



CASSELS BROCK
LAWYERS

December 4, 2018

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

c/o

The Secretary
Ontario Securities Commission
20 Queen Street West
19th Floor, Box 55
Toronto ON M5H 3S8
e-mail: comments@osc.gov.on.ca

M^e Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
800, rue du Square-Victoria, 22^e étage
C.P. 246, tour de la Bourse
Montréal QC H4Z 1G3
e-mail: consultation-en-cours@lautorite.qc.ca

Dear Sirs and Mesdames:

CSA Notice and Request for Comments dated September 6, 2018 – 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

This letter is in response to the Notice and Request for Comments published by the Canadian Securities Administrators (the “CSA”) regarding 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 and Changes, on September 6, 2018 (the “Request for Comments”).

Summary of our Comments

We commend the CSA for its initiative to propose securities legislative requirements in connection with the disclosure of non-GAAP financial measures and other financial measures, based largely on the disclosure guidance in CSA Staff Notice 52-305 (Revised) *Non-GAAP Financial Measures*, in order to provide clear, authoritative Canadian securities legislative requirements for all issuers across all industries in disclosing non-GAAP financial measures and other financial measures.

We recognize the delicate balance required in ensuring consistency and transparency in financial measures disclosure across all issuers and industries, while allowing for financial measures disclosure that meets each issuer’s particular circumstances and that are adaptable to evolving communications practices.

Our general comments, outlined below, relate specifically to the impact of the CSA’s proposals in connection with social media and online disclosure. In addition, we have provided our comments on the specific questions outlined by the CSA in the Request for Comments, in the section following our general comments below.

General Comments Related to Social Media and Online Disclosure

With respect to social media and other online disclosures, we ask the CSA to consider certain characteristics of online social networks and the implications of same in formalizing its proposals.

In particular:

- Platforms such as Twitter have become go-to news sources for an increasing portion of market participants and other stakeholders. As such, discussion related to the performance of many publicly listed issuers occurs in a public sphere, irrespective of the issuer’s engagement on a given network.
- Certain non-GAAP measures are part of the broader online discussion by market participants and other stakeholders, and issuers require flexibility to provide accurate information within the constraints of particular social media platforms.
- The comparison of an issuer’s financial performance to consensus estimates is an increasing driver of share price fluctuations, versus the impact of the issuer’s absolute performance. This is relevant as consensus estimates are often non-GAAP measures such as “adjusted earnings per share” and “cash flow per share”. These consensus estimates are commonly referenced on social media and, thus, form the basis of the online conversation related to an issuer’s financial performance.
- False news spreads more rapidly and more widely than fact-based news. Researchers from MIT found that “falsehood diffused significantly farther, faster, deeper, and more



- broadly than truth in all categories of information.” (Source: <http://science.sciencemag.org/content/359/6380/1146>)
- We note that the proposals limit the disclosure that can be made on social media. For example, Section 2 (– Application) of the Proposed Companion Policy states that: “Issuer’s should not disclose non-GAAP financial measures, segment measures, capital management measures or supplementary measures on social media, if character limits would preclude the disclosure of all the required information in accordance with the Instrument (e.g., Twitter)”. In our view, if an issuer’s use of non-GAAP measures on social media is consistent with the use of such measures in other publicly filed disclosure documents (such as a press release) and the issuer provides linking to such other applicable source for the full required disclosure, we believe that this should satisfy the applicable disclosure requirements. Users requiring additional details have then been provided with links to where they can find the fulsome required disclosure, which should be acceptable practice as it applies to using non-GAAP measures on social media and online platforms where character spacing is restricted.
 - We note that there appears to be differing interpretations being taken with respect to the whether issuers are required to provide a cross reference to the relevant footnote description **each time** the same non-GAAP financial measure is presented, versus only the first time a particular measure is presented. It is our view that each non-GAAP measure should only require a cross-reference to the applicable footnote the first time it is presented, and we believe this is the intention of the CSA in the proposals; however, given the feedback on issuer’s mixed interpretations on this point, we suggest that it be further clarified by the CSA. For example, the use of the non-GAAP metric of cash costs per ounce of gold may be presented as “Cash Costs per Ounce of Gold” with the definition and required disclosures elsewhere in the document if it has followed the requirements for the first time the non-GAAP financial measure appears.

