

CIVIL LIABILITY
FOR
SECONDARY MARKET DISCLOSURE
AND
CEO/CFO CERTIFICATION
OF
ANNUAL AND INTERIM FILINGS

Kenneth Wiener
Goodmans LLP, Toronto
KWiener@Goodmans.ca

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CIVIL LIABILITY FOR SECONDARY MARKET DISCLOSURE

- Being introduced by Ontario Bills 198 and 41 as Part XXIII.1 of the OSA. See Schedule “A” for a consolidation of the Bills as published by the Ontario Securities Commission.
- Limited right of action for secondary market traders where there has been a misrepresentation or failure to disclose.
- Unique status of buyers under a prospectus will disappear.
- Recognition that protecting secondary market traders as important as protecting prospectus buyers.
- Not yet in force – it is hoped Bill 41 will have third reading in September, 2003.

CEO/CFO CERTIFICATION OF ANNUAL AND INTERIM FILINGS

- Being introduced by Multilateral Instrument 52-109 Certification of Disclosure in Companies’ Annual and Interim Filings. See Schedule “B” for a copy of 52-109.
- CEOs and CFOs will have to certify that, based on their knowledge, annual and interim filings do not contain a misrepresentation and financial statements fairly present the financial condition of the issuer.
- Will also have to certify as to (i) internal controls to provide reasonable assurance that financial statements are fairly presented in accordance with GAAP; and (ii) disclosure controls to provide reasonable assurance that material information made known to CEO and CFO.
- CEO and CFO must certify annually that they have evaluated the effectiveness of internal controls and disclosure controls with conclusions in MD&A.

CIVIL LIABILITY AND CERTIFICATION

- Could have either without the other.
- Path to civil liability a longer one.
 - Allen Report – 1997
- Certification clearly in response to Sarbanes-Oxley – 2002.
- But internal and disclosure control certifications intended to make misrepresentations less likely.
- Evidence of control procedures can help defend against civil liability suits.

CIVIL LIABILITY FOR SECONDARY MARKET DISCLOSURE

KEY DEFINITIONS

- “**misrepresentation**” – untrue statement of material fact or omission to state a material fact that is required to be stated or that is necessary to make a statement not misleading in the light of the circumstances in which it was made.
- “**material fact**” – a fact that would reasonably be expected to have a significant effect on the market price or value of the securities. (Note – “significantly affects” hindsight test dropped from definition).
- “**influential person**” –
 - control person (20%+)
 - promoter
 - insider who is not a director or senior officer.
- “**core document**” –
 - for directors who are not officers, influential persons and directors or officers of an influential person: prospectus, take-over and issuer bid circulars, directors’ circular, rights offering circular, MD&A, AIF, information circular, annual and interim financial statements
 - for the issuer and officers of the issuer: all of the above documents plus material change reports.
- “**document**” – any written communication (including electronic):
 - (a) required to be filed with the Commission;
 - (b) that is not required to be filed and:
 - (i) is filed with the Commission (Note: Consider whether to voluntarily file press releases where no material change);
 - (ii) that is filed or required to be filed with government under securities or corporate law or with any stock exchange or quotation and trade reporting system; or
 - (iii) would reasonably be expected to affect market price or value of a security of the issuer.
- “**public oral statement**” – an oral statement made in circumstances in which a reasonable person would believe that information contained in the statement will become generally disclosed.
- “**forward-looking information**” – disclosure regarding possible events, conditions or results that are based on assumptions about future economic conditions and courses of

action and includes future oriented financial information with respect to prospective results of operations, financial position or cash flows that is presented as either a forecast or a projection (Note: Not limited to FOFI).

NON-APPLICATION

- Part XXIII.1 will not apply to:
 - (a) purchase of a security offered by a prospectus during the period of distribution;
 - (b) exempt distributions; or
 - (c) take-over and issuer bids.

BASIS OF ACTION

- Issuer releases “document” with a misrepresentation.
- Misrepresentation in “public oral statement” by issuer relating to its business or affairs.
- Influential person releases a document or makes public oral statement relating to issuer with a misrepresentation.
- Issuer fails to make timely disclosure of a material change.

PLAINTIFFS

- Person or company who acquires or disposes of security from time of misrepresentation, or non-disclosure, until time of public correction or disclosure.
- No need to have relied on the misrepresentation or disclosure having been made on time (unlike common law action for negligent misrepresentation where plaintiff must prove reliance).
- Equivalent to deemed reliance in OSA Section 130 for a prospectus.

DEFENDANTS

- For documents: issuer, each director, involved officers, influential persons and directors and officers thereof who knowingly influenced release, and experts.
- For public oral statements: issuer, person making the statement, involved directors and officers, influential persons and directors and officers thereof who knowingly influenced making of statement, and experts.
- For influential person making misrepresentation: issuer if authorized or acquiesced in release of document or making of statement, person making the statement, involved directors and officers of issuer, the influential person and involved directors and officers thereof, and experts.

- For failure to make timely disclosure: issuer, involved directors and officers, and influential persons and directors and officers thereof who knowingly influenced the failure to disclose.

BURDEN OF PROOF

- For misrepresentation in non-core documents or in public oral statements, plaintiff must prove that defendant (unless an expert):
 - (a) knew that document or statement contained the misrepresentation;
 - (b) deliberately avoided knowing; or
 - (c) was guilty of gross misconduct in connection with release.
- For misrepresentation in core documents, onus on the defendant to show was duly diligent, as described below.
- For failure to make timely disclosure, plaintiff must prove that defendant (unless issuer or officer of issuer):
 - (a) knew of change and that it was material;
 - (b) deliberately avoided knowing; or
 - (c) was guilty of gross misconduct in connection with failure to disclose.

DEFENCES

- Defendant not liable if prove plaintiff knew of misrepresentation or the material change.
- Reasonable investigation – defendant will not be liable if proves that:
 - (a) conducted or caused to be conducted a reasonable investigation; and
 - (b) had no reasonable grounds to believe was a misrepresentation or that failure to make disclosure would occur.
- In determining whether an investigation was reasonable, or whether there was gross misconduct, court to consider all relevant circumstances, including:
 - (a) the nature of the issuer;
 - (b) the knowledge, experience and function of the person or company;
 - (c) the office held, if the person was an officer;
 - (d) the presence or absence of another relationship with the issuer, if the person was a director;

- (e) **the existence, if any, and the nature of any system designed to ensure that the issuer meets its continuous disclosure obligations;**
 - (f) **the reasonableness of reliance by the person or company on the issuer's disclosure compliance system and on the issuer's officers, employees and others whose duties would in the ordinary courses have given them knowledge of the relevant facts;**
 - (g) the period within which disclosure was required to be made under applicable law;
 - (h) in respect of a report, statement or opinion of an expert, any professional standards applicable to the expert;
 - (i) the extent to which the person or company knew, or should reasonably have known, the content and medium of dissemination of the document or public oral statement;
 - (j) in the case of a misrepresentation, the role and responsibility of the person or company in the preparation and release of the document or the making of the public oral statement containing the misrepresentation or the ascertaining of the facts contained in that document or public oral statement; and
 - (k) in the case of a failure to make timely disclosure, the role and responsibility of the person or company involved in a decision not to disclose the material change.
- Confidential disclosure – not liable for failure to make timely disclosure if prove confidential filing made with OSC, issuer had reasonable basis for making confidential disclosure (Note: New condition – must have reasonable basis to determine disclosure would be detrimental) and disclosure promptly made when basis for confidentiality gone.
 - Forward-looking information – Defendant will not be liable for a misrepresentation in “forward-looking information” if prove all of the following:
 - (a) the document or public oral statement containing the forward-looking information contained, proximate to that information,
 - (i) reasonable cautionary language identifying the forward-looking information as such, and identifying material factors that could cause actual results to differ materially from a conclusion, forecast or projection in the forward-looking information, and
 - (ii) a statement of the material factors or assumptions that were applied in drawing a conclusion or making a forecast or projection set out in the forward-looking information.
 - (b) The person or company had a reasonable basis for drawing the conclusions or making the forecasts and projections set out in the forward-looking information.

- “Safe(r) harbour” for forward-looking information provided as MD&A requires forward-looking information and standard is not infallibility. Balance struck – must have “reasonable basis”. Section 132.1 introduced to provide same “reasonable basis” defence for forward-looking information against buyers under a prospectus claiming under existing Section 130(1).
- Safe(r) harbour does not apply for forward-looking information in an IPO prospectus.
- Query: Should your company give earnings guidance?
- Claim and defences for misrepresentation in a prospectus will depend on whether buyer bought under prospectus or in secondary market, whether IPO and whether forward-looking information involved. See following table:

PROSPECTUS LIABILITY

	Bought Under IPO Prospectus	Bought Under Additional Offering Prospectus	Bought in Market During Additional Offering	Bought in Market During IPO
Not Forward Looking Information	130(1) Claim if purchase security offered by the prospectus during period of distribution	130(1) Claim if purchase security offered by the prospectus during period of distribution	138.3 Claim if acquire or dispose of security between release of prospectus and correction of misrepresentation	138.3 Claim if acquire or dispose of security between release of prospectus and correction of misrepresentation
	130(4) Defence – conduct reasonable investigation as to provide reasonable grounds for belief no misrepresentation	130(4) Defence – conduct reasonable investigation as to provide reasonable grounds for belief no misrepresentation	138.4(6) Defence – conduct a reasonable investigation and had no reasonable grounds to believe prospectus contained a misrepresentation	138.4(6) Defence – conduct a reasonable investigation and had no reasonable grounds to believe prospectus contained a misrepresentation
Forward Looking Information	130(1) Claim if purchase security offered by the prospectus during period of distribution	130(1) Claim if purchase security offered by the prospectus during period of distribution	138.3 Claim if acquire or dispose of security between release of prospectus and correction of misrepresentation	138.3 Claim if acquire or dispose of security between release of prospectus and correction of misrepresentation
	130(4) Defence – conduct reasonable investigation as to provide reasonable grounds for belief no misrepresentation	132.1 Defence – had a reasonable basis for making the forecast	138.4(9) Defence – had a reasonable basis for making the forecast	138.4(6) Defence – conduct a reasonable investigation and had no reasonable grounds to believe prospectus contained a misrepresentation

- Expertized statements – Not liable for misrepresentation in an expert’s report if expert consented to use of report and prove that:
 - (a) had no reasonable grounds to believe was a misrepresentation in the report; and
 - (b) fair presentation of expert’s report made.
- Release of documents – Defence if document not required to be filed with OSC and prove did not know, and had no reasonable grounds to believe, document would be released.
- Corrective Action – Defendant, other than the issuer, not liable if misrepresentation or failure to disclose made without knowledge or consent of defendant and after becoming aware:
 - (a) promptly notified board of directors; and
 - (b) if correction not made by issuer within two business days, defendant notifies OSC (unless prohibited by law or professional confidentiality rules).

