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June 29, 2020

VIA E-MAIL

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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

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RE: Second Notice and Request for Comment on Proposed National Instrument 52-112 *Non-GAAP and Other Financial Measures Disclosure*, Proposed Companion Policy 52-112 and Related Proposed Consequential Amendments and Changes

Dear Sirs/Mesdames:

This letter is submitted in response to the Second Notice and Request for Comment dated February 13, 2020 (the "**Notice and Request**") by the Canadian Securities Administrators (the "**CSA**") on proposed National Instrument 52-112 – *Non-GAAP and Other Financial Measures Disclosure* (the "**Proposed Instrument**"), the proposed Companion Policy 52-112 – *Non-GAAP and Other Financial Measures Disclosure* (the "**Proposed Companion Policy**") and the related proposed consequential amendments or changes to various other instruments and companion policies of the CSA.

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The Proposed Instrument is revised from the original version of proposed National Instrument 52-112 – *Non-GAAP and Other Financial Measures Disclosure* (the “**Original Proposal**”) that was published for comment in September 2018, in response to comments received by the CSA on the Original Proposal.

These comments are those of the writers noted below and do not necessarily reflect the views of clients of or others in our firm.

Scope and Application

The reduction in scope of the application of the Proposed Instrument in sections 2 and 3 to, essentially, reporting issuers (other than those exempted under section 4) and certain other issuers making public filings in Canada with the CSA or a recognized exchange is welcome, and we thank the CSA for their consideration of our and others’ comments to the Original Proposal in this regard.

With respect to the exemptions in paragraph 4(d), we suggest the listing of particular items to which the Proposed Instrument would not apply is too narrow and should be expanded in certain cases. In particular:

- subparagraph (d)(i) refers to filings required under subparagraph 9.1(1)(a)(vi) or 9.2(a)(v) of National Instrument 41-101 – *General Prospectus Requirements* (“**NI 41-101**”) – namely, reports or valuations for which a consent is required to be filed. It should also refer to the equivalent provisions in subparagraphs 4.1(1)(a)(vi) and 4.2(a)(iv) of National Instrument 44-101 – *Short Form Prospectus Distributions* (“**NI 44-101**”).
- in addition to the above, the Proposed Instrument should similarly not apply to disclosures in (i) formal valuations or prior valuations required to be prepared, disclosed and/or filed under Multilateral Instrument 61-101 – *Protection of Minority Security Holders in Special Transactions*, and (ii) fairness opinions disclosed by issuers in connection with a take-over bid or securityholder-approved transaction (such as a plan of arrangement) (which in some cases may disclose figures for non-GAAP financial measures or ratios such as EBITDA or enterprise value/EBITDA ratio).
- subparagraph (d)(iii) provides that the Proposed Instrument would not apply to disclosures in Documents Affecting the Rights of Securityholders and Material Contracts required to be filed under sections 12.1 and 12.2 of National Instrument 51-102 – *Continuous Disclosure Obligations*, but a corresponding exemption is not provided for equivalent filings required to be made in connection with a prospectus filing. We suggest subparagraph 4(d)(i) or 4(d)(iii) of the Proposed Instrument should be revised to include reference to these types of filings required to be made under subparagraphs 9.1(1)(a)(ii) and (iii) and 9.2(a)(ii) and (iii) of NI 41-101, and subparagraphs 4.1(1)(a)(iv) and (iv.1) and 4.2(a)(iii) and (iii.1) of NI 44-101.

Exchangeable Security Issuers and Credit Support Issuers

In addition, the Proposed Instrument should not apply to an exchangeable security issuer that files required disclosures of a parent issuer, or a credit support issuer that files required disclosures of a parent credit supporter, in each case under Part 13 of National Instrument 51-102 – *Continuous Disclosure Obligations* (“NI 51-102”). There is no need to apply the rule to these issuers or such disclosures, since a parent issuer or parent credit supporter must be either (i) a reporting issuer in a designated Canadian jurisdiction (as defined in NI 51-102), in which case it would itself generally be subject to the Proposed Instrument, once implemented, or (ii) an SEC issuer (in the case of a parent credit supporter, incorporated or formed under U.S. law) which has filed all required documents with the U.S. Securities and Exchange Commission, in which case it would be governed by the disclosure requirements of U.S. federal securities laws.

