

**Notice of Multilateral Instrument 52-109**  
*Certification Of Disclosure In Issuers' Annual And Interim Filings*

## Introduction

Multilateral Instrument 52-109 - *Certification of Disclosure in Issuers' Annual and Interim Filings*, Form 52-109F1, Form 52-109FT1, Form 52-109F2 and Form 52-109FT2 (collectively, the Instrument) and Companion Policy 52-109CP - *Certification of Disclosure in Issuers' Annual and Interim Filings* (the Companion Policy) are initiatives of certain members of the Canadian Securities Administrators (the CSA or we). The Instrument and the Companion Policy are collectively referred to as the Materials.

The Instrument has been made or is expected to be made by each member of the CSA participating in this initiative and will be implemented as:

- a rule in each of Québec, Alberta, Manitoba, Ontario, Nova Scotia and Newfoundland and Labrador,
- a Commission regulation in Saskatchewan and Nunavut,
- a policy in each of New Brunswick, Prince Edward Island and in the Yukon Territory, and
- a code in the Northwest Territories.

It is expected that the Companion Policy 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.

In Ontario, the Instrument and other required materials were delivered to the Minister of Finance on January 14, 2004. The Minister may approve or reject the Instrument or return it for further consideration. If the Minister approves the Instrument or does not take any further action by March 15, 2004, the Instrument will come into force on March 30, 2004. The Companion Policy will come into force on the date that the Instrument comes into force.

In Québec, the Instrument is a regulation made under section 331.1 of *The Securities Act* (Québec) and must be approved, with or without amendment, by the Minister of Finance. The Instrument will come into force on the date of its publication in the *Gazette officielle du Québec* or on any later date specified in the regulation. It must also be published in the Bulletin.

In Alberta, the Instrument and other materials were delivered to the Minister of Revenue. The Minister may approve or reject the Instrument. Subject to Ministerial approval, the Instrument and Companion Policy will come into force on March 30, 2004. The Alberta Securities Commission will issue a separate notice advising of whether the Minister has approved or rejected the Instrument.

Provided all necessary ministerial approvals are obtained, we expect to implement the Instrument and Companion Policy on March 30, 2004.

## Substance and Purpose

The purpose of the Materials is to improve the quality and reliability of reporting issuers' annual and interim disclosure. We believe that this, in turn, will help to maintain and enhance investor confidence in the integrity of our capital markets. The Materials require chief executive officers (CEOs) and chief financial officers (CFOs) (or persons performing functions similar to a CEO or CFO) of reporting issuers to personally certify that, among other things:

- their issuers' annual filings and interim filings do not contain any misrepresentations or omit to state any material facts;
- 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 their issuers for the relevant time period;
- they have designed disclosure controls and procedures and internal control over financial reporting (or caused them to be designed under their supervision);
- they have evaluated the effectiveness of such disclosure controls and procedures and caused their issuers to disclose their conclusions regarding their evaluation; and
- they have caused their issuers to disclose certain changes in internal control over financial reporting.

The filings required to be certified by CEOs and CFOs (or persons performing functions similar to a CEO or CFO) include:

- 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 disclosure controls and procedures and internal control over financial reporting is intended to provide reasonable assurance 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 Materials do not require a report of management on an issuer's internal control over financial reporting or auditor attestation on management's assessment of an issuer's internal control over financial reporting as envisaged by subsections 404(a) and (b) of the *Sarbanes-Oxley Act of 2002* (SOX). The Securities and Exchange Commission (the SEC) recently adopted rules to implement the requirements of section 404.<sup>1</sup> As a separate CSA initiative, we are currently developing a proposed instrument which will require a report on management's assessment of an issuer's internal control over financial reporting. We are also evaluating the extent to which auditor attestation of such report should be required.

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<sup>1</sup> See SEC Release Nos. 33-8238, 34-47986: Final Rule: Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports (published June 18, 2003).