DAMAGES

- Based on difference in value of securities from time of initial trade and value after correction made (10th trading day after correction).
- Liability limits – is not a full compensation system as caps for liability, as summarized in following table:

Potential Liability

Defendant	Liability Limit will be the Greater of:	
(a) Responsible Issuer	5% of market capitalization	\$1,000,000
(b) Director or officer of issuer	\$25,000	50% of individual's compensation from the issuer and its affiliates during the 12 months preceding misrepresentation or failure to disclose
(c) Influential person (that is not an individual)	5% of market capitalization	\$1,000,000
(d) Influential person (who is an individual)	\$25,000	50% of individual's compensation from the issuer and its affiliates during the 12 months preceding misrepresentation or failure to disclose
(e) Director or officer of influential person	\$25,000	50% of such individual's compensation from the Influential Person and its affiliates during the 12 months preceding misrepresentation or failure to disclose
(f) Expert	\$1,000,000	12 month revenues earned from issuer and its affiliates
(g) Any person that makes a public oral statement other than (d), (e) or (f)	\$25,000	50% of such individual's compensation from the issuer and its affiliates during the 12 months preceding misrepresentation or failure to disclose

- Proportionate liability – Court to determine defendant's responsibility for each defendant found liable.
- Where particular defendant, other than issuer, authorized, permitted or acquiesced while knowing of misrepresentation or failure to disclose, total damages can be recovered from the defendant. Joint and several liability among such defendants.

PROCEDURE

- Need leave of court:
 - (a) action in good faith; and
 - (b) reasonable probability of success for plaintiff.
- Winner entitled to costs.
- These controls to avoid "strike suits" as in U.S. whenever a stock drops in price.

CEO/CFO CERTIFICATION OF ANNUAL AND INTERIM FILINGS

MULTILATERAL INSTRUMENT 52-109

- Released for comment June 27, 2003 by all provinces except British Columbia.
- Comment period expires September 25, 2003.
- January 1, 2004 intended implementation date for most provisions.
- To improve quality and reliability of annual and interim disclosures.

KEY DEFINITIONS

- **“annual filings”** – issuer’s AIF, annual financial statements and annual MD&A, including all documents and information incorporated by reference in the AIF.
- **“interim filings”** – issuer’s interim financial statements and interim MD&A.

CERTIFICATIONS

- CEO and CFO must certify in annual and interim certificates, based on their knowledge, that:
 - (a) “annual filings” and “interim filings” do not contain a misrepresentation; and
 - (b) annual financial statements and interim financial statements, together with other financial information included in the annual or interim filings, fairly present in all material respects the financial condition, results of operations and cash flows of the issuer.
- Patterned after Sarbanes-Oxley section 302.
- Annual certificate to be filed with last of AIF and annual financial statements and MD&A.
- “Fair presentation” includes, but not limited to:
 - (a) selection and application of appropriate accounting policies;
 - (b) disclosure of financial information that is informative and reasonably reflects the underlying transactions; and
 - (c) includes additional disclosure necessary to provide investors with a materially accurate and complete picture of the financial condition, results of operations and cash flow of the issuer.
- Certification requires financial information to be more than GAAP compliant – issuers must look more broadly at their financial information.

- After January 1, 2005, CEO and CFO must also certify that:
 - (a) 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 their company, including consolidated subsidiaries, is made known to them by others within those entities and that such material information is disclosed within the time periods specified under applicable securities legislation;
 - (b) they have designed, or supervised the design of, internal controls and implemented those controls to provide reasonable assurances that their company's financial statements are fairly presented in accordance with GAAP;
 - (c) they have evaluated the effectiveness of such controls and have disclosed in the MD&A their conclusions about such effectiveness (annually only) and have disclosed in the MD&A any changes to, or factors which could significantly affect, the issuer's internal controls (annually and quarterly); and
 - (d) they have disclosed any deficiencies to the company's audit committee and external auditors.
- Patterned after Sarbanes-Oxley sections 302 and 402.
- Annual and interim certification forms included in 52-109. See Schedule "B".
- Issuers that comply with the annual and quarterly certification requirements under Sarbanes-Oxley will be exempt from 52-109 certification.

DISCLOSURE AND INTERNAL CONTROLS

- 52-109 does not define "disclosure controls and procedures" or "internal controls". Definitions said to be unnecessary as representations in certificates define the outcome internal controls and disclosure controls intended to achieve.
- SEC defines "disclosure controls and procedures" 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".
- Disclosure controls broader than internal controls which focus on correct accounting numbers.
- Query – does 52-109 disclosure control certification that "such material information is disclosed within the time periods specified under applicable provincial securities legislation" include press releases and material change reports?
- 52-109 does not provide guidance as to degree of complexity or any specific policies or procedures for internal controls or disclosure controls and procedures. Left to

management's judgement based on factors specific to the issuer to design and implement controls.

- Canadian issuers likely to consider practices and standards developed under Sarbanes-Oxley and to consider practices that other issuers develop under 52-109.
- Ties to civil liability provisions where relevant circumstance for "reasonable investigation" defence (described above) includes "the existence, if any, and the nature of any system designed to ensure that the issuer meets its continuous disclosure obligations" and reasonableness of reliance "on the issuer's disclosure compliance system".

LIABILITY FOR FALSE CERTIFICATION

- The Companion Policy for 52-109 indicates an officer providing a false certification could be subject to quasi-criminal, administrative or civil proceedings under securities law.
- Could also be subject to private actions for damages under the civil liability provisions. Annual and interim certificates required to be filed with OSC under 52-109 are currently not included as "core documents" but are "documents" under Part XXIII.1. Onus thus on the plaintiff, as described above, with respect to action for a false certificate.
- However, the Companion Policy notes that under Part XXIII.1, court has discretion to treat multiple misrepresentations having common subject matter or content as a single misrepresentation. Court could treat a financial statements misrepresentation, and a misrepresentation by CEO or CFO in a certificate that relates to the underlying financial statements, as a single misrepresentation. Query: Backdoor core document?

DISCLOSURE CONTROL PROCEDURES DEVELOPED UNDER SARBANES-OXLEY

- Disclosure control procedures developed under Sarbanes-Oxley can provide guidance as 52-109 based on Sarbanes-Oxley.
- Be careful – do not adopt model structures or procedures that do not reflect your situation or that will not be followed. Not following your own procedures could lead to enhanced liability, not reduced liability.
- The speakers following will focus on control procedures.
- You will need to evaluate your existing Disclosure Controls and Procedures Policy in light of the new requirements.
- Schedules "C" through "F" contain Sarbanes-Oxley type documents for your consideration. These particular examples come from the U.S. law firms Stroock & Stroock & Lavan LLP, Holme Roberts & Owen LLP, and Simpson Thacker & Bartlett LLP.

- Schedule "C" is a charter for a Disclosure Committee. The SEC recommends, but does not require, formation of an internal Disclosure Committee to consider the materiality of information and to determine disclosure obligations on a timely basis. The SEC envisages the Disclosure Committee would report to the CEO and CFO.
- A Disclosure Committee might include the principal accounting officer, general counsel, principal risk management officer, internal auditor, investor relations officer, head of human resources and head of each material department or business unit.
- The remaining three Schedules are certificates that officers and employees sign about their roles in the disclosure process, demonstrating and evidencing the issuer's disclosure control system.
- Such certificates can be useful as part of the process in making disclosure accurate and to help defend against any lawsuit that might nonetheless arise.
- Schedule "D" is a Disclosure Committee Certificate to be signed by all the members of the Committee with respect to the review conducted by them for a particular filing.
- Schedule "E" is a certificate that might be obtained from the head, or principal financial officer, of a business unit.
- Schedule "F" is a Backup Certificate that could be obtained from employees involved in the drafting and/or reviewing of a disclosure document to be filed.

SCHEDULES

Schedule "A" – Consolidation of Ontario Bills 198 and 41

Schedule "B" – Draft Multilateral Instrument 52-109

Schedule "C" – Disclosure Committee Charter

Schedule "D" – Disclosure Committee Certificate

Schedule "E" – Certification of Officers and/or Employees

Schedule "F" – Backup Certificate

SCHEDULE "A"

**PART XXIII.1
CIVIL LIABILITY FOR SECONDARY MARKET DISCLOSURE**

INTERPRETATION AND APPLICATION

Definitions

138.1 In this Part,

"compensation" means compensation received during the 12 month period immediately preceding the day on which the misrepresentation was made or on which the failure to make timely disclosure first occurred, together with the fair market value of all deferred compensation including, without limitation, options, pension benefits and stock appreciation rights, granted during the same period, valued as of the date that such compensation is awarded: ("rémunération")

"control person" means,

- (a) a person or company who holds a sufficient number of the voting rights attached to all outstanding voting securities of an issuer, or
- (b) each person or company or combination of persons or companies acting in concert by virtue of an agreement, arrangement, commitment or understanding, which holds in total a sufficient number of the voting rights attached to all outstanding voting securities of an issuer,

to affect materially the control of the issuer, and, where a person or company, or combination of persons or companies, holds more than 20 per cent of the voting rights attached to all outstanding voting securities of an issuer, the person or company, or combination of persons or companies, shall, in the absence of evidence to the contrary, be deemed to hold a sufficient number of the voting rights to affect materially the control of the issuer; ("personne qui a le contrôle")

"core document" means,

- (a) where used in relation to,
 - (i) a director of a responsible issuer who is not also an officer of the responsible issuer,
 - (ii) an influential person, other than an officer of the responsible issuer or an investment fund manager where the responsible issuer is an investment fund, or
 - (iii) a director or officer of an influential person, other than an officer of an investment fund manager, who is not also an officer of the responsible issuer,

a prospectus, a take-over bid circular, an issuer bid circular, a directors' circular, a rights offering circular, management's discussion and analysis, an annual information form, an information circular, ~~and~~ annual financial statements, and interim financial statements of the responsible issuer, or

- (b) where used in relation to,
 - (i) a responsible issuer or an officer of the responsible issuer,
 - (ii) an investment fund manager where the responsible issuer is an investment fund, or

(iii) an officer of an investment fund manager where the responsible issuer is an investment fund,

a prospectus, a take-over bid circular, an issuer bid circular, a directors' circular, a rights offering circular, management's discussion and analysis, an annual information form, an information circular, annual financial statements, interim financial statements, and a report required by subsection 75 (2), of the responsible issuer, and

(c) such other documents as may be prescribed by regulation for the purposes of this definition; ("document essentiel")

"document" means any written communication, including a communication prepared and transmitted only in electronic form,

(a) that is required to be filed with the Commission, or

(b) that is not required to be filed with the Commission and,

(i) that is filed with the Commission,

(ii) that is filed or required to be filed with a government or an agency of a government under applicable securities or corporate law or with any stock exchange or quotation and trade reporting system under its by-laws, rules or regulations, or

(iii) that is any other communication the content of which would reasonably be expected to affect the market price or value of a security of the responsible issuer; ("document")

"expert" means a person or company whose profession gives authority to a statement made in a professional capacity by the person or company including, without limitation, an accountant, actuary, appraiser, auditor, engineer, financial analyst, geologist or lawyer; ("expert")

"failure to make timely disclosure" means a failure to disclose a material change in the manner and at the time required under this Act; ("non-respect des obligations d'information occasionnelle")

"forward-looking information" means ~~all~~ disclosure regarding possible events, conditions or results ~~(including future that is based on assumptions about future economic conditions and courses of action and includes future oriented financial information with respect to prospective results of operations, a prospective financial position or prospective changes in financial position that is based on assumptions about future economic conditions and sources of action)~~ cash flows that is presented as either a forecast or a projection; ("information prospective")
[This definition was moved to s. 1(1) of the Securities Act.]

