REQUEST FOR COMMENT

NOTICE OF PROPOSED MULTILATERAL INSTRUMENT 52-109, COMPANION POLICY 52-109CP, AND FORMS 52-109F1 AND 52-109F2

CERTIFICATION OF DISCLOSURE IN ISSUERS' ANNUAL AND INTERIM FILINGS

This Notice accompanies proposed Multilateral Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings* (the Proposed Instrument), Forms 52-109F1 and 52-109F2 (collectively, the Forms), and Companion Policy 52-109CP (the CP), all of which are being published for comment. We invite comment on these materials generally. In addition, we have raised a number of questions for your specific consideration.

Introduction

The Proposed Instrument, Forms and CP are initiatives of certain members of the Canadian Securities Administrators. The Proposed Instrument and Forms are expected to be adopted as a rule in each of Québec, Alberta, Manitoba, Ontario, Nova Scotia and Newfoundland and Labrador, as a Commission regulation in Saskatchewan, as a policy in New Brunswick, Prince Edward Island and in the Yukon Territory**,** and as a code in the Northwest Territories and Nunavut; it is expected that the CP will be implemented as a policy in Québec, Alberta, Saskatchewan, Manitoba, Ontario, Nova Scotia, Newfoundland and Labrador, New Brunswick, Prince Edward Island, Nunavut, the Yukon Territory and the Northwest Territories (the adopting jurisdictions).

The purpose of the Proposed Instrument is to improve the quality and reliability of reporting issuers annual and interim disclosures. This, in turn, will help to maintain and enhance investor confidence in the integrity of our capital markets. The Proposed Instrument requires chief executive officers (CEOs) and chief financial officers (CFOs) to personally certify that their issuers' annual and interim filings do not contain any misrepresentations and that the financial statements and other financial information in the annual and interim filings of their issuers fairly present the financial condition, results of operations and cash flows of the issuers for the relevant time period. The filings required to be certified by CEOs and CFOs include issuers' annual information forms, annual financial statements, annual MD&A, interim financial statements and interim MD&A.

The requirement that senior executives certify that they have designed and implemented internal and disclosure controls is intended to ensure that an issuer's senior management is aware of material information that is filed with securities regulators and released to investors and is held accountable for the fairness and accuracy of this information.

The Proposed Instrument does not require auditor attestation to, and reporting on, management's assessment of internal controls as envisaged by subsections 404(a) and (b) of the Sarbanes-Oxley Act. The SEC recently adopted rules to implement the requirements of section 404. We are studying these rules.

Background
In July of 2002, the Sarbanes-Oxley Act (SOX) was enacted in the United States. Replete with accounting, disclosure and corporate governance reforms, this statute aims to restore the public's faith in the U.S. capital markets in the wake of several U.S. financial reporting scandals. SOX prescribes a number of new corporate governance requirements, including CEO and CFO certification of financial and other disclosure. Since our markets are connected to and affected by the U.S. markets, they are not immune from real or perceived erosion of investor confidence in the U.S. Therefore, we have initiated domestic measures, including the certification requirements set out in the Proposed Instrument, to address the issue of investor confidence and to maintain the reputation of our markets internationally.

The Proposed Instrument closely parallels the Securities and Exchange Commission's (SEC) current[1] and proposed[2] certification requirements implementing section 302 of SOX (the U.S. rules) and will require CEOs and CFOs of all reporting issuers in Canada, other than investment funds, to certify their issuers' annual and interim filings in the manner prescribed by Forms 52-109F1 and F2. As discussed below, the Proposed Instrument will also contain a number of exemptions.

Summary and Discussion of Proposed Instrument
The Proposed Instrument has five parts.

Part 1
Part 1 contains the definitions of terms and phrases used in the Proposed Instrument that are not defined in or interpreted under a national definitions instrument in force in an adopting jurisdiction. National Instrument 14-101 *Definitions* sets out definitions for commonly used terms and should be read together with the Proposed Instrument.

