

**Notice and Request for Comments****Proposed Repeal and Replacement of  
Multilateral Instrument 52-109,  
Forms 52-109F1, 52-109FT1, 52-109F2 and 52-109FT2  
and Companion Policy 52-109CP  
*Certification of Disclosure in Issuers' Annual and Interim Filings*****1. PURPOSE OF NOTICE**

We, the Canadian Securities Administrators (CSA), are publishing for a 90-day comment period the following documents:

- National Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings* (the Proposed Instrument);
- Forms 52-109F1, 52-109FMP1, 52-109FM1, 52-109F1 – IPO/RTO, 52-109F1R, 52-109F1 – AIF, 52-109F2, 52-109F2 – IPO/RTO and 52-109F2R (together, the Proposed Forms); and
- Companion Policy 52-109CP (the Proposed Policy, and together with the Proposed Instrument and the Proposed Forms, the Proposed Materials).

In jurisdictions other than British Columbia, the Proposed Materials represent a republication of the previously proposed internal control reporting requirements that CSA members other than British Columbia originally published for comment on February 4, 2005.

The Proposed Materials reflect the proposed approach for additional provisions relating to internal control over financial reporting (ICFR) described in CSA Notice 52-313 *Status of Proposed Multilateral Instrument 52-111 Reporting on Internal Control Over Financial Reporting and Proposed Amended and Restated Multilateral Instrument 52-109 Certification of Disclosure in Issuers' Annual and Interim Filings* (CSA Notice 52-313), released on March 10, 2006. We propose to require management to evaluate an issuer's ICFR and provide MD&A disclosure about their conclusions about the effectiveness of ICFR based on such evaluation. We do not propose requiring an issuer to obtain from its auditor an internal control audit opinion concerning management's assessment of the effectiveness of ICFR. We think our proposal will balance the costs and benefits associated with internal control reporting requirements, while increasing management's focus on, and accountability for, the quality of ICFR.

The Proposed Materials would replace the following documents currently in effect:

- Multilateral Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings* (the Current Instrument);
- Forms 52-109F1, 52-109FT1, 52-109F2 and 52-109FT2 (together, the Current Forms); and
- Companion Policy 52-109CP to the Current Instrument (together with the Current Instrument and Current Forms, the Current Materials).

The Current Instrument came into force in all CSA jurisdictions except British Columbia, Quebec and New Brunswick on March 30, 2004. The Current Instrument came into force in Quebec on June 30, 2005, in New Brunswick on July 28, 2005, and in British Columbia on September 19, 2005.

## **2. OUTLINE OF NOTICE**

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## **3. PUBLISHING JURISDICTIONS**

The Proposed Materials are initiatives of the securities regulatory authorities in all Canadian jurisdictions. If adopted, the Proposed Instrument and the Proposed Forms are expected to be adopted as:

- a rule in each of British Columbia, Alberta, Manitoba, Ontario, Québec, New Brunswick, Nova Scotia and Newfoundland and Labrador;

- a Commission regulation in Saskatchewan;
- a policy in each of Prince Edward Island and Yukon; and
- a code in each of the Northwest Territories and Nunavut.

We expect that the Proposed Policy, if adopted, will be adopted as a policy in all Canadian jurisdictions.

#### **4. BACKGROUND**

##### **Current certification requirements**

The Current Materials require an issuer's chief executive officer (CEO) and chief financial officer (CFO), or persons performing similar functions to a CEO or CFO (certifying officers), to personally certify that, among other things:

- the issuer's annual filings and interim filings do not contain any misrepresentations;
- the financial statements and other financial information in the annual filings and interim filings fairly present the financial condition, results of operations and cash flows of the issuer;
- they have designed disclosure controls and procedures (DC&P) and ICFR (or caused them to be designed under their supervision);
- they have evaluated the effectiveness of the issuer's DC&P and caused the issuer to disclose the conclusions about their evaluation in the issuer's MD&A; and
- they have caused the issuer to disclose certain changes in ICFR in the issuer's MD&A.