## **Background**

In July 2002, SOX was enacted in the United States. SOX introduces numerous accounting, disclosure and corporate governance reforms with a view to restoring the public's faith in the U.S. capital markets in the wake of several U.S. financial reporting scandals. These reforms include the requirement for 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 erosion of investor confidence in the U.S. Therefore, we have initiated domestic measures, including the certification requirements set out in the Materials, to address the issue of investor confidence and to maintain the reputation of our markets internationally.

The Materials closely parallel the SEC's current certification requirements implementing section 302 of SOX<sup>2</sup> and will require CEOs and CFOs (or persons performing functions similar to a CEO or CFO) of all reporting issuers in Canada, other than investment funds, to certify their issuers' annual filings and interim filings in the manner prescribed by Forms 52-109F1 and 52-109F2 (subject to certain transition provisions which are discussed below).

## **Summary of Written Comments Received by the CSA**

The Materials were published for comment on June 27, 2003. During the subsequent 90-day comment period, we received submissions from 41 commenters. We have considered the comments received and thank all the commenters. The names of all the commenters are contained in Appendix A of this notice and a summary of their comments, together with the CSA responses, are contained in Appendix B of this notice.

After considering the comments, we have made several amendments to the Materials. However, as these changes are not material, we are not republishing the Materials for a further comment period. All of the changes that have been made since the publication of the Materials on June 27, 2003 are reflected in the blacklined versions of the Materials contained in Appendix C of this notice.

## **Summary of Changes to the Materials**

Set out below are notable changes made to the Materials since those materials were published for comment on June 27, 2003.

### **1. Terminology used in Certification**

#### **(a) "Disclosure Controls and Procedures"**

The term "disclosure controls and procedures" is now defined in section 1.1 of the Instrument. This definition is similar to the definition of "disclosure controls and procedures" under the SEC rules implementing section 302 of SOX. The definition

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<sup>2</sup> See SEC Release 33-8124: Final Rule: Certification of Disclosure in Companies' Quarterly and Annual Reports (published August 29, 2002) and SEC Release Nos. 33-8238, 34-47986: Final Rule: Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports (published June 18, 2003).

clarifies that this term is intended to embody controls and procedures addressing the quality and timeliness of disclosure.

**(b) “Internal Control over Financial Reporting”**

The term “internal controls” has been replaced by the term “internal control over financial reporting” which is defined in section 1.1 of the Instrument. This definition is similar to the definition of “internal control over financial reporting” under the SEC rules implementing section 302 of SOX. This definition clarifies that the certification regarding internal controls is intended to focus on financial reporting.

In addition, the Companion Policy now includes a discussion regarding the distinction between disclosure controls and procedures and internal control over financial reporting.

**(c) “Fair Presentation”**

Additional guidance regarding the meaning of “fair presentation” has been provided in Part 8 of the Companion Policy.

**(d) “Financial Condition”**

Guidance regarding the meaning of “financial condition” has been provided in Part 9 of the Companion Policy.

**(e) “Subsidiary”**

The term “subsidiary” is now defined in section 1.1 of the Instrument. The definition clarifies that “subsidiary” has the meaning ascribed to it under the CICA Handbook for the purposes of the Instrument. Under this definition, “subsidiary” includes non-corporate entities.

**2. Evaluation and Disclosure of Effectiveness of Internal Control over Financial Reporting**

The requirement under paragraph 4(c) of Form 52-109F1 (as published on June 27, 2003) for an evaluation of, and disclosure regarding the certifying officers’ conclusions about, the effectiveness of internal control over financial reporting has been deleted.

The representation required under paragraph 5 of Forms 52-109F1 and 52-109F2 (as published on June 27, 2003) regarding disclosure of significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting and fraud has been deleted. This representation was based upon an evaluation of the effectiveness of internal control over financial reporting.