Part 1 also contains a transition period. We believe that all reporting issuers should, and most typically already have, a reasonable process of internal and disclosure controls in place. However, we appreciate that some issuers may not yet have controls that their CEOs and CFOs believe are appropriate for the purpose of making all of the representations required of them in the annual and interim certificates. In addition, we do not think it is appropriate to require certification of matters relating to financial periods ending prior to the implementation of the Proposed Instrument. Therefore, we propose a one-year transition period for all issuers. During this transition period, issuers will be required to provide only a "bare" version of the annual and interim certificate containing the first three representations rather than all six. This transition period is set out in section 1.3 of the Proposed Instrument.

?? ***Request for Comment***
Do you agree that the proposed one-year transition period is appropriate?

[1] See SEC Release 33-8124: Final Rule: Certification of Disclosure in Companies' Quarterly and Annual Reports (published August 29, 2002).
[2] See SEC Release 33-8138: Proposed Rule: Disclosure required by Sections 404, 406 and 407 of the Sarbanes-Oxley Act 2002 (published October 22, 2002).

A bare certificate will only be accepted on transitional basis because we believe it is important that CEOs and CFOs make all of the representations in the annual and interim certificates. The elements of representation four (design, implementation and evaluation of internal and disclosure controls), establish that the informational foundation exists upon which to credibly support representations two and three, both of which are qualified as being to the best of the CEO and CFO's knowledge. The fifth and sixth representations complement the fourth and are designed to ensure greater transparency of the internal controls of an issuer by requiring any deficiencies in those controls to be disclosed to the auditors as well as being publicly disclosed in the annual MD&A.

In formulating our proposals for comment we considered whether it was necessary to mandate the representations in paragraphs 4 through 6 as the CEO and CFO will, of necessity, establish appropriate controls to provide the second and third representations. We also considered whether the requirement to provide the representations in paragraphs 4 through 6 would be too onerous for smaller issuers. For the reasons stated above, we are proposing that paragraphs 4 through 6 form part of the certification requirements.

?? ***Request for Comment***
In our view, because the second and third representations are knowledge-based, it is necessary not only to require CEOs and CFOs to certify (i) the accuracy and fairness of their issuer's filings (representations 2 and 3) but also to require them to certify (ii) as to the informational foundation upon which these representations are based (representations 4 through 6). Do you believe it is appropriate to include representations 4 through 6?

Do you think that there is reason to differentiate between smaller and larger issuers? For example, is there any reason to exclude representations 4 through 6 with regard to smaller issuers?

Parts 2 and 3
Parts 2 and 3 address the certification of annual and interim filings. The Proposed Instrument will require reporting issuers to file annual and interim certificates in which their CEOs and CFOs personally certify that, based on their knowledge, their issuer's annual and interim filings do not contain a misrepresentation and their issuer's annual and interim financial statements fairly present the financial condition of their issuer. Because those representations are knowledge-based, in order to eliminate the defense of ignorance, CEOs and CFOs will also be required to personally certify that they are responsible for designing, or supervising the design of, and implementing internal controls and disclosure controls and procedures. Specifically, CEOs and CFOs will be required to certify that: (i) they have designed, or supervised the design of, internal controls and implemented those controls to provide reasonable assurances that the issuer's financial statements are fairly presented in accordance with generally accepted accounting principles; and (ii) they have designed, or supervised the design of, disclosure controls and procedures and implemented those controls to provide reasonable assurances that material information relating to the issuer, including its consolidated subsidiaries, is made known to them by others within those entities.

The Proposed Instrument also requires CEOs and CFOs to certify annually that they have evaluated the effectiveness of their internal controls and disclosure controls and

procedures and presented their conclusions regarding the effectiveness of those controls in the annual MD&A. In addition, the Proposed Instrument requires CEOs and CFOs to disclose to their issuers' audit committee and independent auditors any significant control deficiencies, material weaknesses, and acts of fraud that involve management or other employees who have a significant role in the internal controls. Any significant changes to the controls must be publicly disclosed in the issuer's annual and interim MD&A.

The Proposed Instrument does not prescribe the degree of complexity or any specific policies or procedures that must make up an issuer's internal controls or its disclosure controls and procedures. Rather, it will be left to the judgment of the issuer's CEO and CFO to design, or supervise the design of, reasonable controls in the context of, among other things, the issuer's size, the nature of its business, and the complexity of its operations.