"influential person" means, in respect of a responsible issuer,

(a) a control person,

(b) a promoter,

(c) an insider who is not a director or senior officer of the responsible issuer, or

(d) an investment fund manager, if the responsible issuer is an investment fund; ("personne influente")

"issuer's security" means a security of a responsible issuer and includes a security,

(a) the market price or value of which, or payment obligations under which, are derived from or based on a security of the responsible issuer, and

(b) which is created by a person or company on behalf of the responsible issuer or is guaranteed by the responsible issuer; ("valeur mobilière d'un émetteur")

"liability limit" means,

- (a) in the case of a responsible issuer, the greater of,
 - (i) 5 per cent of its market capitalization (as such term is defined in the regulations), and
 - (ii) \$1 million,
- (b) in the case of a director or officer of a responsible issuer, the greater of,
 - (i) \$25,000, and
 - (ii) 50 per cent of the aggregate of the director's or officer's compensation from the responsible issuer and its affiliates,
- (c) in the case of an influential person who is not an individual, the greater of,
 - (i) 5 per cent of its market capitalization (as defined in the regulations), and
 - (ii) \$1 million,
- (d) in the case of an influential person who is an individual, the greater of,
 - (i) \$25,000, and
 - (ii) 50 per cent of the aggregate of the influential person's compensation from the responsible issuer and its affiliates,
- (e) in the case of a director or officer of an influential person, the greater of,
 - (i) \$25,000, and
 - (ii) 50 per cent of the aggregate of the director's or officer's compensation from the influential person and its affiliates,
- (f) in the case of an expert, the greater of,
 - (i) \$1 million, and
 - (ii) the revenue that the expert and the affiliates of the expert have earned from the responsible issuer and its affiliates during the 12 months preceding the misrepresentation, and
- (g) in the case of each person or company who made a public oral statement, other than an individual ~~under clauses (a), (b), (c),~~ referred to in clauses (d), (e) or (f), the greater of
 - (i) \$25,000, and
 - (ii) 50 per cent of the aggregate of the person or company's compensation from the responsible issuer and its affiliates; ("limite de responsabilité")

"management's discussion and analysis" means the section of an annual information form, annual report or other document that contains management's discussion and analysis of the financial condition and results of operations of a responsible issuer as required under Ontario securities law; ("rapport de gestion")

"public oral statement" means an oral statement made in circumstances in which a reasonable person would believe that information contained in the statement will become generally disclosed; ("déclaration orale publique")

"release" means, with respect to information or a document, to file with the Commission or any other securities regulatory authority in Canada or a stock exchange or to otherwise make available to the public; ("publication")

"responsible issuer" means,

- (a) a reporting issuer, or
- (b) any other issuer with a real and substantial connection to Ontario any securities of which are publicly traded; ("émetteur responsable")

"trading day" means a day during which the principal market (as defined in the regulations) for the security is open for trading. ("jour de Bourse")

Application.

138.2 This Part does not apply to,

- (a) the ~~acquisition-purchase of an issuer's~~ security ~~under~~ offered by a prospectus during the period of distribution;
- (b) the acquisition of an issuer's security pursuant to ~~an exemption~~ a distribution that is exempt from section 53 or 62, except as may be prescribed by regulation;
- (c) the acquisition or disposition of an issuer's security in connection with or pursuant to a take-over bid or issuer bid, except as may be prescribed by regulation; or
- (d) such other transactions or class of transactions as may be prescribed by regulation.

LIABILITY

Liability for secondary market disclosure

Documents released by responsible issuer

138.3 (1) Where a responsible issuer or a person or company with actual, implied or apparent authority to act on behalf of a responsible issuer releases a document that contains a misrepresentation, a person or company who acquires or disposes of ~~an~~ the issuer's security during the period between the time when the document was released and the time when the misrepresentation contained in the document was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against,

- (a) the responsible issuer;
- (b) each director of the responsible issuer at the time the document was released;
- (c) each officer of the responsible issuer who authorized, permitted or acquiesced in the release of the document;
- (d) each influential person, and each director and officer of an influential person, who knowingly influenced,
 - (i) the responsible issuer or any person or company acting on behalf of the responsible issuer to release the document, or
 - (ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the release of the document; and
- (e) each expert where,
 - (i) the misrepresentation is also contained in a report, statement or opinion made by the expert,

- (ii) the document includes, summarizes or quotes from the report, statement or opinion of the expert, and
- (iii) if the document was released by a person or company other than the expert, the expert consented in writing to the use of the report, statement or opinion in the document.

Public oral statements by responsible issuer

(2) Where a person with actual, implied or apparent authority to speak on behalf of a responsible issuer makes a public oral statement that relates to the business or affairs of the responsible issuer and that contains a misrepresentation, a person or company who acquires or disposes of ~~an~~the issuer's security during the period between the time when the public oral statement was made and the time when the misrepresentation contained in the public oral statement was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against,

- (a) the responsible issuer;
- (b) the person who made the public oral statement;
- (c) each director and officer of the responsible issuer who authorized, permitted or acquiesced in the making of the public oral statement;
- (d) each influential person, and each director and officer of the influential person, who knowingly influenced,
 - (i) the person who made the public oral statement to make the public oral statement, or
 - (ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the making of the public oral statement; and
- (e) each expert where,
 - (i) the misrepresentation is also contained in a report, statement or opinion made by the expert,
 - (ii) the person making the public oral statement includes, summarizes or quotes from the report, statement or opinion of the expert, and
 - (iii) if the public oral statement was made by a person other than the expert, the expert consented in writing to the use of the report, statement or opinion in the public oral statement.

Influential persons

(3) Where an influential person or a person or company with actual, implied or apparent authority to act or to speak on behalf of the influential person releases a document or makes a public oral statement that relates to a responsible issuer and that contains a misrepresentation, a person or company who acquires or disposes of ~~an~~the issuer's security during the period between the time when the document was released or the public oral statement was made and the time when the misrepresentation contained in the document or public oral statement was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against,

- (a) the responsible issuer, if a director or officer of the responsible issuer, or where the responsible issuer is an investment fund, the investment fund manager, authorized, permitted or acquiesced in the release of the document or the making of the public oral statement;
- (b) the person who made the public oral statement;
- (c) each director and officer of the responsible issuer who authorized, permitted or acquiesced in the release of the document or the making of the public oral statement;
- (d) the influential person;

-
- (e) each director and officer of the influential person who authorized, permitted or acquiesced in the release of the document or the making of the public oral statement; and
 - (f) each expert where,
 - (i) the misrepresentation is also contained in a report, statement or opinion made by the expert,
 - (ii) the document or public oral statement includes, summarizes or quotes from the report, statement or opinion of the expert, and
 - (iii) if the document was released or the public oral statement was made by a person other than the expert, the expert consented in writing to the use of the report, statement or opinion in the document or public oral statement

Failure to make timely disclosure

(4) Where a responsible issuer fails to make a timely disclosure, a person or company who acquires or disposes of ~~an~~the issuer's security between the time when the material change was required to be disclosed in the manner required under this Act and the subsequent disclosure of the material change has, without regard to whether the person or company relied on the responsible issuer having complied with its disclosure requirements, a right of action for damages against,

- (a) the responsible issuer
- (b) each director and officer of the responsible issuer who authorized, permitted or acquiesced in the failure to make timely disclosure; and
- (c) each influential person, and each director and officer of an influential person, who knowingly influenced,
 - (i) the responsible issuer or any person or company acting on behalf of the responsible issuer in the failure to make timely disclosure, or
 - (ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the failure to make timely disclosure.

Multiple roles

(5) In ~~a proceeding~~an action under this section, a person who is a director or officer of an influential person is not liable in that capacity if the person is liable as a director or officer of the responsible issuer.

Multiple misrepresentations

- (6) In ~~a proceeding~~an action under this section,
 - (a) multiple misrepresentations having common subject matter or content may, in the discretion of the court, be treated as a single misrepresentation; and
 - (b) multiple instances of failure to make timely disclosure of a material change or material changes concerning common subject matter may, in the discretion of the court, be treated as a single failure to make timely disclosure.

No implied or actual authority

(7) In ~~a proceeding~~an action under subsection (2) or subsection (3), if the person who made the public oral statement had apparent authority, but not implied or actual authority, to speak on behalf of the issuer, no other person is liable with respect to any of the responsible issuer's securities that were acquired or disposed of before that other person became, or should reasonably have become, aware of the misrepresentation.

Burden of proof and defences

Non-core documents and public oral statements

138.4 (1) In ~~a proceeding~~ an action under section 138.3 in relation to a misrepresentation in a document that is not a core document, or a misrepresentation in a public oral statement, a person or company is not liable, subject to subsection (2), unless the plaintiff proves that the person or company,

- (a) knew, at the time that the document was released or public oral statement was made, that the document or public oral statement contained the misrepresentation;
- (b) at or before the time that the document was released or public oral statement was made, deliberately avoided acquiring knowledge that the document or public oral statement contained the misrepresentation; or
- (c) was, through action or failure to act, guilty of gross misconduct~ in connection with the release of the document or the making of the public oral statement that contained the misrepresentation.