##### **Previously proposed internal control reporting requirements**

On February 4, 2005, members of the CSA, other than British Columbia, published for comment the following documents:

- Multilateral Instrument 52-111 *Reporting on Internal Control over Financial Reporting* (the Previously Proposed Internal Control Instrument);
- Companion Policy 52-111CP;
- Multilateral Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings* (the Previously Proposed Modification of the Instrument);
- Forms 52-109F1, 52-109FVT1, 52-109FM1, 52-109F1R, 52-109F1R – AIF, 52-109F2, 52-109FT2, 52-109FM2 and 52-109F2R (together, the Previously Proposed Modification of Forms); and
- Companion Policy 52-109CP.

Together, the Previously Proposed Internal Control Reporting Requirements.

The Previously Proposed Internal Control Instrument, as it was published for comment, was substantially similar to the requirements of section 404 of the *Sarbanes-Oxley Act of 2002* (the Sox 404 Rules). The Previously Proposed Internal Control Instrument would have required management of issuers other than venture issuers and investment funds to evaluate the effectiveness of the issuer's ICFR, as at the end of the issuer's financial year, against a suitable framework. In addition, it proposed requirements for an issuer other than a venture issuer or investment fund to file the following with the securities regulatory authorities:

- a report of management on its assessment of the effectiveness of the issuer's ICFR, including statements as to the effectiveness of the issuer's ICFR; and
- a report of the issuer's auditor prepared in accordance with the CICA's auditing standard for internal control audit engagements.

The British Columbia Securities Commission did not publish the Previously Proposed Internal Control Reporting Requirements for comment. It published and sought comment on its views on internal control reporting requirements under BCN 2005/08 *BCSC Comments on Proposed Multilateral Instrument 52-111*.

### **Decision not to proceed with Previously Proposed Internal Control Reporting Requirements**

On March 10, 2006, we issued CSA Notice 52-313 updating market participants on the status of proposed requirements relating to ICFR. After extensive review and consultation, and in view of recent developments, particularly the delays and the debate underway in the U.S. over the implementation of the Sox 404 Rules, we decided not to proceed with the Previously Proposed Internal Control Reporting Requirements.

Instead, CSA Notice 52-313 proposed an approach for additional provisions relating to ICFR that is the basis for the Proposed Materials. Key features of this approach, as communicated in the notice, are the following:

- the certifying officers will be required to certify in their annual certificates that they have evaluated the effectiveness of the issuer's ICFR at the financial year end. They will also be required to certify that they have caused the issuer to disclose in its annual MD&A their conclusions about the effectiveness of ICFR at the financial year end based on their evaluation;
- the issuer's annual MD&A will include disclosure about its ICFR. This disclosure will include a description of the process for evaluating the effectiveness of the issuer's ICFR and the conclusions about the effectiveness of ICFR at the financial year end;
- the requirements will apply to all reporting issuers, other than investment funds, in all Canadian jurisdictions; and
- an issuer will not be required to obtain from its auditor an audit opinion concerning management's assessment of the effectiveness of ICFR.

The Current Materials continue to be in force in all jurisdictions. If the Proposed Materials are adopted, they will repeal and replace the Current Materials.

## **Recent developments in U.S. relating to internal control reporting requirements**

In December 2006, the U.S. Securities Exchange Commission (SEC) published for comment its proposed interpretive guidance for management regarding its evaluation of ICFR entitled *Management's Report on Internal Control over Financial Reporting*. The proposed guidance focuses companies on (i) controls necessary for the prevention or detection of material misstatements in the financial statements and (ii) performing their evaluation in accordance with a risk-based approach. The principles-based approach emphasizes the use of judgment and provides additional guidance in the following areas:

- identifying financial reporting risks and controls;
- evaluating evidence of the operating effectiveness of ICFR;
- reporting on the overall results of management's evaluation; and
- documentation.

Also in December 2006, the Public Company Accounting Oversight Board (PCAOB) published for comment its proposed auditing standard *An Audit of Internal Control Over Financial Reporting That Is Integrated with an Audit of Financial Statements* to supersede its existing Auditing Standard No. 2. The proposed standard is designed to focus the auditor on the matters most important to internal control, eliminate unnecessary procedures, simplify and shorten the standard by reducing detail and make the audit more scalable for smaller and less complex companies.