Form of reporting

Generally, the U.S. rules require certification in a company's annual report on Form 10-K and quarterly report on Form 10-Q. However, with the exception of Québec, Canadian securities legislation does not prescribe annual and quarterly reports *per se*. Therefore, the Proposed Instrument prescribes the annual and interim disclosure documents that CEOs and CFOs will be required to certify, and when the annual and interim certificates must be filed.

Rather than the one all-encompassing annual report on Form 10-K that is required in the U.S., under Canadian securities legislation a reporting issuer is generally required to file, on an annual basis, more than one disclosure document relating to its most recent fiscal year. While those documents, when considered as a whole, approximate the line-item requirements of an annual report on Form 10-K, the various Canadian disclosure documents are not required to be filed at the same time. Therefore, the Proposed Instrument (in Part 2) requires annual CEO and CFO certification of "annual filings". This is a new definition that encompasses an issuer's AIF, and its annual financial statements and MD&A. Under the Proposed Instrument the annual certificate relates to the disclosure in the annual filings because the objective of the annual certificate is for the CEO and CFO to certify the accuracy of the annual filings as a whole. The annual certificate must be filed at the same time as the issuer files the *last* of its AIF and its annual financial statements and MD&A.

?? ***Request for Comment***

If the AIF and annual financial statements and MD&A are not all filed at the same time, there will be a gap between the time that the earliest of those documents is filed and the time the annual certificate is filed. Is this timing gap problematic?

Certification of Executive Compensation
The annual information form, annual financial statements and annual MD&A grouped together are generally equivalent to the annual report filed in the U.S. on Form 10-K. One notable exception, however, is that the Form 10-K typically includes details of executive compensation. In certain jurisdictions, primary disclosure on executive compensation is contained in Form 40. The Form 40 information is typically contained in an issuer's proxy circular, which is filed in advance of its annual general meeting but may be filed subsequent to the documents forming the annual filings. We did consider including Form 40 disclosure in the definition of annual filings and requiring the annual certificate to capture this disclosure "as and when" the Form 40 was filed. However, we considered that this approach may be unfair to the certifying officers who would have personal liability for the information and would be called upon to certify this information in advance, in some instances, of when it would be available or filed. In order to avoid delays in the filing of the annual certificate we have decided not to require certification of Form 40 and thus have not included it in the definition of annual filings.

?? ***Request for Comment***
Should the annual certificate in the Proposed Instrument cover certification of Form 40 executive compensation disclosure? If yes, how should this be done? For example, should the annual certificate cover subsequently filed material in the Form 40 as and when that information is filed?

Interim evaluation of internal controls and disclosure controls and procedures
The U.S. rules require an issuer's CEO and CFO to certify annually and quarterly that they have evaluated, and disclosed their conclusions about, the effectiveness of their issuer's internal controls and disclosure controls and procedures. While the Proposed Instrument maintains this requirement in the annual certificate, it does *not* impose this requirement for the certification of interim filings. In our view, maintaining those controls will necessarily require some form of on-going evaluation process, otherwise those controls will become less effective over time due to regulatory changes, changes to generally accepted accounting principles (GAAP), or changes in, among other things, the size or nature of the issuer's business. However, we acknowledge that a formal interim evaluation that is subject to certification will likely be costlier than an informal evaluation. Therefore, we have concluded that from a cost-benefit standpoint, a formal interim evaluation is unnecessary.

?? ***Request for Comment***
Do you agree with this approach?

Part 4
Part 4 provides for a number of exemptions from the Proposed Instrument.

Part 4 includes an exemption for issuers that comply with U.S. federal securities laws implementing section 302(a) of SOX. We believe that issuers that comply with the annual and quarterly certification requirements in SOX should be exempt from the Proposed Instrument because the investor confidence benefits of requiring them to also comply with the Proposed Instrument will be minimal. Moreover, because our certification requirements are slightly different than the SOX certification requirements (in order to

accommodate language and legal differences between our respective regimes), we would be imposing a double requirement on interlisted issuers with minimal additional benefits from an investor confidence standpoint.

