

CSA 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*

Related Proposed Consequential Amendments and Changes

September 6, 2018

Introduction

The Canadian Securities Administrators (the **CSA** or **we**) are publishing for a 90-day comment period the following materials:

- Proposed National Instrument 52-112 *Non-GAAP and Other Financial Measures Disclosure* (the **Proposed Instrument**);
- Proposed Companion Policy 52-112 *Non-GAAP and Other Financial Measures Disclosure* (the **Proposed Companion Policy**);
- Related proposed consequential amendments or changes to:
 - Multilateral Instrument 45-108 *Crowdfunding (MI 45-108)*¹;
 - Companion Policy 45-108CP *Crowdfunding (45-108CP)*;
 - Companion Policy 51-102CP *Continuous Disclosure Obligations (51-102CP)*;
 - Companion Policy 51-105CP *Issuers Quoted in the U.S. Over-the-Counter Markets (51-105CP)*²;
 - Companion Policy 52-107CP *Acceptable Accounting Principles and Auditing Standards (52-107CP)*.

(collectively, the **Proposed Materials**).

The Proposed Instrument sets out disclosure requirements for non-GAAP financial measures and other financial measures (i.e., segment measures, capital management measures, and supplementary financial measures as defined in the Proposed Instrument).

¹ The securities regulatory authorities in British Columbia, Prince Edward Island, Newfoundland and Labrador, Northwest Territories, Yukon Territory and Nunavut are not proposing these consequential amendments or the changes to the related Companion Policy because MI 45-108 does not apply in these jurisdictions.

² The Ontario Securities Commission is not proposing this consequential change as Multilateral Instrument 51-105 *Issuers Quoted in the U.S. Over-the-Counter Markets* and its Companion Policy do not apply in Ontario.

The Proposed Companion Policy provides guidance on how we will interpret and apply the Proposed Instrument.

The Proposed Materials are intended to replace CSA Staff Notice 52-306 (Revised) *Non-GAAP Financial Measures (SN 52-306)* and complement other CSA financial disclosure requirements.

The text of the Proposed Materials is contained in Annexes A through E of this Notice and will also be available on the websites of CSA jurisdictions, including:

www.lautorite.qc.ca
www.albertasecurities.com
www.bpsc.bc.ca
www.nssc.novascotia.ca
www.fcnb.ca
www.osc.gov.on.ca
www.fcaa.gov.sk.ca
www.msc.gov.mb.ca

Substance and Purpose

The Proposed Instrument aims to address the disclosure surrounding non-GAAP financial measures and other financial measures.

The Proposed Instrument complements the *Securities Acts* of the various jurisdictions in Canada that make it an offence to provide false or misleading information to investors. The Proposed Instrument establishes disclosure requirements that must be met to disclose non-GAAP financial measures and other financial measures.

In some cases, non-GAAP and other financial measures are helpful to investors to assess an issuer's performance.

The Proposed Instrument does not contain specific limitations or industry-specific requirements; rather, it includes comprehensive disclosure requirements whose overall goal is to improve the quality of information provided to investors.

We acknowledge that some stakeholders may prefer that we:

- limit, in specific circumstances, the disclosure of certain financial measures, and
- develop industry-specific requirements for certain financial measures.

However, due to the numerous types of ever-evolving financial measures disclosed across a range of industries, we believe that comprehensive disclosure requirements are best suited to respond to investor needs for quality information. These requirements allow investors to better analyze different financial measures within an industry or among different industries.

Although the definition of a non-GAAP financial measure has been updated, the Proposed Materials have substantially incorporated the disclosure guidance in SN 52-306 for non-GAAP financial measures.

To ensure investors appreciate the context of other financial measures, the Proposed Instrument introduces disclosure requirements if such financial measures are disclosed outside the financial statements.

Background

Many issuers, in all industries, disclose a range of financial measures that may lack standardized meanings under the financial reporting framework used in the preparation of the issuer's financial statements, lack context when disclosed outside of the issuer's financial statements, lack transparency as to their calculation or vary significantly by issuer and industry.

Common terms used to label non-GAAP financial measures may include "adjusted earnings", "adjusted EBITDA", "free cash flow", "pro forma earnings", "cash earnings", "distributable cash", "cost per ounce", "adjusted funds from operations" and "earnings before non-recurring items".