The comment periods on both the SEC and PCAOB proposals ended on February 26, 2007.

## **5. SUMMARY OF CHANGES IN THE PROPOSED INSTRUMENT AND PROPOSED FORMS**

### **Significant proposed amendments**

The most significant proposed changes to the Current Instrument, as reflected in the Proposed Instrument, are as follows:

- Part 1 includes a definition of "reportable deficiency" which means a deficiency, or combination of deficiencies, in the design or operation of one or more controls that would cause a reasonable person to doubt that the design or operation of ICFR provides reasonable assurance regarding the reliability of financial reporting or the preparation of financial statements for external purposes in accordance with the issuer's generally accepted accounting principles (GAAP). We developed this term to link the concept of reasonable doubt with the existing definition of ICFR, which incorporates a standard of reasonableness in assessing the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with the issuer's GAAP. Any deficiency that is determined to be a reportable deficiency will be required to be disclosed in an issuer's MD&A.
- Part 2 requires an issuer to cause its certifying officers to design or supervise the design of DC&P and ICFR.

- Despite the preceding requirement, if a venture issuer cannot reasonably remediate a reportable deficiency relating to design, it must disclose in its MD&A:
  - the reportable deficiency;
  - why the issuer cannot reasonably remediate the reporting deficiency;
  - the risks the issuer faces relating to the reportable deficiency; and
  - whether the issuer has mitigated those risks and if so, how.

This provision is referred to as the “ICFR design accommodation”.

- Despite the requirement that an issuer cause its certifying officers to design or supervise the design of DC&P and ICFR, an issuer may cause its certifying officers to limit the scope of their design of DC&P and ICFR to exclude controls, policies and procedures carried out by:
  - a proportionately consolidated entity in which the issuer has an interest;
  - a variable interest entity in which the issuer has an interest; or
  - a business that the issuer acquired not more than 90 days before the end of the period to which the certificate relates.

If the scope of the issuer’s design is limited due to any of these circumstances the issuer must disclose in its MD&A the scope limitation and summary financial information of the proportionately consolidated entity, variable interest entity or acquired business that has been proportionately consolidated or consolidated in the issuer’s financial statements.

- Part 3 permits certifying officers to file an annual certificate in Form 52-109F1 – IPO/RTO if the issuer’s first annual period (i) following its IPO ends on or before the 90<sup>th</sup> day after it became a reporting issuer, or (ii) in certain circumstances, ends on or before the 90<sup>th</sup> day after completion of a reverse takeover involving the issuer. This form permits certifying officers to exclude certifications relating to ICFR.
- Part 4 permits certifying officers to file an interim certificate in Form 52-109F2 – IPO/RTO if the issuer’s first interim period (i) following its IPO ends on or before the 90<sup>th</sup> day after it became a reporting issuer, or (ii) in certain circumstances, ends on or before the 90<sup>th</sup> day after completion of a reverse takeover involving the issuer. This form permits certifying officers to exclude certifications relating to ICFR.

The most significant proposed changes to the Current Forms, as reflected in the Proposed Forms, are as follows:

- We have expanded the full annual certificate to include the following representations:
  - The certifying officers have evaluated, or caused to be evaluated under their supervision, the effectiveness of the issuer’s ICFR as of the financial year end and the issuer has disclosed in its annual MD&A:

- the certifying officers' conclusions about the effectiveness of ICFR at the financial year end based on such evaluation;
    - a description of the process they used to evaluate the effectiveness of ICFR;
    - a description of any reportable deficiency relating to operation of ICFR existing at the financial year end; and
    - the issuer's plans, if any, to remediate any such reportable deficiency relating to operation of ICFR.
  - The issuer has disclosed in its annual MD&A a statement identifying the control framework the certifying officers used to design the issuer's ICFR or a statement that they did not use a framework, as applicable.
  - If applicable, the issuer has disclosed in its annual MD&A, for any reportable deficiency relating to design of ICFR that existed at the financial year end:
    - a description of the reportable deficiency;
    - a description of the remediation plan to address the reportable deficiency; and
    - the completion date or expected completion date of the remediation plan.
  - If applicable, the issuer has disclosed in its annual MD&A the disclosure relating to the ICFR design accommodation.
  - If applicable, the issuer has disclosed in its annual MD&A (i) any limitation in the scope of the certifying officers' design of DC&P and ICFR for a proportionately consolidated investment, variable interest entity or business that the issuer acquired, and (ii) summary financial information of the proportionately consolidated entity, variable interest entity or acquired business that has been proportionately consolidated or consolidated in the issuer's financial statements.
  - Based on their most recent evaluation of ICFR, the issuer's certifying officers have disclosed to the issuer's auditors, the board of directors and audit committee of the board of directors any fraud that involves management or other employees who have a significant role in the issuer's ICFR.
- We have expanded the full interim certificate to include representations relating to the design of DC&P and ICFR that are also included in the full annual certificate, as described above.
  - New certificate forms will apply in the following situations:

- when an issuer refiles its annual or interim financial statements, annual or interim MD&A or AIF; and
- when a venture issuer voluntarily files an AIF after it has filed its annual financial statements and MD&A.

Appendix A presents a summary of proposed changes to the Previously Proposed Modification of the Instrument and Previously Proposed Modification of Forms as reflected in the Proposed Materials.

***Specific requests for comment***

1. Do you agree with the definition of “reportable deficiency” and the proposed related disclosures? If not, why not and how would you modify it?
2. Do you agree that the ICFR design accommodation should be available to venture issuers? If not, please explain why you disagree.
3. Do you agree that our proposal to provide a scope limitation in the design of DC&P and ICFR for an issuer’s interest in a proportionately consolidated investment or variable interest entity is practical and appropriate? If not, please explain why you disagree.
4. Do you agree that our proposal to allow certifying officers to limit the scope of their design of DC&P or ICFR within 90 days of the acquisition of a business is practical and appropriate? If not, please explain why you disagree.
5. Do you agree that our proposal not to require certifying officers to certify the design of ICFR within 90 days after an issuer has become a reporting issuer or following the completion of certain reverse takeover transactions is practical and appropriate? If not, please explain why you disagree.

**Proposed effective date**

The proposed effective date of the Proposed Instrument, which will apply to all reporting issuers other than investment funds, is June 30, 2008. Since all issuers other than investment funds must certify the design of ICFR for financial years ending after June 29, 2006, issuers will have significant time between the certification of design and the certification of the evaluation of the effectiveness of ICFR to complete the evaluation. As a result, we believe issuers will have adequate time to prepare for and complete an evaluation of their ICFR.

**6. SUMMARY OF ADDITIONAL GUIDANCE INCLUDED IN THE PROPOSED POLICY**

We have significantly expanded the Proposed Policy to assist issuers and advisors in understanding how to interpret and apply certain provisions of the Proposed Instrument. The proposed guidance includes the following:

- A list of available control frameworks that might provide certifying officers with a useful reference when designing or evaluating the effectiveness of ICFR.
- Considerations for the design of DC&P and ICFR, including:

- the use of a top-down, risk-based approach;
  - the importance of developing and maintaining a control environment as the foundation upon which all other components of DC&P and ICFR are based;
  - the components that should generally be included in the design of DC&P and ICFR;
  - the key features of ICFR and related design challenges; and
  - the extent and form of documentation to support the certifying officers' design of DC&P and ICFR.
- Considerations for the evaluation of DC&P and ICFR, including:
    - the evaluation tools that certifying officers might use to perform their DC&P and ICFR evaluations; and
    - the extent of documentation to support the certifying officers' evaluations of DC&P and ICFR.
  - Guidance for determining whether a reportable deficiency exists.
  - A discussion of the role of directors and audit committees in relation to DC&P and ICFR.
  - A discussion of the effect on an issuer's DC&P and ICFR of various types of investments including subsidiaries, variable interest entities, proportionately consolidated entities, equity investments and portfolio investments.
  - A discussion of the effect on an issuer's DC&P and ICFR of a recent acquisition of a business.

***Specific requests for comment***

6. Do you agree that the nature and extent of guidance provided in the Proposed Policy, particularly in Parts 6, 7 and 8, is appropriate? If not, please explain why and how it should be modified.
7. Are there any specific topics that we have not addressed in the Proposed Policy on which you believe guidance is required?