We note that proposed National Instrument 52-107 *Acceptable Accounting Principles, Auditing Standards and Reporting Currency* will allow certain Canadian issuers to satisfy their requirements to file financial statements prepared in accordance with Canadian GAAP by filing statements prepared in accordance with U.S. GAAP. However, it is possible that some Canadian companies may still continue to prepare two sets of financial statements and continue to file their Canadian GAAP statements in the applicable jurisdictions. In order to ensure that the Canadian GAAP financial statements are certified (pursuant to either SOX or the Instrument) those issuers will not have recourse to the exemptions in subsections 4.1(1) and (2).

?? ***Request for Comment***
Do you think that the exemption in section 4.1, as currently drafted, will have the effect of discouraging issuers that prepare their financial statements in accordance with U.S. GAAP from preparing and filing Canadian GAAP financial statements?

Part 4 includes an exemption for certain foreign issuers. We have included this exemption in order to be consistent with the basic scheme contemplated by proposed National Instrument 71-102 *Continuous Disclosure and Other Exemptions Relating to Foreign Issuers*.

Part 4 includes an exemption for issuers of exchangeable securities. This is consistent with proposed National Instrument 51-102 *Continuous Disclosure Obligations*.

Part 4 also includes an exemption for issuers of certain guaranteed debt securities.

Part 5
Part 5 sets out the effective date for the Proposed Instrument.

The Concept of Fair Presentation
As noted above, the Proposed Instrument will require CEOs and CFOs to certify, annually and on an interim basis, that their issuer's financial statements "fairly present" the financial condition of the issuer for the relevant time period. This representation is not qualified by the phrase "in accordance with generally accepted accounting principles" which Canadian auditors typically include in their financial statement audit reports. This qualification has been specifically excluded from the annual and interim certificates to prevent management from relying entirely upon compliance with GAAP procedures in this representation, particularly where the results of a GAAP audit may not fairly reflect the overall financial condition of a company.

In our view, fair presentation includes but is not necessarily limited to the selection and application of appropriate accounting policies and disclosure of financial information that is informative and reasonably reflects the underlying transactions. To achieve fair presentation, inclusion of additional disclosure may also be necessary to provide

investors with a materially accurate and complete picture of an issuer's financial condition, results of operations and cash flows.

Application of the Proposed Instrument to Certain Classes of Reporting Issuers
As presently drafted, the Proposed Instrument will apply to every reporting issuer in adopting jurisdictions, other than an investment fund. Consequently, under the Proposed Instrument, every reporting issuer other than an investment fund will be required to file an annual certificate and interim certificates personally signed by each CEO and CFO of the reporting issuer or, in the case of an issuer that does not have a CEO or CFO, those individuals who perform similar functions to the functions of a CEO or CFO.

We believe that for certain types of issuers, such as issuers that are income trusts, it may be the case that the certificate filing requirement should apply to more than one issuer, or to an issuer other than the reporting issuer.

In the case of an income trust, for example, it may be the case that the certificate filing requirement should apply to the underlying business entity (Opco) in the place of, or in addition to, the income trust. In respect of an entity structured as an income trust, in many cases, the investment ultimately represents an investment in Opco and the investors' return can be entirely dependent on the operations and assets of Opco. Requiring certificates only from the CEO and CFO of the income trust may not be sufficient. For example, the CEO and CFO of Opco may not be the same as the CEO and the CFO (or their equivalents) of the income trust. Also, in some jurisdictions it may be unclear in certain circumstances whether Opco is a "subsidiary" of the income trust for the purposes of the Proposed Instrument. It may be arguable that the "business" of the income trust – to act as a passive holding/distributing entity – is different from the business of Opco. Consequently, if certificates were required only from the CEO and CFO of the income trust, the controls being certified might be those of a "passive" investor rather than the controls that would be necessary in relation to Opco.

?? ***Request for Comment***
Should an issuer that is structured such that all or majority of its business is operated through a subsidiary or another issuer of which it materially affects control or direction such as an income trust, be subject to the same certification filing requirements as issuers that offer securities directly to the public?