As demonstrated through the above-noted examples, issuers are often required to be active participants in online discussions to manage their brand and attempt to ensure accurate information related to the issuer’s performance is available to stakeholders within the constraints of various social media platforms, and, thus, issuers must be provided commercially reasonable flexibility in order to do so.

Responses to Specific Questions Outlined in Request for Comments

The CSA has invited comments on specific questions regarding the Proposed Instrument and Proposed Companion Policy. For ease of reference, each of those questions is set out above the comments we are providing in response.

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.*



We note that the definition of “non-GAAP financial measure” includes “a financial measure of financial performance”. It is our view that financial performance may be broadly interpreted to include current share price, credit rating and any other external financial measures used to evaluate an issuer. If the intent of the CSA is to capture adjusted operating measures of performance from those presented in the Statement of Operations, it is suggested that this be defined as “financial operating performance”.

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.*

Other than as noted in our comments and considerations provided above under the heading “*General Comments Related to Social Media and Online Disclosure*”, we believe that the disclosures currently considered in the Proposed Instrument should significantly improve the overall quality of disclosure and be of benefit to investors.

3. *Is specific content in the Proposed Companion Policy unclear or inconsistent with the Proposed Instrument?*

Other than as noted in our comments made above under the heading “*General Comments Related to Social Media and Online Disclosure*”, the specific content in the Proposed Companion Policy is not unclear, or inconsistent with the Proposed Instrument.

4. *Is the proposed exemption for SEC foreign issuers appropriate? If not, please explain.*

It is our view that it is not appropriate to exempt SEC foreign issuers from the application of the Proposed Instrument as, given such issuers are also reporting issuers in Canada and the CSA’s focus is to create more transparency and provide investors with an ability to better analyze different financial measures within an industry or among different industries. SEC foreign issuers should be included for comparison/analysis purposes amongst companies that are reporting issuers in Canada.

5. *Is the proposed exclusion of oral statements to the application appropriate? If not, please explain.*

In our view, seldom are any oral statements unsupported by a press release or other written disclosure that is required to be publicly filed by an issuer, which written disclosure document would include all of the required disclosures under the Proposed Instrument. Therefore, we believe that the proposed exclusion of oral statements to the application is appropriate.



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.*

It is our view that the proposed inclusion of all documents to the application is appropriate as an investor may rely on one specific written document without referring to any others. Accordingly, for purposes of complying with the Proposed Instrument, all documents should be considered on a stand-alone basis, but with the permissible cross-references to other documents that are easily accessible and contain all of the relevant and required financial measures disclosure. Additionally, with the widespread availability and common use of technology, it is our view that the use of an online site address or hyperlink to a website that contains all the relevant disclosures should be sufficient to provide access to users of the information. In the case of written transcripts, in the event that the transcript is presented as a package with a presentation or other written communication (whether or not formally “appended” or “annexed” to the transcript), or the transcript makes specific cross-reference to a written communication that includes all of the required financial measures disclosures under the Proposed Instrument (even if not appended or annexed), it is our view that an issuer should not be required to repeat the required financial measures disclosures in the transcript itself (whether by way of attachment or appendix).

We trust that our comments will be of assistance to the CSA in advancing its objectives under the Proposed Instrument, Proposed Companion Policy and Related Proposed Consequential Amendments and Changes. Should you wish to discuss any of these comments with us, please do not hesitate to contact Andrea FitzGerald at (416) 846-3531, or by e-mail at afitzgerald@casselsbrock.com.

Yours very truly,

(Signed) CASSELS BROCK & BLACKWELL LLP