6.6(3) of the Companion Policy.</p> <p>We do not propose to include additional guidance since these are decisions that would be made by the certifying officers based on the issuer’s facts and circumstances using a top-down, risk-based approach.</p> |
| 4. | Section 6.11 ICFR Design Challenges | <p>One commenter suggests that two of the examples provided in section 6.11 of the Companion Policy are prohibited by the auditor independence rules.</p> <p>One commenter does not see the value in providing the guidance in section 6.11 of the Companion Policy on ICFR design challenges. If retained the commenter does not agree with the statement in paragraph 6.11(d) relating to the auditor’s expert advice that states “this type of arrangement should not be considered a component of ICFR”. Another commenter suggests that the removal of guidance relating to an auditor providing services to mitigate risks raises the question of whether auditor services with respect to design are part of an issuer’s controls, or alternatively, mitigating procedures.</p> | <p>We disagree. In some instances the auditor independence rules allow for auditor involvement depending on the size of the issuer.</p> <p>We disagree with the commenter. We have clarified one sentence in section 6.11 of the Companion Policy by deleting the word “compensate” and inserting “provide” to avoid any confusion between the guidance in section 6.11 and the concept of compensating controls discussed in subsection 9.1(3) of the Companion Policy. Even though independence rules may permit an external auditor to perform certain services, we do not believe that this should be considered a component of the issuer’s ICFR.</p> |

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| 5. | Section 6.15 Documenting design | <p>One commenter believes the guidance provided in subsection 6.15(4) of the Companion Policy should focus on the risk of misstatement as opposed to the process or flow. In addition the commenter believes some guidance should be provided on adapting the extent of documentation to the situation.</p> <p>One commenter believes it is not necessary to distinguish controls over safeguarding of assets in paragraph 6.15(4)(g) of the Companion Policy.</p> | <p>We agree, and have amended the guidance in subsection 6.15(1) of the Companion Policy to provide further information on adapting the extent of documentation.</p> <p>We disagree with the commenter. We believe the controls over safeguarding of assets form a part of the issuer's ICFR, as indicated by the definition of ICFR.</p> |
| 10. PART 7 – EVALUATING OPERATING EFFECTIVENESS OF DC&P AND ICFR | | | |
| 1. | Section 7.5 Use of an external auditor or other third party | <p>One commenter believes that the Companion Policy should include a statement that an audit of internal control is not a substitute for the certifying officer's own evaluation.</p> <p>One commenter suggests expanding the guidance in section 7.5 of the Companion Policy to clarify the roles of management and the auditors. The commenter suggested wording similar to that used by the SEC.</p> | <p>We believe the guidance in section 7.5 of the Companion Policy clearly indicates that the certifying officers have responsibility for their own evaluation regardless of the auditor's involvement.</p> <p>We do not believe that additional disclosure regarding the use of an external auditor is necessary or appropriate in the Companion Policy.</p> |
| 2. | Section 7.8 Walkthroughs | One commenter suggests that including a section on walkthroughs makes it appear as a requirement when the commenter believes it would be more efficient for an issuer to proceed directly to testing. | The guidance in section 7.8 of the Companion Policy clearly states that walkthroughs are a tool that "can assist" a certifying officer. |
| 3. | Section 7.10 Self-assessments | Two commenters believe further guidance should be provided relating to self-assessments. | We agree and have amended the guidance in section 7.10 of the Companion Policy to indicate that, where one certifying officer performs a self-assessment, it is appropriate for the other certifying officer to perform direct testing of the control. |
| 4. | Section 7.11 Timing of evaluation | One commenter suggests providing examples of controls that could be tested before or after year end, such as controls that have documented attributes. | We believe the guidance in section 7.11 of the Companion Policy is clear. |
| 11. PART 8 – USE OF A SERVICE ORGANIZATION OR SPECIALIST FOR AN ISSUER'S ICFR | | | |
| 1. | Section 8.1 Use of a service | One commenter believes the example in section 8.1 of the Companion Policy should not be payroll as the commenter believes this is a low risk area and the example isn't consistent | We believe certifying officers need to determine the risks within their own organization. Payroll may be an area of |

