

Notice and Request for Comments

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

1. PURPOSE OF NOTICE

We, the Canadian Securities Administrators (CSA), are publishing for a 60-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, 52-109FV1, 52-109F1 – IPO/RTO, 52-109F1R, 52-109F1 – AIF, 52-109F2, 52-109FV2, 52-109F2 – IPO/RTO and 52-109F2R (together, the Proposed Forms); and
- Companion Policy 52-109CP *Certification of Disclosure in Issuers' Annual and Interim Filings* (the Proposed Policy, and together with the Proposed Instrument and the Proposed Forms, the Proposed Materials).

The Proposed Materials are a revision of the previously proposed materials that CSA members published for comment on March 30, 2007 (the March 2007 Proposed Materials).

The comment period in connection with the March 2007 Proposed Materials expired on June 28, 2007. We received 53 comment letters, and held four roundtable discussions across the country to capture the views of smaller issuers. After extensive review and consideration of the comments received, we have decided to make significant revisions to certain aspects of the March 2007 Proposed Materials. Certain of these revisions were previously described in CSA Notice 52-319 *Status of Proposed Repeal and Replacement of Multilateral Instrument 52-109 Certification of Disclosure in Issuers' Annual and Interim Filings*, released on November 23, 2007.

The Proposed Materials will, if adopted, 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 *Certification of Disclosure in Issuers' Annual and Interim Filings* (the Current Policy, and 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.

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

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

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 internal control over financial reporting (ICFR), or caused them to be designed under their supervision;

- they have caused the issuer to disclose in its MD&A any change in the issuer's ICFR that has materially affected the issuer's ICFR; and
- on an annual basis they have evaluated the effectiveness of the issuer's DC&P and caused the issuer to disclose their conclusions about the effectiveness of DC&P in the issuer's MD&A.

In November 2007, certain CSA jurisdictions, as indicated in the table below, issued blanket orders that had the effect of modifying the current requirements as they apply to venture issuers. As a result of these blanket orders, venture issuers in these jurisdictions may file interim and annual certificates for periods ending on or after December 31, 2007 in a form that does not require the CEO and the CFO to certify that they have designed and evaluated the effectiveness of DC&P or designed ICFR. Please refer to the following blanket orders issued by these jurisdictions for more information.

Jurisdiction	Instrument	Effective Date
BC	BCI 52-511 <i>Relief for venture issuers from certain certification requirements</i>	November 23, 2007
AB	MI 52-109 Exemptive Relief, 2007 ABASC 836 <i>Certain Certification Requirements: Relief for Venture Issuers</i>	November 23, 2007
SK	GRO 52-905 <i>Relief from Certification Requirements in National Instrument 52-109</i>	November 27, 2007
MB	Blanket Order No. 52-501 <i>Relief for Venture Issuers from Certain Certification Requirement</i>	November 23, 2007
QC	DÉCISION N° 2007-PDG-0203 <i>Règlement 52-109 sur l'attestation de l'information présentée dans les documents annuels et intermédiaires des émetteurs</i>	November 23, 2007
NL	Blanket Order 55 <i>In the Matter of Certain Certification Requirements: Relief for Venture Issuers</i>	December 17, 2007
NB	Blanket Order 52-501 <i>In the Matter of Certification Requirements: Relief for Venture Issuers</i>	November 26, 2007
NS	Blanket Order No. 52-501 <i>In the Matter of Certification Requirements: Relief for Venture Issuers</i>	December 10, 2007
PE	Blanket Order No. 52-501 <i>In the Matter of Certain Certification Requirements: Relief for Venture Issuers</i>	March 17, 2008
NT	Blanket Order No. 10 <i>In the Matter of Multilateral Instrument 52-109 Certification of Disclosure in Issuers' Annual and Interim Filings</i>	January 23, 2008

Similar blanket order relief is not necessary for venture issuers in Yukon and Nunavut because the Current Instrument is a policy rather than a rule in these jurisdictions. Accordingly, a venture issuer may file certificates in these jurisdictions in the form prescribed by the other CSA jurisdictions' blanket orders for financial years and interim periods ending on or after December 31, 2007.

Please refer to Ontario Securities Commission Staff Notice 52-717 *Certification of Annual and Interim Certificates – Venture Issuer Basic Certificates* for more information as to the applicable requirements in Ontario.

For further background on the March 2007 Proposed Materials refer to the CSA Staff Notice and Request for Comments published on March 30, 2007.

5. SUMMARY OF CHANGES TO THE MARCH 2007 PROPOSED MATERIALS

Significant proposed amendments

The significant proposed changes to the March 2007 Proposed Materials, as reflected in the Proposed Materials, are as follows:

- a new form of certificate for venture issuers, called a "venture issuer basic certificate" does not include representations relating to the establishment and maintenance of DC&P and ICFR;
- non-venture issuers are required to use a control framework in the design of ICFR;
- the threshold for reporting a weakness in ICFR is a "material weakness" rather than the previous concept of "reportable deficiency";
- an issuer does not have to remediate a material weakness; however, an issuer must disclose its plans, if any, to remediate a material weakness;
- an issuer may limit the scope of its design of DC&P and ICFR to exclude controls, policies and procedures of a business that the issuer acquired not more than 365 days before the end of the financial period to which the certificate relates; this compares to a 90-day period in the March 2007 Proposed Materials; and
- we have increased the extent of guidance included in the Companion Policy.

These changes are described in more detail below.