Same

(2) A plaintiff is not required to prove any of the matters set out in subsection (1) in ~~a proceeding~~ an action under section 138.3 in relation to an expert.

Failure to make timely disclosure

(3) In ~~a proceeding~~ an action under section 138.3 in relation to a failure to make timely disclosure, a person or company is not liable, subject to subsection (4), unless the plaintiff proves that the person or company,

- (a) knew, at the time that the failure to make timely disclosure first occurred, of the change and that the change was a material change;
- (b) at the time or before the failure to make timely disclosure first occurred, deliberately avoided acquiring knowledge of the change or that the change was a material change; or
- (c) was, through action or failure to act, guilty of gross misconduct in connection with the failure to make timely disclosure.

Same

(4) A plaintiff is not required to prove any of the matters set out in subsection (3) in ~~a proceeding~~ an action under section 138.3 in relation to,

- (a) a responsible issuer;
- (b) an officer of a responsible issuer;
- (c) an investment fund manager; or
- (d) an officer of an investment fund manager.

Knowledge of the misrepresentation or material change

(5) A person or company is not liable in ~~a proceeding~~ an action under section 138.3 in relation to a misrepresentation or a failure to make timely disclosure if that person or company proves that the plaintiff acquired or disposed of the issuer's security,

- (a) with knowledge that the document or public oral statement contained a misrepresentation; or
- (b) with knowledge of the material change.

Reasonable investigation

- (6) A person or company is not liable in a ~~proceeding~~an action under section 138.3 in relation to,
- (a) a misrepresentation if that person or company proves that,
 - (i) before the release of the document or the making of the public oral statement containing the misrepresentation, the person or company conducted or caused to be conducted a reasonable investigation, and
 - (ii) at the time of the release of the document or the making of the public oral statement, the person or company had no reasonable grounds to believe that the document or public oral statement contained the misrepresentation; or
 - (b) a failure to make timely disclosure if that person or company proves that,
 - (i) before the failure to make timely disclosure first occurred, the person or company conducted or caused to be conducted a reasonable investigation, and
 - (ii) the person or company had no reasonable grounds to believe that the failure to make timely disclosure would occur.

Factors to be considered by court

(7) In determining whether an investigation was reasonable under subsection (6), or whether any person or company is guilty of gross misconduct under subsection (1) or (3), the ~~court~~court shall consider all relevant circumstances, including,

- (a) the nature of the responsible issuer;
- (b) the knowledge, experience and function of the person or company;
- (c) the office held, if the person was an officer;
- (d) the presence or absence of another relationship with the responsible issuer, if the person was a director;
- (e) the existence, if any, and the nature of any system designed to ensure that the responsible issuer meets its continuous disclosure obligations;
- (f) the reasonableness of reliance by the person or company on the responsible issuer's disclosure compliance system and on the responsible issuer's officers, employees and others whose duties would in the ordinary course have given them knowledge of the relevant facts;
- (g) the period within which disclosure was required to be made under the applicable law;
- (h) in respect of a report, statement or opinion of an expert, any professional standards applicable to the expert;
- (i) the extent to which the person or company knew, or should reasonably have known, the content and medium of dissemination of the document or public oral statement;
- (j) in the case of a misrepresentation, the role and responsibility of the person or company in the preparation and release of the document or the making of the public oral statement containing the misrepresentation or the ascertaining of the facts contained in that document or public oral statement; and
- (k) in the case of a failure to make timely disclosure, the role and responsibility of the person or company involved in a decision not to disclose the material change.

Confidential disclosure

(8) A person or company is not liable in a ~~proceeding~~an action under section 138.3 in respect of a failure to make timely disclosure if,

- (a) the person or company proves that the material change was disclosed by the responsible issuer in a report filed on a confidential basis with the Commission under subsection 75 (3);
- (b) the responsible issuer had a reasonable basis for making the disclosure on a confidential basis;
- (c) where the information contained in the report filed on a confidential basis remains material, disclosure of the material change was made public promptly when the basis for confidentiality ceased to exist;
- (d) the person or company or responsible issuer did not release a document or make a public oral statement that, due to the undisclosed material change, contained a misrepresentation, and
- (e) where the material change became publicly known in a manner other than the manner required under this Act, the responsible issuer promptly disclosed the material change in the manner required under this Act.

Forward-looking information

(9) A person or company is not liable in a ~~proceeding~~an action under section 138.3 for a misrepresentation in forward-looking information if the person or company proves ~~that~~all of the following things:

- (a~~1~~) ~~the~~The document or public oral statement containing the forward-looking information contained, proximate to ~~the forward-looking~~that information,
 - (i) reasonable cautionary language identifying the forward-looking information as such, and identifying material factors that could cause actual results to differ materially from a conclusion, forecast or projection in the forward-looking information, and
 - (ii) a statement of the material factors or assumptions that were applied in drawing a conclusion or making a forecast or projection set out in the forward-looking information; ~~and~~
- (b~~2~~) ~~the~~The person or company had a reasonable basis for drawing the conclusions or making the forecasts or ~~and~~ projections set out in the forward-looking information.

(9.1) The person or company shall be deemed to have satisfied the requirements of paragraph 1 of subsection (9) with respect to a public oral statement containing forward-looking information if the person who made the public oral statement

- (a) made a cautionary statement that the oral statement contains forward-looking information;
- (b) stated that
 - (i) the actual results could differ materially from a conclusion, forecast or projection in the forward-looking information, and
 - (ii) certain material factors or assumptions were applied in drawing a conclusion or making a forecast or projection as reflected in the forward-looking information; and
- (c) stated that additional information about
 - (i) the material factors that could cause actual results to differ materially from the conclusion, forecast or projection in the forward-looking information, and
 - (ii) the material factors or assumptions that were applied in drawing a conclusion or making a forecast or projection as reflected in the forward-looking information.

is contained in a readily-available document or in a portion of such a document and has identified that document or that portion of the document.

(9.2) For the purposes of clause (9.1) (c), a document filed with the Commission or otherwise generally disclosed shall be deemed to be readily available.

Same

(10) Subsection (9) does not ~~apply to relieve~~ a person or company ~~in respect of liability respecting~~ forward-looking information ~~contained in the prospectus of the responsible issuer filed a financial statement required to be filed under this Act or forward-looking information in a document released~~ in connection with ~~the an~~ initial public ~~distribution of securities of the responsible issuer or contained in financial statements prepared by the responsible issuer~~offering.

Expert report, statement or opinion

(11) A person or company, other than an expert, is not liable in ~~a proceeding~~an action under section 138.3 with respect to any part of a document or public oral statement that includes, summarizes or quotes from a report, statement or opinion made by the expert in respect of which the responsible issuer obtained the written consent of the expert to the use of the report, statement or opinion if the consent had not been withdrawn in writing before the document was released or the public oral statement was made, if the person or company proves that,

- (a) the person or company did not know and had no reasonable grounds to believe that there had been a misrepresentation in the part of the document or public oral statement made on the authority of the expert; and
- (b) the part of the document or oral public statement fairly represented the report, statement or opinion made by the expert.

Same

(12) An expert is not liable in ~~a proceeding~~an action under section 138.3 with respect to any part of a document or public oral statement that includes, summarizes or quotes from a report, statement or opinion made by the expert, if the expert proves that, the written consent previously provided was withdrawn in writing before the document was released or the public oral statement was made.

Release of documents

(13) A person or company is not liable in ~~a proceeding~~an action under section 138.3 in respect of a misrepresentation in a document, other than a document required to be filed with the Commission, if the person or company proves that, at the time of release of the document the person or company did not know and had no reasonable grounds to believe that the document would be released.

Derivative information

(14) A person or company is not liable in ~~a proceeding~~an action under section 138.3 for a misrepresentation in a document or a public oral statement, if the person or company proves that,

- (a) the misrepresentation was also contained in a document filed by or on behalf of another person or company, other than the responsible issuer, with the Commission or any other securities regulatory authority in Canada or a stock exchange and was not corrected in another document filed by or on behalf of that other person or company with the Commission or that other securities regulatory authority in Canada or stock exchange before the release of the document or the public oral statement made by or on behalf of the responsible issuer;
- (b) the document or public oral statement contained a reference identifying the document that was the source of the misrepresentation; and
- (c) when the document was released or the public oral statement was made, the person or company did not know and had no reasonable grounds to believe that the document or public oral statement contained a misrepresentation.

Where corrective action taken

(15) A person or company, other than the responsible issuer, is not liable in a ~~proceeding~~ an action under section 138.3 if the misrepresentation or failure to make timely disclosure was made without the knowledge or consent of the person or company and, if, after the person or company became aware of the misrepresentation before it was corrected, or the failure to make timely disclosure before it was disclosed in the manner required under this Act,

- (a) the person or company promptly notified the board of directors of the responsible issuer or other persons acting in a similar capacity of the misrepresentation or the failure to make timely disclosure; and
- (b) if no correction of the misrepresentation or no subsequent disclosure of the material change in the manner required under this Act was made by the responsible issuer within two business days after the notification under clause (a), the person or company, unless prohibited by law or by professional confidentiality rules, promptly and in writing notified the Commission of the misrepresentation or failure to make timely disclosure.

DAMAGES

Assessment of damages

138.5 (1) Damages shall be assessed in favour of a person or company that acquired an issuer's securities after the release of a document or the making of a public oral statement containing a misrepresentation or after a failure to make timely disclosure as follows:

1. In respect of any of the securities of the responsible issuer that the person or company subsequently disposed of on or before the 10th trading day after the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act, assessed damages shall equal the difference between the average price paid for those securities (including any commissions paid in respect thereof) and the price received upon the disposition of those securities (without deducting any commissions paid in respect of the disposition), calculated taking into account the result of hedging or other risk limitation transactions.
2. In respect of any of the securities of the responsible issuer that the person or company subsequently disposed of after the 10th trading day after the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act, assessed damages shall equal the lesser of,
 - i. an amount equal to the difference between the average price paid for those securities (including any commissions paid in respect thereof) and the price received upon the disposition of those securities (without deducting any commissions paid in respect of the disposition), calculated taking into account the result of hedging or other risk limitation transactions, and
 - ii. an amount equal to the number of securities that the person disposed of, multiplied by the difference between the average price per security paid for those securities (including any commissions paid in respect thereof determined on a per security basis) and,
 - A. if the issuer's securities trade on a published market, the trading price of the issuer's securities on the principal market (as those terms are defined in the regulations) for the 10 trading days following the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act, or
 - B. if there is no published market, the amount that the court considers just.
3. In respect of any of the securities of the responsible issuer that the person or company has not disposed of, assessed damages shall equal the number of securities acquired, multiplied by the difference between the average price per security paid for those securities (including any commissions paid in respect thereof determined on a per security basis) and,

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- i. if the issuer's securities trade on a published market, the trading price of the issuer's securities on the principal market (as those terms are defined in the regulations) for the 10 trading days following the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act, or
 - ii. if there is no published market, the amount that the court considers just.