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| | organization | <p>with a risk-based approach.</p> <p>One commenter suggests clarifying the definition of “significant process” within section 8.1 of the Companion Policy as the term may be viewed in a broader context than was intended.</p> <p>One commenter suggests eliminating the word “compensating” in paragraph 8.1(c) of the Companion Policy as the controls do not need to be compensating.</p> | <p>significant risk to an organization based on its facts and circumstances.</p> <p>We believe the reference in subsection 6.6(2) of the Companion Policy appropriately focuses on the relevance of risk assessment in determining the scope of an issuer’s DC&P and ICFR.</p> <p>We agree and have modified the guidance in paragraph 8.1(c) of the Companion Policy.</p> |
| 2. | Section 8.5 Use of a specialist | One commenter recommends adding guidance indicating that management accepts responsibility for the results of the service expert’s work. If an error is found in the specialist’s work, management must evaluate the severity of the deficiency and consider whether it represents a material weakness. | We believe that the guidance in section 8.5 of the Companion Policy regarding use of a specialist is clear. |
| 12. <u>PART 9 – MATERIAL WEAKNESS</u> | | | |
| 1. | Section 9.1 Identifying a deficiency in ICFR | Two commenters believe the distinction between compensating controls and mitigating procedures is confusing. The commenters recommend that additional examples be provided in paragraph 9.1(3)(b) of the Companion Policy. One commenter recommends clarifying that a control deficiency that has been compensated for remains a control deficiency. | We have included additional guidance in subsection 9.1(3) of the Companion Policy to clarify the distinction between compensating controls and mitigating procedures and the fact that mitigating procedures do not eliminate the existence of a material weakness. |
| 2. | Section 9.6 Disclosure of a material weakness | <p>One commenter recommends that, due to the overlap between design and operation of ICFR, the guidance should state that all material weaknesses should be disclosed.</p> <p>One commenter suggests that disclosure of a material weakness relating to design should focus on material information as required by Part 1(e) of NI51-102F1 <i>Management’s Discussion and Analysis</i>.</p> | <p>We believe the guidance in subsections 9.6(1) and (2) of the Companion Policy makes it sufficiently clear that either a material weakness in design or a material weakness in operation would have to be disclosed.</p> <p>We do not believe that additional guidance is necessary.</p> |
| 3. | Section 9.7 Disclosure of remediation plans and actions | One commenter believes the guidance in section 9.7 of the Companion Policy discussing mitigating procedures in the case where an issuer is not remediating a material weakness might be misleading. The commenter recommends deleting this guidance. | We have added guidance to subsection 9.1(3) of the Companion Policy that states if an issuer discusses mitigating procedures in its MD&A, the issuer should not imply that the procedures eliminate the existence of a |

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| | undertaken | One commenter expects management to have a plan for remediation otherwise the auditor would be unable to issue an unreserved audit opinion. | material weakness. We believe an auditor plans its audit considering but not necessarily relying on the control environment and would refer to CICA Handbook Section 5220 in the case of a weakness in internal control. |
| 13. <u>PART 10 – WEAKNESS IN DC&P THAT IS SIGNIFICANT</u> | | | |
| 1. | Section 10.1 Conclusions on effectiveness of DC&P if a weakness exists that is significant | Two commenters believe additional guidance should be provided in section 10.1 of the Companion Policy to help issuers apply the standard consistently. | Guidance has been added to section 10.1 of the Companion Policy to assist certifying officers in determining the effectiveness of DC&P. |
| 2. | Section 10.3 Certification of DC&P if a material weakness in ICFR exists | One commenter suggests that given the overlap between DC&P and ICFR the term “often” in section 10.3 of the Companion Policy should be replaced with “always” or “almost always” and an issuer should be required to explain if they concluded DC&P is effective if ICFR is not effective. | We agree and have amended the guidance in section 10.3 of the Companion Policy to say “almost always”. |
| 14. <u>PART 11 – REPORTING CHANGES IN ICFR</u> | | | |
| 1. | Section 11.1 Assessing materiality of a change in ICFR | One commenter recommends providing further guidance to assist reporting issuers with assessing the materiality of a change in ICFR. The commenter recommends that the guidance include consideration of selected factors, such as context and materiality when assessing changes in ICFR to be disclosed and that the example of a payroll conversion be removed. | We believe the guidance in section 11 of the Companion Policy is appropriate. The certifying officers would assess the materiality of a change in ICFR based on the issuer’s facts and circumstances. |
| 15. <u>PART 12 – ROLE OF THE BOARD OF DIRECTORS AND AUDIT COMMITTEE</u> | | | |
| 1. | Section 12.2 Audit committee | One commenter feels the CSA should not have removed the requirement that certifying officers must disclose to the audit committee all significant deficiencies in the design or operation of ICFR. | The lack of a requirement to report to the audit committee does not preclude an audit committee from requesting that certifying officers bring any significant deficiencies to its attention. |