Definition of Non-GAAP Financial Measure

As we noted in our comment letter on the Original Proposal, some issuers may present EBITDA, adjusted EBITDA or other financial measures that do not have a standardized meaning under GAAP/IFRS in their financial statements, in particular in financial statement notes relating to segment disclosure and presentation of the financial measures used by the entity’s chief operating decision maker.

Paragraph (c) of the definition of “non-GAAP financial measure” in the Proposed Instrument retains the element of the definition that the measure “is not presented in the financial statements of the entity” (we note that this reference is to “financial statements”, and not the defined term “primary financial statements”, and so would include notes to the financial statements). We submit that this language in the defined term remains unclear and potentially confusing. It is not clear whether a measure without a standardized meaning under GAAP/IFRS, such as an issuer’s EBITDA, if able (or required) to be presented in the issuer’s financial statements, would not be considered a non-GAAP financial measure at all for that issuer under the Proposed Instrument wherever disclosed. If that is the case, this could result in a situation where that issuer’s EBITDA would not be a non-GAAP financial measure under the Proposed Instrument (although in fact it is a measure without a standardized meaning under GAAP/IFRS) when presented in MD&A or another document, but the same-labeled measure for another issuer that does not disclose it in financial statements but only in MD&A or another document would be a non-GAAP financial measure under the Proposed Instrument. We suggest this would be a very confusing result.

Alternatively, perhaps the intention is that the requirements of section 6 of the Proposed Instrument would not apply to disclosure of non-GAAP financial measures where that disclosure is made within an issuer’s financial statements, but would apply to such disclosures in other documents that are not financial statements. If this is the case, we suggest that the Proposed Instrument should be revised to clarify – perhaps by deleting paragraph (c) of the definition of “non-GAAP financial measure”, and revising the lead-in language of section 6 to read: “An issuer must not disclose a non-GAAP financial measure that is historical information in a document other than financial statements of the entity to which the measure relates unless all of the following apply:” [suggested change underlined]. This would align with the treatment of total of segment measures and capital management measures in sections 9 and 10, respectively, of the Proposed Instrument. To preserve the separate treatment and more limited disclosure for those measures, a replacement paragraph (c) reading “...is not a capital management

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measure or a total of segment measures” could be included in the definition of “non-GAAP financial measure”.

Section 5 – Incorporating information by reference

The Proposed Instrument would specifically permit certain of the required information for specified financial measures in a document, including quantitative reconciliation of non-GAAP financial measures, to be incorporated by reference from the issuer’s MD&A. In our view this is a positive change (subject to our comment below in relation to cross-referencing rather than incorporation by reference). However, paragraph 5(3) specifically states that incorporation by reference is not permitted in a news release issued or filed by the issuer. There seems to be no explanation or commentary as to why the CSA propose not to allow incorporation by reference in a news release.

If this aspect of the Proposed Instrument is adopted, reporting issuers’ earnings news releases will have to contain all of the required disclosures relating to specified financial measures, including quantitative reconciliation where required. We believe this will be a significant change from common current practice for many reporting issuers, including many very senior issuers, which currently disclose non-GAAP financial measures and identify them as such in news releases, but cross-reference to other required disclosures (including the quantitative reconciliations) in their MD&A.

We suggest this would result in unnecessarily lengthy news releases that repeat information found elsewhere in issuers’ disclosure (MD&A, specifically) and require multiple reviews by issuer personnel, every quarter, of the same disclosures in different documents to ensure they are consistent and avoid errors, with no discernible increase in investor protection. This is contrary to the CSA’s initiatives with respect to regulatory burden reduction for issuers where investor protection can be adequately maintained. We strongly submit that incorporation by reference (or, preferably, simple cross-referencing – please see our comment below) to MD&A disclosure should be permitted in news releases.