Same

(2) Damages shall be assessed in favour of a person or company that disposed of securities after a document was released or a public oral statement made containing a misrepresentation or after a failure to make timely disclosure as follows:

1. In respect of any of the securities of the responsible issuer that the person or company subsequently acquired on or before the 10th trading day after the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act, assessed damages shall equal the difference between the average price received upon the disposition of those securities (deducting any commissions paid in respect of the disposition) and the price paid for those securities (without including any commissions paid in respect thereof), calculated taking into account the result of hedging or other risk limitation transactions.
2. In respect of any of the securities of the responsible issuer that the person or company subsequently acquired after the 10th trading day after the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act, assessed damages shall equal the lesser of,
 - i. an amount equal to the difference between the average price received upon the disposition of those securities (deducting any commissions paid in respect of the disposition) and the price paid for those securities (without including any commissions paid in respect thereof), calculated taking into account the result of hedging or other risk limitation transactions, and
 - ii. an amount equal to the number of securities that the person disposed of, multiplied by the difference between the average price per security received upon the disposition of those securities (deducting any commissions paid in respect of the disposition determined on a per security basis), and,
 - A. if the issuer's securities trade on a published market, the trading price of the issuer's securities on the principal market (as those terms are defined in the regulations) for the 10 trading days following the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act, or
 - B. if there is no published market, the amount that the court considers just.
3. In respect of any of the securities of the responsible issuer that the person or company has not acquired, assessed damages shall equal the number of securities that the person or company disposed of, multiplied by the difference between the average price per security received upon the disposition of those securities (deducting any commissions paid in respect of the disposition determined on a per security basis) and,
 - i. if the issuer's securities trade on a published market, the trading price of the issuer's securities on the principal market (as such terms are defined in the regulations) for the 10 trading days following the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act, or
 - ii. if there is no published market, then the amount that the court considers just.

Same

(3) Despite subsections (1) and (2), assessed damages shall not include any amount that the defendant proves is attributable to a change in the market price of securities that is unrelated to the misrepresentation or the failure to make timely disclosure.

Proportionate liability

138.6 (1) In ~~a proceeding~~ an action under section 138.3, the court shall determine, in respect of each defendant found liable in the action, the defendant's responsibility for the damages assessed in favour of all plaintiffs in the action, and each such defendant shall be liable, subject to the limits set out in subsection 138.7 (1), to the plaintiffs for only that portion of the aggregate amount of damages assessed in favour of the plaintiffs that corresponds to that defendant's responsibility for the damages.

Same

(2) Despite subsection (1), where, in ~~a proceeding~~ an action under section 138.3 in respect of a misrepresentation or a failure to make timely disclosure, a court determines that a particular defendant, other than the responsible issuer, authorized, permitted or acquiesced in the making of the misrepresentation or the failure to make timely disclosure while knowing it to be a misrepresentation or a failure to make timely disclosure, the whole amount of the damages assessed in the action may be recovered from that defendant.

Same

(3) Each defendant in respect of whom the court has made a determination under subsection (2) is jointly and severally liable with each other defendant in respect of whom the court has made a determination under subsection (2).

Same

(4) Any defendant against whom recovery is obtained under subsection (2) is entitled to claim contribution from any other defendant who is found liable in the action.

Limits on damages

138.7 (1) Despite section 138.5, the damages payable by a person or company in ~~a proceeding~~ an action under section 138.3 is the lesser of,

- (a) the aggregate damages assessed against the person or company in the action, and,
- (b) the liability limit for the person or company less the aggregate of all damages assessed after appeals, if any, against the person or company in all other actions brought under section 138.3, and under comparable legislation in other provinces or territories in Canada in respect of that misrepresentation or failure to make timely disclosure, and less any amount paid in settlement of any such actions.

Same

(2) Subsection (1) does not apply to a person or company, other than the responsible issuer, if the plaintiff proves that the person or company authorized, permitted or acquiesced in the making of the misrepresentation or the failure to make timely disclosure while knowing that it was a misrepresentation or a failure to make timely disclosure, or influenced the making of the misrepresentation or the failure to make timely disclosure while knowing that it was a misrepresentation or a failure to make timely disclosure.

PROCEDURAL MATTERS

Leave to proceed

138.8 (1) No ~~proceeding~~ action may be commenced under section 138.3 without leave of the court granted upon motion with notice to each defendant. The court shall grant leave only where it is satisfied that,

- (a) the action is being brought in good faith; and
- (b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.

Same

(2) Upon an application under this section, the plaintiff and each defendant shall serve and file one or more affidavits setting forth the material facts upon which each intends to rely.

Same

(3) The maker of such an affidavit may be examined on it in accordance with the rules of court.

Same

(4) A copy of the application for leave to proceed and any affidavits filed with the court shall be sent to the Commission when filed.

Notice

138.9 A person or company that has been granted leave to commence ~~a proceeding~~an action under section 138.3 shall,

- (a) promptly issue a news release disclosing that leave has been granted to commence ~~a proceeding~~an action under section 138.3;
- (b) send a written notice to the Commission within seven days, together with a copy of the news release; and
- (c) send a copy of the statement of claim or other originating document to the Commission when filed.

Restriction on discontinuation, etc., of ~~proceeding~~action

138.10 ~~A proceeding~~An action under section 138.3 shall not be ~~stayed, discontinued, abandoned or settled or dismissed for delay~~ without the approval of the court given on such terms as the court thinks fit including, without limitation, terms as to costs, and in determining whether to approve the settlement of the ~~proceeding~~action, the court shall consider, among other things, whether there are any other ~~proceedings~~actions outstanding under section 138.3 or under comparable legislation in the other provinces or territories in Canada in respect of the same misrepresentation or failure to make timely disclosure.

Costs

138.11 Despite the *Courts of Justice Act* and the *Class Proceedings Act, 1992*, the prevailing party in a ~~proceeding~~an action under section 138.3 is entitled to costs determined by a court in accordance with applicable rules of civil procedure.

Power of the Commission

138.12 The Commission may intervene in a ~~proceeding~~an action under section 138.3 and in an application for leave under section 138.8.

No derogation from other rights

138.13 The right of action for damages and the defences to a ~~proceeding~~an action under section 138.3 are in addition to and without derogation from any other rights or defences the plaintiff or defendant may have in ~~an~~an ~~proceeding~~action brought otherwise than under this Part.

Limitation period

138.14 No ~~proceeding~~action shall be commenced under section 138.3,

- (a) in the case of misrepresentation in a document, later than the earlier of,
 - (i) three years after the date on which the document containing the misrepresentation was first released, and

- (ii) six months after the issuance of a news release disclosing that leave has been granted to commence ~~a proceeding~~ an action under section 138.3 or under comparable legislation in the other provinces or territories in Canada in respect of the same misrepresentation;
- (b) in the case of a misrepresentation in a public oral statement, later than the earlier of,
 - (i) three years after the date on which the public oral statement containing the misrepresentation was made, and
 - (ii) six months after the issuance of a news release disclosing that leave has been granted to commence ~~a proceeding~~ an action under section 138.3 or under comparable legislation in another province or territory of Canada in respect of the same misrepresentation; and
- (c) in the case of a failure to make timely disclosure, later than the earlier of,
 - (i) three years after the date on which the requisite disclosure was required to be made, and
 - (ii) six months after the issuance of a news release disclosing that leave has been granted to commence ~~a proceeding~~ an action under section 138.3 or under comparable legislation in another province or territory of Canada in respect of the same failure to make timely disclosure.

SCHEDULE "B"

**Multilateral Instrument 52-109
Certification Of Disclosure In Companies' Annual And Interim Filings**

Part 1 - Definitions, Application and Transition

1.1 Definitions¹ – In this Instrument,

“annual certificate” means the certificate required to be filed pursuant to Part 2 of this Instrument;

“annual filings” means the issuer’s annual information form, and annual financial statements and annual MD&A, that have been most recently filed under provincial and territorial securities legislation, including for greater certainty all documents and information that are incorporated by reference in the annual information form;

“annual financial statements” means the annual financial statements required to be filed under National Instrument 51-102 *Continuous Disclosure Obligation*² ;

“annual information form” means the AIF as defined under National Instrument 51-102 *Continuous Disclosure Obligations*³ ;

“filings” means annual filings and interim filings;

“interim certificate” means the certificate required to be filed pursuant to Part 3 of this Instrument;

¹ National Instrument 14-101 Definitions defines certain terms that are used in more than one national or multilateral Instrument.

² Section 4.1 of NI 51-102 states:

4.1- Annual Financial Statements and Auditor’s Report

(1) Subject to subsection 4.8(6), a reporting issuer must file annual financial statements that include:

- (a) an income statement, a statement of retained earnings, and a cash flow statement for:
 - (i) the most recently completed financial year; and
 - (ii) the period covered by the financial year immediately preceding the most recently completed financial year, if any;
- (b) a balance sheet as at the end of each of the periods referred to in paragraph (a); and
- (c) notes to the financial statements.

(2) Comparative annual financial statements filed under subsection (1) must be accompanied by an auditor’s report.

³ In NI 51-102, “AIF” means a completed Form 51-102F1 Annual Information Form or, in the case of an SEC issuer, either a completed Form 51-102F1 or an annual report or transition report under the 1934 Act on Form 10-K, Form 10-KSB or on Form 20-F.

“interim filings” means the issuer’s interim financial statements and interim MD&A, that have been most recently filed under provincial and territorial securities legislation;

“interim financial statements” means the interim financial statements required to be filed under National Instrument 51-102 *Continuous Disclosure Obligations*⁴;

“interim period” has the meaning ascribed to it in the definition of interim period under National Instrument 51-102 *Continuous Disclosure Obligations*⁵;

“investment fund”⁶ means a mutual fund, a non-redeemable investment fund or a scholarship plan;

“MD&A” has the meaning ascribed to it in the definition of MD&A under National Instrument 51-102 *Continuous Disclosure Obligations*⁷;

“non-redeemable investment fund”⁸ means an issuer:

⁴ NI 51-102 states:

4.3 - Interim Financial Statements

(1) A reporting issuer must file:

- (a) if it has not completed its first financial year, interim financial statements for the interim periods of the reporting issuer’s current financial year other than a period that is less than three months in length; or
- (b) if it has completed its first financial year, interim financial statements for the interim periods of the reporting issuer’s current financial year.