In Canada, SN 52-306 is intended to help ensure that non-GAAP financial measures do not mislead investors. Although we have updated SN 52-306 several times to respond to changing circumstances and published various staff notices and reports that comment on the topic, we

continue to find that disclosure practices surrounding non-GAAP financial measures vary. Our findings are consistent with those of other stakeholders (particularly investors) who share our desire for quality disclosure.

Over the years, we have also found that other financial measures that do not meet the definition of a non-GAAP financial measure in SN 52-306 may be equally problematic if not accompanied by appropriate disclosure. Such financial measures include those disclosed in the notes to the financial statements that lack context when disclosed outside the financial statements.

Replacing SN 52-306 with the Proposed Instrument will provide CSA Staff with a stronger tool to take appropriate regulatory action as needed.

We are aware that some accounting standards boards, such as the International Accounting Standards Board (IASB), are currently examining, among other things, the structure and content of financial statements. This work may potentially lead to certain changes in the types of information to be included in financial statements. If necessary in the future, we may update the Proposed Instrument (or other securities legislative requirements) to respond to these and other marketplace changes (if any).

We are aware that commentary continues to be issued by certain industry groups, professional bodies, and standard setters on the topic of non-GAAP financial measures and other financial measures disclosed outside the financial statements. This has, in some cases, created confusion with stakeholders as to requirements under Canadian securities law versus suggested non-authoritative guidance. When implemented, the Proposed Instrument will provide authoritative Canadian securities legislative requirements for all issuers when they disclose non-GAAP financial measures and other financial measures.

With the issuance of the Proposed Instrument, we join other securities regulators, including the International Organization of Securities Commissions (IOSCO), the European Securities and Markets Authority (ESMA), and the U.S. Securities and Exchange Commission (SEC), that have recently strengthened their efforts to regulate the disclosure of certain financial measures.

Summary of the Proposed Instrument

The Proposed Instrument:

- applies to all issuers (including investment funds), except for SEC foreign issuers, and all documents (e.g., Management's Discussion and Analysis, press releases, the Annual Information Form, prospectuses etc.) including other written communications in websites or social media;
- pertains to the disclosure of financial measures (including ratios) that are non-GAAP financial measures, segment measures, capital management measures, and supplementary financial measures as defined in the Proposed Instrument;
- includes an updated definition of a non-GAAP financial measure which builds upon and incorporates the disclosure guidance in SN 52-306, and
- introduces the concept of segment measures, capital management measures, and supplementary financial measures, together with associated disclosure requirements.

Annex C provides a general overview of the application process for the Proposed Instrument.

Anticipated Costs and Benefits of the Proposed Instrument

Benefits

Issuers

The Proposed Instrument does not limit an issuer's ability to disclose non-GAAP financial measures or other financial measures provided the disclosure is not misleading. If an issuer chooses to disclose these financial measures, the Proposed Instrument contains clear and formalized disclosure requirements that we anticipate will reduce the uncertainty regarding an issuer's disclosure obligations.

Investors

Investors have identified to us several problematic disclosure practices surrounding non-GAAP financial measures and other financial measures, such as a lack of transparency regarding the nature of these financial measures, including calculation, as well as a lack of consistency of disclosures among issuers. The Proposed Instrument addresses these investor concerns by requiring comprehensive disclosures, including disclosure regarding a financial measure's method of calculation and usefulness. Such disclosures are intended to help investors better analyze different financial measures within an industry or among different industries.

Costs

Since the disclosure requirements for non-GAAP financial measures are substantially aligned with the current guidance in SN 52-306, we do not expect issuers to incur increased costs to comply with these disclosure requirements.

We expect issuers will initially incur some immaterial administrative costs to comply with the new disclosure requirements relating to segment measures, capital management measures, and supplementary financial measures in the first reporting period after the Proposed Instrument comes into force, if issuers choose to disclose these financial measures.

Summary of the Proposed Companion Policy

The Proposed Companion Policy provides guidance on how we will interpret and apply the Proposed Instrument and includes, among other things, interpretations of various terms and provisions in the Proposed Instrument as well as selected illustrative examples.