Summary of Forms
The Proposed Instrument will require the annual certificate to be filed in accordance with Form 52-109F1 and each interim certificate to be filed in accordance with Form 52-109F2. By signing those certificates, CEOs and CFOs will be personally certifying that their issuer's annual and interim filings do not contain a misrepresentation and that their issuer's annual and interim financial statements fairly present the financial condition, results of operations and cash flows of their issuer. In addition, those certificates will require CEOs and CFOs to personally certify that they:

? are responsible for internal controls and disclosure controls and procedures;
? have designed or supervised the design of, internal controls and implemented those internal controls to provide reasonable assurances that the issuer's financial

statements are fairly presented in accordance with generally accepted accounting principles;

? have designed or supervised the design of, disclosure controls and procedures and implemented those disclosure controls and procedures to provide reasonable assurances that material information relating to the issuer, including its consolidated subsidiaries, is made known to them by others within those entities;

? have evaluated the effectiveness of those controls (52-109F1 only);

? have presented their conclusions regarding the effectiveness of those controls (52-109F1 only);

? have disclosed to the audit committee and the independent auditors any significant control deficiencies, material weaknesses, and acts of fraud that involve management or other employees who have a significant role in the internal controls; and

? have indicated in their issuers' annual and interim filings any significant changes to the controls

Internal Controls, and Disclosure Controls and Procedures

A key aspect of management's responsibility for the preparation of financial information is its responsibility to establish and maintain internal controls. While internal controls has been defined in U.S. securities legislation for a number of years, Canadian legislation has no similar legal requirement. The Proposed Instrument does not contain an express definition of "internal controls". We believe a formal definition is unnecessary since representation 4(b) of the annual and interim certificates in effect defines the *outcome* that internal controls are designed to achieve. This representation requires the CEO and CFO to state that they have designed and implemented internal controls "…to provide reasonable assurances that the issuer's financial statements are fairly presented in accordance with generally accepted accounting principles." As discussed in the commentary under "Parts 2 and 3", how issuers' achieve this outcome is best left to the judgment of their CEOs and CFOs.

Unlike internal controls, "disclosure controls and procedures" is a term that was newly introduced by the SEC following enactment of SOX. "Disclosure controls and procedures" is currently defined by the SEC as controls "designed to ensure that material information required to be disclosed by a company under the Exchange Act is recorded, processed and summarized, and reported within the time periods specified by the SEC."[3]

This concept generally refers to the non-financial aspects of an issuer's release of information to the public. Disclosure controls and procedures, for example, not only include procedures that aid in reaching the correct accounting numbers, but also encompass the procedures involved in reporting the significance of those numbers to the public. Some examples of non-financial disclosure include the signing of a significant contract, developments regarding intellectual property, changes in union relationships, termination of a strategic relationship and legal proceedings.

Like internal controls, the term "disclosure controls and procedures" is not expressly defined in the Proposed Instrument. However, representation 4(a) of the annual and

[3] SEC Release 33-8124: Final Rule: Certification of Disclosure in Companies Quarterly and Annual Financial Statements.

interim certificate does, in effect, define the *outcome* that disclosure controls are designed to achieve because the CEO and CFO must certify that they have designed and implemented those disclosure controls and procedures "…to provide reasonable assurances that material information relating to the issuer, including its consolidated subsidiaries, is made known to us by others within those entities…and that such material information is disclosed within the time periods specified under applicable provincial and territorial securities legislation". Again, we will leave it to management's judgment how to best effect this outcome.

?? ***Request for Comment***
Should we formally define: (i) internal controls and (ii) disclosure controls and procedures? If so, what should the appropriate definitions be?

Summary of the CP
The purpose of the CP is to provide information relating to the manner in which the provisions of the Proposed Instrument are intended to be interpreted or applied. The CP includes a discussion of the concept of fair presentation, commentary and guidance on how to file the annual and interim certificates on SEDAR, a discussion of internal and disclosure controls, and the consequences of filing false certificates, from a liability perspective.