(2) Subject to subsections 4.7(4), 4.8(7) and (8), the interim financial statements required to be filed under subsection (1) must include:

- (a) a balance sheet as at the end of the interim period and a balance sheet as at the end of the immediately preceding financial year, if any;
- (b) an income statement, a statement of retained earnings and a cash flow statement, all for the year-to-date interim period and comparative financial information for the corresponding interim period in the immediately preceding financial year, if any;
- (c) for interim periods other than the first interim period in a reporting issuer’s financial year, an income statement and cash flow statement for the three month period ending on the last day of the interim period and comparative financial information for the corresponding period in the preceding financial year, if any; and
- (d) notes to the financial statements.

⁵ In NI 51-102, “interim period” means:

- (a) a period commencing on the first day of a financial year and ending nine, six or three months before the end of a financial year, or
- (b) in the case of a reporting issuer’s transition year, a period commencing on the first day of the transition year and ending either:
 - (i) three, six, nine or twelve months, if applicable, after the end of its old financial year, or
 - (ii) twelve, nine, six or three months, if applicable, before the end of the transition year,

and in the case of (b)(ii), the first interim period must not exceed four months.

⁶ This definition is taken from subsection 1.1 of proposed National Instrument 81-106 Investment Fund Continuous Disclosure.

⁷ In NI 51-102, “MD&A” means a completed Form 51-102F2 Management’s Discussion & Analysis or, in the case of an SEC issuer, either a completed Form 51-102F2 or management’s discussion and analysis prepared in accordance with Item 303 of Regulation S-K or item 303 of Regulation S-B under the 1934 Act.

⁸ This definition is taken from OSC Rule 14-501 Definitions.

- (a) whose primary purpose is to invest money provided by its securityholders;
- (b) that does not invest for the purpose of exercising effective control, seeking to exercise effective control, or being actively involved in the management of the issuers in which it invests, other than other mutual funds or non-redeemable investment funds; and
- (c) that is not a mutual fund;

“Sarbanes-Oxley Act” means the Sarbanes-Oxley Act of 2002, Pub.L. 107-204, 116 Stat. 745 (2002); and

“SEDAR” means the computer system for the transmission, receipt, acceptance, review and dissemination of documents filed in electronic format known as the System for Electronic Document Analysis and Retrieval.

- 1.2 Application – This Instrument applies to all reporting issuers other than investment funds.
- 1.3 Transition Period – Notwithstanding Parts 2 and 3 of this Instrument, issuers may exclude paragraphs 4, 5 and 6 from any annual and interim certificates required to be filed prior to **[January 1, 2005]**.

Part 2 - Certification of Annual Filings

- 2.1 Every issuer must file a separate annual certificate, in the form specified in Form 52-109F1, in respect of and personally signed by each of the following persons:
 - 1. each chief executive officer;
 - 2. each chief financial officer; and
 - 3. in the case of an issuer that does not have a chief executive officer or chief financial officer, each person who performs similar functions to a chief executive officer or a chief financial officer, as the case may be.
- 2.2 The annual certificate must be filed by the issuer at the same time as it files the last of the following annual filings:
 - 1. its annual information form; and
 - 2. its annual financial statements and annual MD&A.

Part 3 - Certification of Interim Filings

- 3.1 Every issuer must file a separate interim certificate, in the form specified in Form 52-109F2, in respect of and personally signed by each of the following persons:
 - 1. each chief executive officer;
 - 2. each chief financial officer; and

3. in the case of an issuer that does not have a chief executive officer or chief financial officer, each person who performs similar functions to a chief executive officer or a chief financial officer, as the case may be.
- 3.2 The interim certificate must be filed by the issuer at the same time as it files its interim filings.

Part 4 - Exemptions

4.1 Exemption for Issuers that comply with U.S. laws –

- (a) Subject to subsection (4), an issuer is exempt from Part 2 of this Instrument with respect to the relevant period if:
 - (i) the issuer is in compliance with U.S. federal securities laws⁹ implementing the annual report certification requirements in section 302(a) of the Sarbanes-Oxley Act; and
 - (ii) the issuer's most recent annual report and signed certificates are filed on SEDAR as soon as reasonably practicable after they are filed with the SEC.
- (b) Subject to subsection (5), an issuer is exempt from Part 3 of this Instrument with respect to the relevant interim period if:
 - (i) the issuer is in compliance with U.S. federal securities laws implementing the quarterly report certification requirements in section 302(a) of the Sarbanes-Oxley Act; and
 - (ii) the issuer's most recent quarterly report and signed certificates are filed on SEDAR as soon as reasonably practicable after they are filed with the SEC.
- (c) An issuer is exempt from Part 3 of this Instrument with respect to the relevant interim period if:
 - (i) the issuer furnishes to the SEC a current report on Form 6-K containing the issuer's quarterly financial statements and MD&A;
 - (ii) the Form 6-K is accompanied by signed certificates that are furnished to the SEC in the same form required by U.S. federal securities laws implementing the quarterly report certification requirements in section 302(a) of the Sarbanes-Oxley Act; and
 - (iii) the Form 6-K and signed certificates are filed on SEDAR as soon as reasonably practicable after they are furnished to the SEC.

⁹ "U.S. federal securities laws" is defined in National Instrument 14-101 Definitions.

- (d) Notwithstanding subsection 4.1(1), Part 2 of this Instrument applies to an issuer with respect to the relevant period if the issuer files annual financial statements prepared in accordance with Canadian generally accepted accounting principles, unless the issuer files those statements with the SEC in compliance with U.S. federal securities laws implementing the annual report certification requirements in section 302(a) of the Sarbanes-Oxley Act.
 - (e) Notwithstanding subsection 4.1(2), Part 3 of this Instrument applies to an issuer with respect to the relevant interim period if the issuer files interim financial statements prepared in accordance with Canadian generally accepted accounting principles, unless the issuer files those statements with the SEC in compliance with U.S. federal securities laws implementing the quarterly report certification requirements in section 302(a) of the Sarbanes-Oxley Act.
- 4.2 Exemption for Foreign Issuers – An issuer is exempt from the requirements in this Instrument so long as it qualifies for the relief contemplated by, and is in compliance with the requirements and conditions set out in, sections 5.4¹⁰ and 5.5¹¹ of National Instrument 71-102 *Continuous Disclosure and Other Exemptions Relating to Foreign Issuers*.
- 4.3 Exemption for Issuers of Exchangeable Securities – An issuer is exempt from the requirements in this Instrument so long as it qualifies for the relief contemplated by, and

¹⁰ NI 71-102 states:

5.4 - Financial Statements

A designated foreign issuer satisfies securities legislation requirements relating to the preparation, filing and delivery of its interim financial statements, annual financial statements and auditor's reports on annual financial statements if it:

- (a) complies with the foreign disclosure requirements relating to interim financial statements, annual financial statements and auditor's reports on annual financial statements;
- (b) files the interim financial statements, annual financial statements and auditor's reports on annual financial statements required to be filed with or furnished to the foreign regulatory authority;
- (c) sends each document filed under paragraph (b) to securityholders in the local jurisdiction, in the manner and at the time such documents are required to be sent to securityholders of the issuer by the foreign disclosure requirements; and
- (d) complies with NI 52-107 as it relates to financial statements of the issuer that are included in any documents specified in paragraph (b).

¹¹ NI 71-102 states:

5.5 - Annual Reports, AIFs, Business Acquisition Reports & MD&A

A designated foreign issuer satisfies securities legislation requirements relating to the preparation, filing and delivery of annual reports, AIFs, business acquisition reports and MD&A if it:

- (a) complies with the foreign disclosure requirements relating to annual reports, quarterly reports, business acquisitions and management's discussion and analysis;
- (b) files each annual report, quarterly report, report in respect of a business acquisition and management's discussion and analysis required to be filed with the foreign regulatory authority;
- (c) sends each document filed under paragraph (b) to securityholders in the local jurisdiction, in the manner and at the time such documents are required to be sent to securityholders of the issuer by the foreign disclosure requirements; and
- (d) complies with NI 52-107 as it relates to financial statements of the issuer that are included in any documents specified in paragraph (b).

is in compliance with the requirements and conditions set out in, section 13.3¹² of National Instrument 51-102 *Continuous Disclosure Obligations*.

- 4.4 Exemption for Issuers of Guaranteed Securities – An issuer is exempt, in a jurisdiction, from the requirements in this Instrument if:
- (a) it does not have any securities outstanding other than debt securities or preferred shares, and all payments to be made in respect of those securities are fully and unconditionally guaranteed by another issuer (the guarantor issuer); and
 - (b) it has been granted an exemption in that jurisdiction (the exemption order) from filing its annual financial statements, annual MD&A, interim financial statements, and interim MD&A on the condition that, among other things, the equivalent annual and interim disclosure documents of the guarantor issuer be filed;

so long as at the time that the issuer would otherwise be required to comply with this Instrument the exemption order is in effect and the parties to the exemption order are in compliance with its requirements and conditions.

4.5 General Exemption –

- (1) The regulator or securities regulatory authority may grant an exemption from this Instrument, in whole or in part, subject to such conditions or restrictions as may be imposed in the exemption.
- (2) Despite subsection (1), in Ontario only the regulator may grant such an exemption.

Part 5 - Effective Date

- 5.1 This Instrument comes into force on **[January 1, 2004]**.

¹² Section 13.3 of NI 51-102 provides relief for certain exchangeable security issuers.