**7. RELATED INSTRUMENTS**

The Proposed Materials are related to:

- National Instrument 51-102 *Continuous Disclosure Obligations*;
- National Instrument 71-102 *Continuous Disclosure and Other Exemptions Relating to Foreign Issuers*;

- National Instrument 52-107 *Acceptable Accounting Principles, Auditing Standards and Reporting Currency*;
- National Instrument 52-108 *Auditor Oversight*; and
- Multilateral Instrument 52-110 *Audit Committees* and BC Instrument 52-509 *Audit Committees*.

## **8. AUTHORITY – ONTARIO**

The following provisions of the *Securities Act* (Ontario) (the Act) provide the Ontario Securities Commission (the Commission) with authority to adopt the Proposed Materials:

- Paragraph 143(1) 10 authorizes the Commission to make rules prescribing requirements in respect of the books, records and other documents required by subsection 19(1) of the Act to be kept by market participants, including the form in which and the period for which the books, records and other documents are to be kept;
- Paragraph 143(1) 22 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) 24 authorizes the Commission make rules requiring issuers or other persons to comply, in whole or in part, with the continuous disclosure filing requirements;
- Paragraph 143(1) 25 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 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;
- Paragraph 143(1) 39.1 authorizes the Commission to make rules governing the approval of any document described in paragraph 143(1) 39 of the Act;
- Paragraphs 143(1) 58 and 59 authorize the Commission to make rules requiring reporting issuers to devise and maintain systems of DC&P and internal controls, the effectiveness and efficiency of their operations, including financial reporting and assets control; and
- Paragraphs 143(1) 60 and 61 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 DC&P and internal controls.

## **9. SUMMARY OF WRITTEN COMMENTS RECEIVED BY THE CSA**

The Previously Proposed Internal Control Requirements were published for 90-day comment on February 4, 2005. On May 27, 2005 this comment period was extended for an additional 26 days to June 30, 2005.

During the comment period, we received submissions from 64 commenters. We have considered the comments received and thank all the commenters. The names of the commenters are contained in Appendix B of this notice and a summary of their comments, together with the CSA responses, are contained in Appendix C of this notice.

## 10. ALTERNATIVES CONSIDERED

Prior to this publication, members of the CSA other than British Columbia published the Previously Proposed Internal Control Reporting Requirements for comment on February 4, 2005. After extensive review and consultation, we determined not to proceed with the Previously Proposed Internal Control Reporting Requirements, and instead expand the Current Materials.

The proposed amendments to the Current Materials are intended to improve the effectiveness of this instrument, which we believe will better serve issuers, investors and other market participants. We believe the Proposed Materials will also contribute towards achieving our objectives to improve quality, reliability and transparency of financial reporting while balancing the costs and benefits associated with the internal control reporting requirements.

We considered no other alternatives.

## 11. RELIANCE ON UNPUBLISHED STUDIES, ETC.

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

## 12. WITHDRAWAL OF NOTICES

The following notices are no longer required and we therefore withdraw them in all Canadian jurisdictions in which they were published:

- CSA Notice 52-313 *Status of Proposed MI 52-111 Reporting on Internal Control over Financial Reporting and Proposed Amended and Restated MI 52-109 Certification of Disclosure in Issuers' Annual and Interim Filings*; and
- CSA Notice 52-317 *Timing of Proposed National Instrument 52-109 Certification of Disclosure in Issuers' Annual and Interim Filings*.

## 13. COMMENTS

We invite interested parties to make written submissions on the Proposed Materials. We will consider submissions received by June 28, 2007. **Due to timing concerns, we will not consider comments received after the deadline.**

Please address your submissions to the following securities regulatory authorities:

British Columbia Securities Commission  
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.

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If you are not sending your comments by e-mail, please send a diskette containing your comments (in DOS or Windows format, preferably Word).

We cannot keep submissions confidential because securities legislation in certain provinces requires that a summary of the written comments received during the comment period be published.

#### **14. QUESTIONS**

Please refer your questions to any of:

##### *Ontario Securities Commission*

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