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| 16. <u>PART 13 – CERTAIN LONG TERM INVESTMENTS</u> | | | |
| 1. | Section 13.3 Design and evaluation of DC&P and ICFR | <p>One commenter believes the disclosure in subsection 13.3(4) of the Companion Policy would be enhanced by the addition of “that will not be prevented or detected on a timely basis” after each instance of “material misstatement”.</p> <p>One commenter believes certifying officers should consider whether portfolio investments and equity investments referred to in subsection 13.3(5) of the Companion Policy include risks that could reasonably result in a material misstatement in the issuer's annual filings, interim filings or other reports.</p> | <p>We do not believe the Companion Policy would be enhanced by this addition.</p> <p>We have amended subsection 13.3(5) of the Companion Policy to clearly indicate that an issuer should address controls over its disclosure of material information. Although subsection 13.3 (5) of the Companion Policy does not specifically refer to risks, certifying officers must consider risks when addressing the issuer's controls over its disclosure relating to its portfolio investments and equity investments. Section 6.6 of the Companion Policy gives guidance for the identification of risks that could reasonably result in a material misstatement.</p> |
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| 17. <u>PART 14 – BUSINESS ACQUISITIONS</u> | | | |
| 1. | Section 14.1 Access to acquired business | <p>Two commenters believe that section 14.1 of the Companion Policy should be clarified to indicate that the scope limitation for a business acquisition should only be taken subject to materiality.</p> <p>One commenter also suggests that, subject to materiality, aggregated summary financial information for business combinations should be allowed as it is for proportionately consolidated entities and VIEs.</p> | <p>We agree and have amended the guidance in section 14.2 of the Companion Policy to clarify that the scope limitation is only relevant for material business acquisitions.</p> <p>We have revised the Companion Policy to indicate that summary information may be disclosed for related businesses in the case of an acquisition of related businesses, as that term is used in NI 51-102 <i>Continuous Disclosure Obligations</i>.</p> |
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| 18. <u>PART 15 – VENTURE ISSUER BASIC CERTIFICATES</u> | | | |
| 1. | General comments | One commenter believes more emphasis should be given to the general expectations for management of all issuers regarding their certification obligations, particularly the “no misrepresentations” requirements. | We believe that Parts 1 and 4 of the Companion Policy appropriately address the purpose of the certification requirements, including representations relating to fair presentation, financial condition and reliability of financial reporting. |

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| 2. | Section 15.3 Voluntary disclosure regarding DC&P and ICFR | <p>One commenter believes it would be beneficial to provide venture issuers with additional guidance on their disclosure expectations. The commenter suggested guidance on the following:</p> <ul style="list-style-type: none"> • What should be disclosed in the MD&A? • Should material weaknesses be disclosed? • If disclosing a material weakness, should the venture issuer’s disclosure be the same as the disclosure requirements of section 5.2 and 6(b) of Form 52-109F1? <p>One commenter suggests “and has not completed such an evaluation” should be added to the venture issuer’s qualifying statement in the MD&A which currently states “the venture issuer is not required to certify the design and evaluation of the issuer’s DC&P and ICFR”.</p> | <p>We believe the guidance in section 15.3 of the Companion Policy clearly states that a venture issuer filing a basic certificate “is not required to discuss in its annual or interim MD&A the design or operating effectiveness of DC&P or ICFR”.</p> <p>We agree and have added the suggested phrase to the guidance in section 15.3 of the Companion Policy.</p> |
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