These amendments have been made to harmonize the certification required under the Instrument with the certification required pursuant to the SEC rules implementing section 302 of SOX.

As noted above, we are developing, as a separate CSA initiative, a proposed instrument which will require a report on management’s assessment of an issuer’s internal control

over financial reporting. We are also evaluating the extent to which auditor attestation of such report should be required.

### **3. Effective Date and Transition**

The effective date of the Instrument is March 30, 2004.

#### **(a) Annual Certificates**

The provisions of the Instrument concerning annual certificates apply for financial years beginning on or after January 1, 2004. Notwithstanding the foregoing, issuers may file a “bare” certificate using Form 52-109FT1 (which excludes the representations in paragraphs 4 and 5 of Form 52-109F1) in respect of financial years ending on or before March 30, 2005.

#### **(b) Interim Certificates**

The provisions of the Instrument concerning interim certificates apply for interim periods beginning on or after January 1, 2004. Notwithstanding the foregoing, an issuer may file a “bare” interim certificate using Form 52-109FT2 (which excludes the representations in paragraphs 4 and 5 of Form 52-109F2) in respect of any interim period that occurs prior to the end of the first financial year in respect of which an issuer is required to file a “full” annual certificate (which includes the representations in paragraphs 4 and 5 of Form 52-109F1).

For illustration purposes only, Appendix A to the Companion Policy includes a table setting out the filing requirements for annual certificates and interim certificates for issuers with financial years beginning on the first day of a month.

### **4. New CEOs and CFOs**

The Companion Policy now clarifies that CEOs and CFOs (or persons performing functions similar to a CEO or CFO) holding such offices at the time that annual certificates and interim certificates are required to be filed are the persons who must sign those certificates. Certifying officers are required to file annual certificates and interim certificates in the specified form (without any amendment) and failure to do so will be a breach of the Instrument. There may be situations where an issuer’s disclosure controls and procedures and internal control over financial reporting have been designed and implemented prior to the certifying officers assuming their respective offices. We recognize that in these situations the certifying officers may have difficulty in representing that they have designed or caused to be designed these controls and procedures. The Companion Policy now provides that, in our view, where:

- these controls and procedures have been designed prior to the certifying officers assuming their respective offices;
- the certifying officers have reviewed the existing controls and procedures upon assuming their respective offices; and
- the certifying officers have designed (or caused to be designed under their supervision) any modifications or enhancements to these controls and procedures determined to be necessary following their review,

the certifying officers will have designed (or caused to be designed under their supervision) these controls and procedures for the purposes of paragraphs 4(a) and (b) of Forms 52-109F1 and 52-109F2.

## **5. Certificates to be Filed by Income Trusts**

Under the Instrument, income trusts are subject to the same certification requirements as other reporting issuers. We are not requiring the CEO and CFO of the underlying business entity to deliver annual certificates and interim certificates in addition to the certificates delivered by executives of the income trust. We may consider imposing such a requirement, however, upon concluding our review of the comments received on proposed National Policy 41-201 *Income Trusts and Other Indirect Offerings* and upon further consideration of this issue.

## **Authority for the Instrument**

In those adopting jurisdictions in which the Instrument is 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 Instrument.

## **Related Instruments**

The 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 Instrument and the Companion Policy are discussed in the paper entitled, *Investor Confidence Initiatives: A Cost-Benefit Analysis* (the Cost-Benefit Analysis), which was published on June 27, 2003 and which is incorporated by reference into this Notice. A response to comments received on the Cost-Benefit Analysis 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 Instrument; however, because an aim of the 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 SEC rules implementing section 302 of SOX.

## **Reliance on Unpublished Studies, Etc.**

In developing the Instrument and Companion Policy, we did not rely upon any significant unpublished study, report or other written materials.

## **Questions**

Please refer your questions to any of:

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## **Instrument and Companion Policy**

The text of the Instrument and Companion Policy follows.

DATED: January 16, 2004.