Venture Issuer Basic Certificate

We have decided to remove the requirement for venture issuers to design and evaluate DC&P and ICFR. As a result of this change:

- certifying officers of venture issuers are no longer required to include representations in their certificates relating to the establishment and maintenance of DC&P and ICFR;
- the venture issuer basic certificate includes a note to reader explaining how it differs from the full certificate required to be filed by reporting issuers other than venture issuers;
- a venture issuer filing a basic certificate is no longer required to discuss in its annual or interim MD&A the design or operating effectiveness of DC&P or ICFR. If a venture issuer files a basic certificate and chooses to discuss the design or operation of one or more components of its DC&P or ICFR, we suggest that the issuer include a discussion in its MD&A that is similar to the disclosure in the note to reader on its venture issuer basic certificate; and
- venture issuers that wish to do so may choose to file full certificates.

Control framework

A non-venture issuer must use a control framework to design the issuer's ICFR. We believe this is appropriate now that the requirement to design ICFR only applies to non-venture issuers.

Control frameworks commonly in use include:

- (a) the *Risk Management and Governance: Guidance on Control* (COCO Framework), formerly known as *Guidance of the Criteria of Control Board*, published by The Canadian Institute of Chartered Accountants;
- (b) the *Internal Control – Integrated Framework* (COSO Framework) published by The Committee of Sponsoring Organizations of the Treadway Commission (COSO); and
- (c) the *Guidance on Internal Control* (Turnbull Guidance) published by The Institute of Chartered Accountants in England and Wales.

A smaller issuer can also refer to *Internal Control over Financial Reporting – Guidance for Smaller Public Companies* published by COSO, which provides guidance to smaller public companies on the implementation of the COSO Framework.

Material Weakness

Based on comments we received, we have decided to replace the concept of “reportable deficiency” which we proposed in the March 2007 Proposed Materials, with the concept of “material weakness”.

The definition of “material weakness” in the Proposed Instrument, which is the same as the corresponding U.S. definition, is as follows:

“material weakness” means a deficiency, or a combination of deficiencies, in ICFR such that there is a reasonable possibility that a material misstatement of the reporting issuer’s annual or interim financial statements will not be prevented or detected on a timely basis.

Under the Proposed Instrument, if a non-venture issuer determines it has a material weakness which exists as at the end of the period covered by its annual or interim filings, as the case may be, it must disclose in its annual or interim MD&A for each material weakness:

- a description of the material weakness;
- the impact of the material weakness on the issuer’s financial reporting and its ICFR; and
- the issuer’s current plans, if any, or any actions already undertaken, for remediating the material weakness.

Scope limitations

An issuer may limit the scope of its design of DC&P and ICFR to exclude controls, policies and procedures of a business that the issuer acquired not more than 365 days (formerly 90 days in the March 2007 Proposed Materials) before the end of the financial period to which the certificate relates.

Extent of guidance

As requested in the comments and roundtable discussions, the Companion Policy contains new guidance on various topics, including:

- Self-assessments – The guidance indicates that a certifying officer’s self-assessment, in certain circumstances, would provide sufficient evidence since the certifying officer signs the certificate;
- Compensating controls & mitigating procedures – Guidance is provided to assist certifying officers in determining whether a deficiency is addressed by a compensating control or a mitigating procedure and how that determination affects their conclusions on the effectiveness of ICFR;

- Use of a service organization or specialist for an issuer's ICFR – Further guidance is provided relating to the use of service auditor reports and procedures to consider when using the work of a specialist;
- Weakness in DC&P – Guidance is provided for situations where the certifying officers identify a weakness in the design or operation of DC&P that is significant and exists as at the period end date; and
- Disclosure of an external auditor report on ICFR – Guidance is provided on filing a copy of the internal control audit report if an issuer refers, in a continuous disclosure document, to an audit report relating to the issuer's ICFR, prepared by its external auditor.

We have attached to this notice, as Appendix A, blacklines showing changes made to the March 2007 Proposed Materials.

Proposed effective date

The proposed effective date of the Proposed Instrument, which will apply to all reporting issuers other than investment funds, is December 15, 2008.

6. RELATED INSTRUMENTS AND CONSEQUENTIAL AMENDMENTS

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
- National Instrument 52-110 *Audit Committees*.

We are also publishing for comment in connection with the publication of the Proposed Materials proposed consequential amendments to Form 51-102F1 *Management's Discussion & Analysis* of National Instrument 51-102 *Continuous Disclosure Obligations*. The proposed amendment instrument for this form is attached as Appendix D.

7. 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 to 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 asset 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.

8. SUMMARY OF WRITTEN COMMENTS RECEIVED BY THE CSA

The March 2007 Proposed Materials were published for a 90-day comment period on March 30, 2007.

During the comment period, we received written submissions from 53 commenters, and held roundtable discussions across the country. 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.

9. ALTERNATIVES CONSIDERED

The proposed repeal and replacement of the Current Materials with the Proposed Materials are intended to improve the effectiveness of the current internal controls reporting regime, 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 did not consider other alternatives.

10. RELIANCE ON UNPUBLISHED STUDIES, ETC.

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

11. WITHDRAWAL OF NOTICES

The following notice is no longer required and we therefore withdraw it in all Canadian jurisdictions in which it was published:

- CSA Notice 52-319 *Status of Proposed Repeal and Replacement of Multilateral Instrument 52-109 Certification of Disclosure in Issuers' Annual and Interim Filings*

12. COMMENTS

We invite interested parties to make written submissions on the Proposed Materials. We will consider submissions received by June 17, 2008. **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 Financial Services 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 do not submit your comments by e-mail, provide a diskette containing the submissions in MS Word format.

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.

13. QUESTIONS

Please refer your questions to any of:

Ontario Securities Commission

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