Form 52-109F1 - Certification of Annual Filings

I, *⟨identify the certifying officer, the issuer, and his or her position at the issuer⟩*, certify that:

1. I have reviewed the annual filings (as this term is defined in Multilateral Instrument 52-109 Certification of Disclosure in Companies' Annual and Interim Filings) of *⟨identify issuer⟩* (the issuer) for the period ending *⟨state the reporting period covered by the annual filings⟩*;
2. Based on my knowledge, the annual filings do not contain any untrue statement of a material fact or omit to state a material fact required to be stated or that is necessary to make a statement not misleading in light of the circumstances under which it was made, with respect to the period covered by the annual filings;
3. Based on my knowledge, the annual financial statements together with the other financial information included in the annual filings fairly present in all material respects the financial condition, results of operations and cash flows of the issuer as of the date and for the periods presented in the annual filings;
4. The issuer's other certifying officers and I are responsible for establishing and maintaining disclosure controls and procedures and internal controls for the issuer, and we have:
 - (a) designed those disclosure controls and procedures, or caused them to be designed under our supervision, 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, particularly during the period in which the annual filings are being prepared, and that such material information is disclosed within the time periods specified under applicable provincial and territorial securities legislation;
 - (b) designed those internal controls, or caused them to be designed under our supervision, 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;
 - (c) evaluated the effectiveness of the issuer's disclosure controls and procedures and internal controls as of the end of the period covered by the annual filings; and
 - (d) disclosed in the annual MD&A our conclusions about the effectiveness of the disclosure controls and procedures and internal controls, in each case based on our evaluation as of the end of the period covered by the annual filings;
5. I have disclosed, based on my most recent evaluation, to the issuer's auditors and the audit committee of the issuer's board of directors or persons performing the equivalent function:

- (a) all significant deficiencies and material weaknesses in the design or operation of internal controls that could adversely affect the issuer's ability to disclose information required to be disclosed by the issuer under applicable provincial and territorial securities legislation, within the time periods specified under applicable provincial and territorial securities legislation; and
 - (b) any fraud, whether or not material, that involves management or other employees who have a significant role in the issuer's internal controls; and
6. I have disclosed in the annual MD&A whether there were significant changes in the issuer's internal controls or in other factors that could significantly affect internal controls, made during the period covered by the annual filings, including any actions taken to correct significant deficiencies and material weaknesses in the issuer's internal controls.

Date:

[Signature]

[Title]

Form 52-109F2 - Certification of Interim Filings

I *<identify the certifying officer, the issuer, and his or her position at the issuer>*, certify that:

1. I have reviewed the interim filings (as this term is defined in Multilateral Instrument 52-109 Certification of Disclosure in Companies' Annual and Interim Filings) of *<identify the issuer>*, (the issuer) for the interim period ending *<state the reporting period covered by the interim filings>*;
2. Based on my knowledge, the interim filings do not contain any untrue statement of a material fact or omit to state a material fact required to be stated or that is necessary to make a statement not misleading in light of the circumstances under which it was made, with respect to the period covered by the interim filings;
3. Based on my knowledge, the interim financial statements together with the other financial information included in the interim filings fairly present in all material respects the financial condition, results of operations and cash flows of the issuer as of the date and for the periods presented in the interim filings;
4. The issuer's other certifying officers and I are responsible for establishing and maintaining disclosure controls and procedures and internal controls for the issuer, and we have:
 - (a) designed those disclosure controls and procedures, or caused them to be designed under our supervision, 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, particularly during the period in which the interim filings are being prepared, and that such material information is disclosed within the time periods specified under applicable provincial and territorial securities legislation; and
 - (b) designed those internal controls, or caused them to be designed under our supervision, and implement those internal controls, to provide reasonable assurances that the issuer's financial statements are fairly presented in accordance with generally accepted accounting principles;
5. I have disclosed, based on my most recent evaluation, to the issuer's auditors and the audit committee of the issuer's board of directors or persons performing the equivalent function:
 - (a) all significant deficiencies and material weaknesses in the design or operation of internal controls that could adversely affect the issuer's ability to disclose information required to be disclosed by the issuer under applicable provincial and territorial securities legislation, within the time periods specified under applicable provincial and territorial securities legislation; and

- (b) any fraud, whether or not material, that involves management or other employees who have a significant role in the issuer's internal controls; and
6. I have disclosed in the interim MD&A whether there were significant changes in the issuer's internal controls or in other factors that could significantly affect internal controls, made during the period covered by the interim filings, including any actions taken to correct significant deficiencies and material weaknesses in the issuer's internal controls.

Date:

[Signature]

[Title]

Companion Policy 52-109CP – To Multilateral Instrument 52-109 Certification of Disclosure in Companies’ Annual and Interim Filings

Part 1 - General

This Companion Policy provides information about how the Canadian securities regulatory authorities interpret Multilateral Instrument 52-109, and should be read in conjunction with it.

Part 2 - Form and Filing of Certificates

The annual and interim certificates must be filed in the exact language prescribed in Forms 52-109F1 and F2. Each certificate must be separately filed on SEDAR under the issuer’s profile in the appropriate annual or interim certificate filing type:

Category of Filing - Continuous Disclosure
Folder for Filing Type - General

Filing Type - Annual Certificates
Document Type:
Form 52-109F1 - Certification of Annual Filings – CEO
Form 52-109F1 - Certification of Annual Filings - CFO

or

Filing Type - Interim Certificates
Document Type:
Form 52-109F2 - Certification of Interim Filings – CEO
Form 52-109F2 - Certification of Interim Filings - CFO

An issuer that is in compliance with U.S. federal securities laws implementing the certification requirements in section 302(a) of the Sarbanes-Oxley Act and that uses the exemption in section 4.1 of the Instrument, must file on SEDAR the CEO and CFO certificates that it filed with SEC with respect to the relevant reporting period. Where those certificates are “in” the annual or quarterly report filed with the SEC (“in” as opposed to being attached as “exhibits”), the issuer should file the report containing the certificates in the appropriate filing type described above.

Where the officers' certificates are attached as exhibits to the issuer's annual or quarterly report, the issuer should file the report, together with the attached certificates, in the appropriate filing type described above.

An issuer relying on the exemption in section 4.1 of the Instrument need not file the signed paper copies of the reports and certificates that it filed with, or furnished to, the SEC.

Part 3 - Internal and Disclosure Controls

The Canadian securities regulatory authorities believe that CEOs and CFOs should be required to certify that their issuers have adequate internal and disclosure controls. We believe that this is an important factor in maintaining integrity in our capital markets and thereby enhancing investor confidence in our capital markets. The Instrument does not, however, formally define those

controls nor does it prescribe the degree of complexity or any specific policies or procedures that must make up those controls. This is intentional. In our view, these considerations are best left to management's judgement based on various factors that may be particular to their issuer, including its size and the nature of its business.

Part 4 - Fair Presentation

Pursuant to the third paragraph in each of the annual and interim certificates, the CEO and CFO must each certify that their issuer's financial statements "fairly present" the financial condition of the issuer for the relevant time period. Those representations are not qualified by the phrase "in accordance with generally accepted accounting principles" (GAAP) which Canadian auditors typically include in their financial statement audit reports. This qualification has been specifically excluded from the Instrument to prevent management from relying entirely upon compliance with GAAP procedures in this representation, particularly where the results of a GAAP audit may not reflect the financial condition of a company (since GAAP may not always define all the components of an overall fair presentation).

At page 7 of its adopting release,¹³ the SEC states:

The certification statement regarding fair presentation of financial statements and other financial information is not limited to a representation that the financial statements and other financial information have been presented in accordance with "generally accepted accounting principles" (GAAP) and is not otherwise limited by reference to GAAP. We believe that Congress intended this statement to provide assurances that the financial information disclosed in a report, viewed in its entirety, meets a standard of overall material accuracy and completeness that is broader than financial reporting requirements under GAAP. ... Presenting financial information in conformity with generally accepted principles may not necessarily satisfy obligations under the antifraud provisions of the federal securities law.

In our view, fair presentation includes but is not necessarily limited to:

- the selection of appropriate accounting policies
- proper application of appropriate accounting policies
- disclosure of financial information that is informative and reasonably reflects the underlying transactions
- inclusion of additional disclosure necessary to provide investors with a materially accurate and complete picture of financial conditions, results of operations and cash flows

For additional commentary on what constitutes fair presentation we refer you to case law in this area. The leading U.S. case in this area is U.S. v. Simon (425 F.2d 796); the leading Canadian

¹³ SEC Release No. 33-8124 Final Rule: Certification of Disclosure in Companies' Quarterly and Annual Reports dated August 29, 2002.

case in this area is the B.C. Court of Appeal decision in *Kripps v. Touche Ross and Co.* [1997] B.C.J. No. 968.

Part 5- Exemptions

The exemptions in section 4.1 of the Instrument are based on our view that the investor confidence aims of the Instrument do not justify requiring issuers to comply with the certification requirements in the Instrument if such issuers already comply with substantially similar requirements in the U.S.

As a condition to being exempt from the annual certificate and interim certificate requirements in subsections 4.1(1) and (2) respectively, issuers must file on SEDAR the CEO and CFO certificates that they filed with the SEC in compliance with its rules implementing the certification requirements prescribed in section 302(a) of the Sarbanes-Oxley Act.

Pursuant to National Instrument 52-107 *Acceptable Accounting Principles, Auditing Standards and Reporting Currency* certain Canadian issuers are able 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).

Part 6 - Liability for False Certification

An officer providing a false certification potentially could be subject to quasi-criminal, administrative or civil proceedings under securities law.

Officers providing a false certification could also potentially be subject to private actions for damages either at common law or under the *Securities Act* (Ontario) when amendments which create statutory civil liability for misrepresentations in continuous disclosure are proclaimed in force.¹⁴ The liability standard applicable to a document required to be filed with the Ontario Securities Commission, including an annual or interim certificate, will depend on whether the document is a “core” document as defined under Part XXIII.1.¹⁵ Annual and interim certificates are currently not included in the definition of “core document” but would be caught by the definition of “document”.

¹⁴ These amendments were enacted on December 9, 2002.

¹⁵ Where an action is brought for a misrepresentation contained in a non-core document, a defendant is not liable unless the plaintiff proves that the defendant: (i) knew of the misrepresentation; (ii) deliberately avoided acquiring knowledge of the misrepresentation; or (iii) by acting or failing to act, was guilty of gross misconduct in connection with the release of the document containing the misrepresentation. Where an action is brought for a misrepresentation contained in a core document, the onus is on the defendant to show that he or she was duly diligent.

In any action commenced under Part XXIII.1 of the *Securities Act* (Ontario) a court has the discretion to treat multiple misrepresentations having common subject matter or content as a single misrepresentation. This provision would permit a court in appropriate cases to treat a misrepresentation in a company's financial statements and a misrepresentation made by an officer in an annual or interim certificate that relate to the underlying financial statements as a single misrepresentation.

SCHEDULE “C”

DISCLOSURE COMMITTEE CHARTER

This Disclosure Committee Charter (the “**Charter**”) has been adopted by _____ (the “**Company**”) and ratified by the Audit Committee of the Board of Directors. The Disclosure Committee (the “**Committee**”) shall review and reassess this Charter annually and recommend any proposed changes to the Chief Executive Officer and Chief Financial Officer (the “**Senior Officers**”) and the Audit Committee for approval.

I. Purpose

All disclosures made by the Company to its security holders or the investment community must be accurate and complete and fairly present the Company’s financial condition and results of operations and be made on a timely basis as required by applicable laws.

