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SISKINDS | THE LAW FIRM

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September 17, 2021

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
Office of the Superintendent of Securities, Service NL
Northwest Territories Office of the Superintendent of Securities
Office of the Yukon Superintendent of Securities
Superintendent of Securities, Nunavut

Dear Sirs/Mesdames:

Re: CSA Notice and Request for Comment: Proposed Amendments to National Instrument 51-102 *Continuous Disclosure Obligations* and Other Amendments and Changes Relating to Annual and Interim Filings of Non-Investment Fund Reporting Issuers and Seeking Feedback on a Proposed Framework for Semi-Annual Reporting – Venture Issuers on a Voluntary Basis

INTRODUCTION

We appreciate the opportunity to respond to the CSA's May 20, 2021 Notice and Request for Comment (the "**RFC**").

Siskinds LLP is one of the leading plaintiff securities class action firms in Canada. We have substantial experience litigating class actions under Parts XXIII and XXIII.1 of the Ontario *Securities Act* ("***OSA***") relating to defective disclosure. Accordingly, we are well positioned to provide input from an investor protection standpoint. Investor protection is at the very core of what we do.

We set out below our answers to certain questions posed at Part 9 of the RFC. Our recommendations are animated by our desire to enhance investor protection by the regular

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disclosure of decision-useful information, and that any changes to issuers' disclosure obligations are harmonized with the civil liability regime under the *OSA* and other provincial securities legislation.

RECOMMENDATIONS

Question 2

We approve of the use of "impact/probability" to describe the seriousness of a risk as it aligns with the well-established probability/magnitude test adopted by the Commission and the courts to evaluate the materiality of risks and contingent events.

More clarity from the CSA on the meaning of the seriousness of a risk is helpful because it allows for better disclosure and more informed investment decisions by market participants. As is evident from the proposed amendments, standardization provides clarity. Thus, rather than suggest that issuers "consider presenting risk factor disclosure …", the language of Instruction (3) to Section 16 in Form 51-102F1 ought to be mandatory. There is no reason for reporting issuers to not provide disclosure with respect to the impact/probability (*i.e.*, the seriousness) of each risk factor, in addition to the other items.

Question 3

We support the adoption of the risk factor disclosure requirements similar to the SEC's amendments. Such requirements—for example, grouping generic risks together—would assist market participants by providing clarity that generic risks are, in fact, generic, and thus distinguish them from more specific risks that may be affecting an issuer at a particular point in time based on actual events. Further, a summary of risk factor disclosure where such disclosure exceeds 15 pages would assist by presenting information in a more digestible format, while still providing investors with fulsome non-summary risk disclosure.

Question 6

We recommend maintaining the short form prospectus requirements for expert consents in paragraph 4.2(a)(vii) of NI 44-101 and subsection 10.1(1.1) of NI 41-101, which require technical report authors who are named in the AIF to file expert consents for a short form prospectus filing. Personal liability attaching to the authors of expert reports is important for ensuring accurate disclosure. Specialized expert authors who draft technical reports must be comfortable standing behind what they have set out in their reports in the form of a consent.

Question 9

Semi-annual reporting should not be adopted. Market participants benefit from timely disclosure of accurate, decision-useful information in a core document to which liability attaches under the *OSA*.

The preparation of quarterly disclosure has value for issuers too. The process of preparing quarterly disclosure imposes a discipline on issuers by forcing them to carry out the internal processes and controls that assist in identifying problems, deficiencies and undisclosed material information. In our experience, material information that should have been disclosed at an earlier time is often revealed by issuers during quarterly financial reporting. There is a risk this might not happen under the proposed alternative disclosure regime.

Finally, there is a high degree of integration between Canadian and US markets, which have not adopted semi-annual reporting. There is value in maintaining consistency between the reporting regimes in the two jurisdictions.

Question 10

To the extent that semi-annual reporting is to be introduced (which we are opposed to, as noted above), our view is that for larger venture issuers (market capitalization over $100 million), semi-annual reporting should not be allowed for two reasons. *First*, the traditional economic justifications for it do not apply insofar as the cost of disclosure is not disproportionate. *Second*, these are likely to be sophisticated issuers whose businesses justify quarterly disclosure to investors.

In our view, there are other useful metrics other than market capitalization. For example, revenues over a certain quantum might be a more useful metric for excluding venture issuers from participating in semi-annual reporting.

Question 11

The CSA has recognized that, if semi-annual reporting is adopted, alternative disclosure is required for the interim periods for which an interim disclosure statement is not filed in order to provide timely information to investors. The RFC indicates that this alternative disclosure will take the form of a news release.

While we endorse the requirement for this mandatory disclosure, it is our view that these news releases must be treated as "core documents" under Part XXIII.1 of the *OSA*. A news release would generally be treated as a non-core document under Part XXIII.1 and thus attract a higher evidentiary burden for a plaintiff. Given the importance of the alternative disclosure in the absence of regular interim disclosure, it is appropriate to treat the alternative disclosure as a core

document. While taking the form of a news release, the content and importance of this disclosure is more akin to an interim MD&A and should be treated in the same way from a liability perspective.

We note that Annex H states that the definition of "core document" will include the new annual disclosure statement and interim disclosure statement. A similar amendment could be made to include the alternative disclosure within the definition of "core document" in section 138.1 of the *OSA*.

CONCLUSION

It is essential that the CSA take steps to recommend improvements to the regulatory system that will enhance investor protection while streamlining disclosure for issuers. The purpose of securities regulation is to protect investors in a manner that inspires confidence in the capital markets and limits systemic risk. We believe our recommendations assist in achieving this purpose.

We would be happy to discuss the foregoing at your convenience.

Yours very truly,

Siskinds LLP

Jared Rosenbaum

Per:
Michael Robb, Daniel E. H. Bach, Anthony O'Brien, Alex Dimson and Jared S. Rosenbaum