Section 5 - “Incorporation by reference” vs. cross-referencing

Where a document does not contain all of the required information relating to specified financial measures (including reconciliation of non-GAAP financial measures to GAAP measures), the current practice of many, if not most, issuers is to identify the non-GAAP financial measures as such, perhaps including some additional discussion, and to direct the reader to the issuer’s MD&A with a cross-reference, rather than including formal “incorporation by reference” language as in a prospectus. Some examples of this kind of disclosure are shown below:

- “Readers are advised to review the section entitled Non-GAAP Financial Measures in [the issuer]’s 2019 MD&A for a further discussion of such non-GAAP measures and a reconciliation of such measures to Canadian GAAP.”
- “management believes that these non-GAAP measures provide useful information to investors regarding the company’s financial condition and results of operations as they provide additional measures of its performance. Additional details for these non-GAAP measures can be found on

pages 3 and 4 of our MD&A which is posted on [the issuer]'s website, and filed with SEDAR and EDGAR.”

- “A Non-GAAP measurement. For definitions and basis of presentation of [the issuer]'s Non-GAAP measures, refer to the Non-GAAP Measures section in [the issuer]'s Management's Discussion and Analysis (MD&A) for the year ended December 31, 2019.”

In this context, the purpose is simply to direct the reader to the issuer's MD&A where more fulsome disclosure can be found. Formal “incorporation by reference” language is not necessary in this context and does not achieve any additional investor protection objective - by definition, the more fulsome disclosure is contained in the issuer's MD&A which is a “core document” under the secondary market civil liability provisions of securities legislation and is required to be incorporated by reference in any short form prospectus of the issuer. We suggest that a simple cross-reference to the location of the required information in the MD&A is sufficient for this purpose and aligns with current common practice, rather than requiring “incorporation by reference”.

Non-GAAP financial measures that are forward-looking information

For a non-GAAP financial measure that is forward-looking information, paragraph 7(2) of the Proposed Instrument requires labeling of the measure using the same label as the historical non-GAAP financial measure, presentation of the equivalent historical measure and other disclosures relating to the equivalent historical measure. This does not accommodate a situation in which the issuer has no equivalent historical non-GAAP financial measure. We suggest that disclosure relating to a historical non-GAAP financial measure under section 7 of the Proposed Instrument should be qualified in full by reference to a concept of “if applicable” or “if such a historical non-GAAP financial measure has been previously disclosed”.

Specified Financial Measures of Other Issuers - Comparables

The CSA states in the Notice and Request that it disagreed with comments on the Original Proposal that it should only apply to an issuer's own financial results or measures, and not those of other issuers. We understand this in the context of disclosure in relation to the kinds of entities referred to on the first page of the Proposed Companion Policy (such as joint ventures, subsidiaries, reverse takeover acquirors, investee entities, etc.), or about an entity on which a reporting issuer is significantly dependent (such as the restaurant operating company for a restaurant royalty fund), or for which the reporting issuer has given an undertaking to disclose.

At a minimum, however, we submit that the Proposed Instrument should not apply to measures of other issuers that are disclosed by an issuer in a comparison format (for example, as “comparables” (as defined in Part 13 of NI 41-101, Part 7 of NI 44-101 and Part 9A of National Instrument 44-102 – *Shelf Distributions*)). These types of comparisons are expressly contemplated by the marketing material rules in the context of prospectuses, notwithstanding the acknowledgement that (in the case of non-GAAP financial measures) the measures do not have a standardized meaning and may not be comparable to similar measures presented by other issuers.

Comparative measures or ratios that are commonly presented as comparables are generally those of unrelated issuers considered to be comparable to the issuer and typically based on publicly available information disclosed by those other issuers. Such comparable information may include specified financial measures such as EBITDA, enterprise value, enterprise value to EBITDA ratio, payout ratio, debt to EBITDA ratio, and so on. We submit that comparables in marketing materials, and such information in other documents that would be “comparables” if contained in marketing materials (for example, in an issuer’s investor presentation), should not be captured by the Proposed Instrument.

Comparative Period Information

Outside of financial statements and MD&A, issuers seem to be free to disclose GAAP/IFRS financial information in a document for only one fiscal period, without comparative period GAAP/IFRS information (for example, in an investor presentation that shows only information for the most recent fiscal year). However, the Proposed Instrument would require comparative period information to be shown in any document, where that document discloses a non-GAAP financial measure (paragraph 6(d)), a non-GAAP ratio (paragraph 8(c)), a total of segments measure (paragraph 9(d)) or a capital management measure (paragraph 10(c)), with incorporation by reference (or cross-reference) of the comparative period information seemingly not permitted.