Overall, the goal of the guidance provided in the Proposed Companion Policy is to assist issuers in applying the provisions of the Proposed Instrument so as to help ensure non-GAAP financial measures and other financial measures do not mislead investors. For example, the Proposed Companion Policy contains useful examples and guidance in the following key areas:

- definition of a non-GAAP financial measure, including the terms "disaggregation" and "equivalent financial measure";
- definition of a supplementary financial measure, including the "periodic basis" attribute;
- requirements for a non-GAAP financial measure on labelling, prominence, consistency, location, identification, and usefulness;
- reconciliation requirements for a non-GAAP financial measure, including guidance on the determination of the most directly comparable measure;
- prominence requirement for a non-GAAP financial measure that is a ratio

- reconciliation requirement for a non-GAAP financial measure that is a financial outlook, and
- disclosure requirements for a segment measure and a capital management measure.

The expanded detail set out in the Proposed Companion Policy is intended to clarify the four defined types of financial measure subject to the Proposed Instrument and to explain how we expect the disclosure requirements in the Proposed Instrument to be satisfied.

Consequential Amendments and Changes

We, except the securities regulatory authorities listed in footnote 1 of this Notice, propose consequential amendments or changes to the instructions of Schedule A of Form 45-108F1 *Crowdfunding Offering Document* of MI 45-108 and section 16 of 45-108CP. We also propose changes to section 4.2 of 51-102CP and section 2.10 of 52-107CP. These proposed amendments and changes replace the references to the guidance provided in SN 52-306 with references to the requirements set out in the Proposed Instrument.

We, except the Ontario Securities Commission, also propose a consequential change to section 5 of 51-105CP to add a reference to the requirements set out in the Proposed Instrument.

Local Matters – Ontario

Authority for the Instrument

In Ontario, the rule-making authority for the Proposed Instrument is in paragraphs 13, 16, 22, 22.1, 25 and 39 of subsection 143(1) of the *Securities Act* (Ontario).

Alternatives Considered

To address stakeholder concerns regarding the quality of disclosure surrounding non-GAAP financial measures and other financial measures, we considered updating SN 52-306 or developing a staff bulletin to supplement SN 52-306. After careful consideration, we concluded that the development of the Proposed Materials would be more effective in addressing stakeholder concerns and reducing uncertainty regarding an issuer's disclosure obligations.

Reliance on Unpublished Studies

In developing the Proposed Instrument, we are not relying on any significant unpublished study, report or other written material.

Request for Comments

We welcome your comments on the Proposed Materials.

We particularly appreciate comments that are specific and accompanied by concrete examples.

In addition to any general comments, we also invite comments on the following specific questions:

1. Does the proposed definition of a non-GAAP financial measure capture (or fail to capture) specific financial measures that should not (or should) be captured? Please explain using concrete examples.
2. Are there any specific additional disclosures not considered in the Proposed Instrument, that would significantly improve the overall quality of disclosure and be of benefit to investors? Please explain using concrete examples.
3. Is specific content in the Proposed Companion Policy unclear or inconsistent with the Proposed Instrument?
4. Is the proposed exemption for SEC foreign issuers appropriate? If not, please explain.
5. Is the proposed exclusion of oral statements to the application appropriate? If not, please explain.
6. Is the proposed inclusion of all documents to the application appropriate? If not, for which documents should an exclusion be made available? Please explain.

Please submit your comments in writing on or before December 5, 2018. If you are not sending your comments by email, please send us an electronic file containing submissions provided (in Microsoft Word format).

Address your submission to all of the CSA as follows:

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

Deliver your comments only to the addresses below. Your comments will be distributed to the other participating CSA.

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Ontario Securities Commission
20 Queen Street West
19th Floor, Box 55
Toronto ON M5H 3S8
Fax: 416-593-2318
comment@osc.gov.on.ca

M^e Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
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Fax: 514-864-6381
consultation-en-cours@lautorite.qc.ca

Please refer your questions to any of the following:

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We cannot keep submissions confidential because securities legislation in certain provinces requires publication of the written comments received during the comment period. All comments received will be posted on the websites of each of the Alberta Securities Commission at www.albertasecurities.com, the Autorité des marchés financiers at www.lautorite.qc.ca and the Ontario Securities Commission at www.osc.gov.on.ca. Therefore, you should not include personal information directly in comments to be published. It is important that you state on whose behalf you are making the submission.