The Ontario Securities Commission (the OSC) plans to amend OSC Policy 51-601 *Reporting Issuer Defaults* and OSC Policy 57-603 *Defaults by Reporting Issuers in Complying with Financial Statement Filing Requirements* to indicate that failure to file an annual or interim certificate will be considered an act of default with all the consequences of default discussed in those policies.

Authority for the Instrument – Saskatchewan
In those adopting jurisdictions in which the Proposed Instrument and Forms are to be adopted or made as a rule or regulation, the securities legislation in each of those jurisdictions provides the securities regulatory authority with rule-making or regulation-making authority regarding the subject matter of the Proposed Instrument and Forms.

The following provisions of *The Securities Act, 1988* (Saskatchewan) (the Act) provide the Saskatchewan Financial Services Commission (SFSC) with authority to adopt the Proposed Instrument and Forms.

Clause 154(1)(r) authorizes the SFSC to make regulations 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 requirements under the Act.

Clause154(1)(s) authorizes the SFSC to prescribe requirements in respect of financial accounting, reporting and auditing for the purposes of the Act, the regulations and the rules.

Clause 154(1)(ii) authorizes the SFSC to make regulations 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.

Related Instruments
The Proposed Instrument is related to proposed National Instrument 51-102 *Continuous Disclosure Obligations*, proposed National Instrument 71-102 *Continuous Disclosure and Other Exemptions Relating to Foreign Issuers*, and proposed National Instrument 52-107 *Acceptable Accounting Principles, Auditing Standards and Reporting Currency*.

Anticipated Costs and Benefits
The anticipated costs and benefits of implementing the Proposed Instrument and the CP are discussed in the paper entitled, *Investor Confidence Initiatives: A Cost-Benefit Analysis*, which has been published together with this Notice, and is incorporated by reference into this Notice.

Alternatives Considered
We did consider proposing an instrument or policy which would contain less onerous requirements than those found in the Proposed Instrument; however, because an aim of the Proposed Instrument is to help foster and maintain investor confidence in Canada's capital markets, we determined that it was necessary to propose requirements that closely parallel the U.S. Rules.

Reliance on Unpublished Studies, Etc.
In developing the Proposed Instrument, we did not rely upon any significant unpublished study, report or other written materials.

Comments
Interested parties are invited to make written submissions on the Proposed Instrument, Forms and CP. We will consider submissions received by September 25, 2003. **Due to timing concerns, comments received after the deadline will not be considered.**

Submissions should be addressed to the securities regulatory authorities listed below:

Ontario Securities Commission
Alberta Securities Commission
Manitoba Securities Commission
Registrar of Securities, Government of Yukon
Registrar of Securities, Department of Justice, Government of the Northwest Territories
Securities Commission of Newfoundland and Labrador
Nova Scotia Securities Commission
Commission des valeurs mobilières du Québec
Saskatchewan Financial Services Commission
Office of the Attorney General, Prince Edward Island

Registrar of Securities, Legal Registries Division, Department of Justice, Government of Nunavut
Department of Justice, Securities Administration Branch, New Brunswick

Please deliver your submissions to the addresses below. Your submissions will be distributed to the other CSA member jurisdictions.

John Stevenson, Secretary
Ontario Securities Commission
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Denise Brosseau, Secretary
Commission des valeurs mobilières du Québec
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e-mail: consultation-en-cours@cvmq.com

A diskette containing the submissions (in Windows format, preferably Word) should also be submitted to the OSC.

Comment letters submitted in response to requests for comments are placed on the public file in certain jurisdictions and form part of the public record, unless confidentiality is requested. Comment letters will be circulated amongst the securities regulatory authorities, whether or not confidentiality is requested. Although comment letters requesting confidentiality will not be placed in the public file, freedom of information legislation in certain jurisdictions may require securities regulatory authorities in those jurisdictions to make comment letters available. Persons submitting comment letters should therefore be aware that the press and members of the public may be able to obtain access to any comment letters.

Questions may be referred to the following people:

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Instrument and Policy
The text of the Proposed Instrument and CP follow, together with footnotes that are not part of the Proposed Instrument and CP, but have been included to provide background and explanation.

Dated: June 27, 2003

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