This results in an anomalous situation where an issuer document discloses financial information for only one fiscal period, and comparative period GAAP/IFRS information is not required to be disclosed in the document, but comparative period information for specified financial measures would be required to be disclosed under the Proposed Instrument. We submit that the comparative period disclosure requirements for specified financial measures should only apply to MD&A or, alternatively, that they be part of the permitted cross-referencing or incorporation by reference to issuers’ MD&A disclosure.

Executive Compensation Disclosure

The Proposed Companion Policy contains guidance that, for Form 51-102F6 disclosure only, where a non-GAAP financial measure is disclosed, a cross-reference to MD&A will provide sufficient “prominence” of the most comparable GAAP measure (presumably, for purposes of paragraph 6(c)). While this is welcome, it does not appear to address many of the other elements of section 6 of the Proposed Instrument that are not relevant to disclosure relating to executive compensation. For example, the requirements in paragraphs 6(b) and (d) to present the most comparable GAAP measure and the non-GAAP financial measure for a comparative period, and the disclosures required under subparagraphs 6(e)(ii) and (iii), do not make sense in the context of discussing executive compensation policies and decisions that may relate to non-GAAP metrics or targets for a particular period. However, these do not technically appear to be items that are permitted to be cross-referenced or incorporated by reference under section 5 of the Proposed Instrument.

As noted in the Proposed Companion Policy, the purpose of executive compensation disclosure is “to provide information about executive compensation within the context of the overall stewardship and governance of the issuer, in contrast to disclosure explaining an issuer’s financial performance, financial position or cash flow”. Executive compensation disclosure clearly serves a different purpose than the discussion of an issuer’s financial results in its MD&A and the disclosure should not be cluttered with

discussions and comparisons of non-GAAP financial measures and other specified financial measures that are not relevant in that context.

Accordingly we submit that, if non-GAAP financial measures or other specified financial measures are disclosed in Form 51-102F6 or Form 51-102F6V executive compensation disclosure, the Proposed Instrument should make it clear that those measures need only be identified as such, and that a cross-reference or incorporation by reference to MD&A disclosure will be sufficient for the remaining requirements relating to those measures, including presentation of comparable GAAP measures and comparative period measures.

Total of Segments Measures

As defined in the Proposed Instrument, a total of segments measure is defined as one that is presented in the notes to the financial statements. In light of such presentation in financial statement notes, we submit that paragraph 9(c) of the Proposed Instrument should not require a quantitative reconciliation in every document in which a total of segments measure appears, and/or should allow for cross-referencing (or incorporation by reference) of such reconciliation to the financial statements rather than just MD&A.

Please see above with respect to our comment relating to paragraph 9(d) with respect to inclusion of comparative period measures.

Proposed Companion Policy – Paragraph 6(e) – Proximity to the first instance

The Proposed Companion Policy suggests that an issuer disclosing a non-GAAP financial measure in a document must identify the measure as such and cross-reference to the section of the document containing the required section 6 disclosures “each time” a non-GAAP financial measure is presented in that document. This would be very cumbersome, particularly where the non-GAAP financial measure is disclosed and discussed multiple times, for different financial periods, in narrative disclosure (as opposed to a table format), and again not consistent with CSA initiatives relating to regulatory burden reduction. It is also not aligned with the actual words of paragraph 6(e) of the Proposed Instrument itself, which only requires the disclosure provided for in that paragraph to be made “in proximity to the first instance” of the non-GAAP financial measure in the document, not each time in the document where the measure appears.

We submit that an appropriately named non-GAAP financial measure should be clear enough to the reader after the first instance of disclosure with the required disclosures from paragraph 6(e) (including by way of cross-reference as permitted with respect to subparagraphs 6(e)(iv), (v) and (vi)). This part of the Proposed Companion Policy should be revised to change “each time a non-GAAP financial measure is presented” to “in proximity to the first instance of the non-GAAP financial measure presented”.

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If you have any questions concerning these comments, please contact Brendan Reay at 416.863.5273 or brendan.reay@blakes.com, or Matthew Merkley at 416.863.3328 or matthew.merkley@blakes.com.

Sincerely,

(signed) *"Brendan Reay"*

(signed) *"Matthew Merkley"*