The Committee shall assist the Senior Officers in fulfilling their responsibility for oversight of the accuracy and timeliness of the disclosures made by the Company by being responsible for the following tasks, in each case subject to the supervision and oversight of the Senior Officers:

- Design and establish controls and other procedures (which may include procedures currently used by the Company) that are designed to ensure that (i) information required by the Company to be disclosed to the Securities and Exchange Commission (“**SEC**”) and other written information that the Company will disclose to the investment community is recorded, processed, summarized and reported accurately and on a timely basis and (ii) information is accumulated and communicated to management, including the Senior Officers, as appropriate to allow timely decisions regarding such required disclosure (“**Disclosure Controls**”).
- Monitor the integrity and effectiveness of the Company’s Disclosure Controls.
- Review and supervise the preparation of the Company’s (i) periodic and current reports, proxy statements, information statements, registration statements and any other information filed with the SEC, (ii) press releases containing financial information, earnings, information about material acquisitions or dispositions or other information material to the Company’s security holders, (iii) correspondence broadly disseminated to shareholders and all presentations to analysts and the investment community (collectively, the “**Disclosure Statements**”) and review disclosure policies for the Company’s website.
- Evaluate the effectiveness of the Company’s Disclosure Controls within 90 days prior to the filing of each of the Company’s Annual Report on Form 10-K and each Quarterly Report on Form 10-Q (collectively, the “**Periodic Reports**”).
- Meet and discuss with the Senior Officers all relevant information with respect to the Committee’s proceedings, the preparation of the Disclosure Statements and the Committee’s evaluation of the effectiveness of the Company’s Disclosure Controls.

- Meet with Audit Committee to review internal controls and any comments or concerns the Committee may have regarding the review process and disclosure.

In discharging its duties, the Committee shall have full access to all Company books, records, facilities, and personnel, including the internal and outside auditors and attorneys. The Committee shall promptly evaluate each of the following:

- The Company's acquisition or disposition of a significant amount of assets outside the ordinary course of business;
- A change in the Company's certifying accountant;
- The resignation of a Company director (or a director declining to stand for re-election);
- The appointment, resignation or termination of any Company executive officer;
- Entry into, or amendment or termination of, a material agreement not made in the ordinary course of business;
- Termination or reduction of a business relationship with, or financial difficulty of, any material customer or third parties;
- Creation of a direct or contingent financial obligation (including any guarantee) that is material to the Company;
- Events triggering a direct or contingent financial obligation that is material to the Company, including any default or acceleration of an obligation;
- The use of off-balance sheet financing or special purpose vehicles;
- The impact on the Company's financial condition or performance of affiliated or associated entities;
- The management discussion and analysis section of the report, with particular attention to (i) critical accounting policies and trends which would, if altered, have a significant impact on the reported financial condition or performance (especially, in many cases, revenue recognition policies and accounting reserves), and (ii) liquidity and capital resources;
- The propriety of any characterization of costs as a capital expense;
- Loans to or other transactions with directors, officers or significant shareholders;
- Activities including material write-offs and restructuring charges;
- Any material goodwill or asset impairment;
- Any change in, or withdrawal of, a rating agency rating of the Company (or refusal to provide one upon request), issuance of a credit watch or change in the Company's outlook;
- Internal controls;
- Derivative transactions;
- Tax reduction strategies;

- Any amendment to the Company's charter or by-laws;
- Any unregistered sales of equity securities by the Company;
- Any material modifications to rights of holders of the Company's securities;
- Any other event or development outside the ordinary course of business that is material to the Company's results of operations, financial condition or prospects or is believed to be of importance to the Company's shareholders.

II. Organization

The membership of the Committee shall initially consist of the principal accounting officer, general counsel, principal risk management officer, internal auditor, investor relations officer, head of human resources and head of each material department or business unit. Such members may be replaced, or new members added, at any time and from time to time by the Senior Officers.

The Committee may designate two or more officers who can, acting together, approve Disclosure Statements (other than periodic reports) when time does not permit the full Committee to meet.

One Member of the Committee shall be appointed by the Senior Officers as chairperson. The chairperson shall be responsible for scheduling and presiding over meetings and preparing agendas. Any question of interpretation of this Charter or the Committee's procedures shall be determined by either Senior Officer or, in their absence from any meeting, the chairperson.

The Committee shall meet as frequently as circumstances dictate to (i) ensure the accuracy and completeness of the Disclosure Statements and (ii) evaluate the Disclosure Controls and determine whether any changes to the Disclosure Controls are necessary or advisable in connection with the preparation of the Company's upcoming periodic reports or other Disclosure Statements, taking into account developments since the most recent meeting, including changes in the Company's organization and business and any change in economic or industry conditions.

III. Other Responsibilities

The Committee shall also have such other responsibilities as the Senior Officers may assign to it from time to time.

SCHEDULE “D”

DISCLOSURE COMMITTEE CERTIFICATE

The undersigned, being all of the members of the Disclosure Committee of _____ (the “**Company**”), hereby certify that:

1. We have reviewed the Company’s **[specify covered report(s)]** on Form **• [for the period ending] [dated 1, 201]** (the “**Covered Report**”), in accordance with the procedures set forth in the Company’s Disclosure Committee Charter. Our review included the following steps:
 - a. a meeting with the audit committee of the Company on **[date]**;
 - b. interviews with the following individuals: **[list names/titles and portions of the Covered Report discussed]**;
 - c. receipt of signed certificates from **[names/titles of individuals]** regarding those portions of the Covered Report that they prepared or reviewed; and
 - d. **[other specific steps taken]**.
2. Based on our knowledge, the Covered Report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by the Covered Report.
3. Based on our knowledge, the financial statements, and other financial information included in the Covered Report, fairly present in all material respects the financial condition, results of operations and cash flows of the Company as of, and for, the periods presented in the Covered Report.
4. We have evaluated the effectiveness of the Company’s disclosure controls and procedures as of a date within 90 days prior to the filing date of the Covered Report, as required by and in accordance with the procedures set forth in the Company’s Disclosure Committee Charter. We have concluded that the Company’s disclosure controls and procedures are effectively designed to ensure that material information relating to the Company and its consolidated subsidiaries is communicated to the Disclosure Committee and the Company’s Chief Executive Officer(s) and Chief Financial Officer(s) (the “**Certifying Officers**”) in an appropriate manner to enable them to make timely and accurate disclosure decisions.
5. We acknowledge that the Certifying Officers will rely on this Disclosure Committee Certificate in connection with their certification to the SEC as required by Section 302 of the Sarbanes-Oxley Act and the rules and regulations thereunder.

IN WITNESS WHEREOF, each of the undersigned has executed this Disclosure Committee Certificate this ● day of ●, 20●.

Name

Name

Name

Name

Name

Name

SCHEDULE "E"

CERTIFICATION OF OFFICERS AND/OR EMPLOYEES

The undersigned, being **[insert title of officer or employee]** of **[insert name of company]** (the "Company"), hereby certifies that:

1. To my knowledge, the enclosed financial statements for which I am responsible fairly present in all material respects the financial condition, results of operations and cash flows of the Company's **[Insert name of business unit]** (the "Unit") as of, and for, the periods presented in those financial statements;
2. The statements made by me to the Company's Disclosure Committee during the **[meeting/telephone conference]** held on **[insert date]** are true and correct in all material respects and do not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading;
3. I have disclosed to the Company's Disclosure Committee any and all material developments, whether positive or negative, relating to the Unit; and
4. I have disclosed to the Company's Disclosure Committee each incident of fraud that I am aware of, whether or not material, that occurred in the Unit and involves any employee or agent of the Company.

With respect to clauses (1) through (4) above, I have evaluated materiality as to the Unit.

With respect to (1) above, "fairly present" is not limited to the financial statements and other financial information having been presented in accordance with GAAP. Rather, the term "fairly present" encompasses the selection of appropriate accounting policies, the appropriate application of appropriate accounting policies, disclosure of financial information that is informative and reasonably reflects the underlying transactions and events and the inclusion of any additional disclosure necessary to provide investors with a materially accurate and complete picture of the Unit's financial condition, results of operations and cash flows.

[If applicable: The undersigned acknowledges that the Company's Chief Executive Officer and Chief Financial Officer (together, the "Certifying Officers") will rely on this certification in connection with their certification of the Company's periodic reports pursuant to Section 302 of the Sarbanes-Oxley Act of 2002 and related SEC rules and regulations promulgated under the Securities Exchange Act of 1934, as amended. The undersigned also acknowledges that the Company's **[identify the individuals that will prepare and review the disclosure on a consolidated basis]** will rely on this certification in connection with their related certification to the Certifying Officers of the Company's periodic reports].

IN WITNESS WHEREOF, I have signed this certification on this ___ day of **[Insert month]**, 20__.

[insert name of individual]

SCHEDULE "F"

BACKUP CERTIFICATE

I, **[name]**, the **[title]** of **[Company Name]** (the "**Company**"), certify to the Disclosure Committee of the Company as follows:

1. I have received and reviewed the information provided to me by the Company's Disclosure Committee regarding the Company's disclosure controls and procedures.
2. I acknowledge that the Disclosure Committee has requested my participation in the preparation or review of the following SEC filings and/or other disclosure statements of the Company:

[specify covered report(s)] [for the period ending] [dated] 20● (the "Covered Disclosures").
3. In connection with my preparation or review of the Covered Disclosures, I have provided to the Disclosure Committee all information that I believe is responsive to the Disclosure Committee's requests, in accordance with the instructions provided to me by the Disclosure Committee.
4. **[NOTE: this paragraph applies only to individuals who prepare or review Covered Disclosures on an ongoing basis; it may be omitted for one-time reviewers.]** Since the date of my last Backup Certificate to the Disclosure Committee (or, if this is my first Backup Certificate, since the date when I was first asked to participate in the preparation and/or review of Covered Disclosures) and through the date of this Backup Certificate, I have notified the Disclosure Committee of any and all Trigger Events (as defined in the information provided to me by the Disclosure Committee) of which I became aware.
5. If I become aware of additional information that I believe is responsive to the Disclosure Committee's requests, or the occurrence of any additional Trigger Event, I undertake to notify the Disclosure Committee of such information or event as soon as reasonably practicable.
6. I understand that the Company, its officers and the Disclosure Committee will rely on this Backup Certificate in reviewing the Covered Disclosures and in evaluating the effectiveness of the Company's disclosure controls and procedures.

IN WITNESS WHEREOF, I have executed this Backup Certificate this ● day of _____, 20●.

Signature: _____

Name: _____

Title: _____

Phone: _____

E-mail: _____