Guidance for Management:
Disclosure and Certification—What’s at Stake?

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Preface

The Risk Oversight and Governance Board (ROGB) of the Chartered Professional Accountants of Canada (CPA Canada) commissioned this Directors’ Briefing publication Guidance for Management: Disclosure and Certification—What’s at Stake? to help management fulfill its responsibilities for the filing of CEO and CFO certifications required under the regulatory corporate disclosure regime for publicly listed companies.

Directors and officers are at significant risk of personal civil liability under securities class action legislation in the event of misrepresentations in a company’s public statements or failure to make appropriate, timely disclosures. Effective board oversight of corporate disclosures is key to mitigating this risk. The objectives of the certifying officers are to ensure that the organization’s financial filings are reliable, that there is effective internal control over financial reporting (ICFR) and there are effective disclosure controls and procedures (DC&P). The board’s oversight role includes directors assuring themselves that the content and control certifications made by the CEO and CFO have been supported by a formal, documented certification support process.

This Briefing provides guidance to management on the establishment, implementation and execution of a formal, documented certification support process. It will also be useful to audit committee members in making appropriate enquiries of management and the external auditors about the certifications and the support process.

The companion Directors’ Briefing Guidance for Directors: Disclosure and Certification—What’s at Stake sets out the elements of a certification support process and key questions for directors to ask the audit committee when reviewing the audit committee’s report about the effectiveness of the certification process.
The ROGB thanks the authors, Jim Goodfellow and Alan Willis, and acknowledges the contribution of the CPA Canada Directors Advisory Group. Particular gratitude is extended to Juli-ann Gorgi, CPA Canada; Andrew McDougall and his colleagues at Osler Hoskin & Harcourt LLP; Dennis Lopes, Discovery Air Ltd.; Greg Armstrong, Canadian Tire Ltd.; and Mary Ann Finn, Deloitte, all of whom provided valuable input and reviews at various stages of the project.

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CEO and CFO certifications of financial filings have been a regulatory requirement for publicly listed companies in Canada since 2004. But Canadian Securities Administrators’ (CSA) continuous disclosure reviews suggest that many companies do not have in place an effective process to support their certifications. Without such a process, companies are exposed to control, financial reporting, and disclosure risk, opening the potential for their certifying officers and directors to face personal civil liability and enforcement proceedings.

Among other key benefits, an effective certification support process:

- Creates a financial reporting environment that focuses management, the audit committee and the board of directors on the quality of financial reporting and other disclosures.
- Ensures that financial reporting and disclosure issues, which often relate to business issues, are communicated to and dealt with promptly by senior management.
- Ensures that the issuer is in compliance with applicable securities regulation.
- Fosters a culture of continuous improvement for internal controls over financial reporting and disclosure controls and the management of financial reporting and disclosure risks.

This publication aims to help the certifying officers and others involved in the support process to comply with the CSA certification requirements and realize the above benefits. CPA Canada’s Directors Briefing Guidance for Directors: Disclosure and Certification — What’s at Stake? features an overview of the certification support process and discusses why and how directors should assess and monitor its effectiveness.

1 For readability and ease of reference, the word “companies” in this document refers to issuers of publicly listed securities unless otherwise noted.
Personal Accountability and Civil Liability
CEO and CFO certifications aim to prevent fraudulent financial reporting by emphasizing the CEO’s and CFO’s personal accountability for financial reporting and by exposing them to personal civil liability and enforcement proceedings. Three types of certification requirements apply to Canadian issuers:

- **Canadian SEC registrants** adhere to the certification requirements introduced in 2002 as a result of the Sarbanes-Oxley Act (SOX).
- **Canadian reporting issuers (including TSX-listed issuers and venture issuers)** are required to provide “content certifications” on their interim and annual financial statements and Management Discussion and Analyses (MD&As) under the CSA National Instrument (NI) 52-109, *Certification of Disclosure in Issuers’ Annual and Interim Filings*.
- **TSX-listed issuers and other Canadian reporting issuers who are not venture issuers** must also comply with specified control certification requirements under NI 52-109 (though venture issuers should consider the benefits of following these requirements voluntarily).

Directors and certifying officers may be subject to statutory liability for misrepresentations and disclosure failures, for which one of the available defences is carrying out what courts would recognize as a “reasonable investigation.”

Required Certifications
The certifications required under NI 52-109 fall into three groups:

1. **Content certifications** about the completeness, accuracy and fair presentation of the financial information in the interim and annual filings (applicable to TSX-listed and venture issuers).

2. **Control design certifications** about the design of internal control over financial reporting (ICFR) and disclosure controls and procedures (DC&P) in the interim and annual filings (applicable to TSX-listed issuers).

3. **Control effectiveness certifications** which report on the effectiveness of ICFR and DC&P, including the disclosure of any material control weaknesses and the communication of any fraudulent financial reporting incidents in the annual MD&A (applicable to TSX-listed issuers).

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2 These certifications are presented in Appendix A and discussed further in Chapter 2.
Elements of a Certification Support Process

To support their certifications, the certifying officers of a company should set up a formal, documented process appropriate to its size and business circumstances. Management should expect that boards and audit committees will seek assurance about the effectiveness of this process as part of their reasonable investigation into company disclosures.

We recommend that for any issuer this process be based on the following key elements:
1. Scope and design of the certification support process
2. Commitment and capability
3. Interim certifications
4. Annual certification of DC&P and ICFR
5. Learning and improvement

1. Scope and Design of the Certification Support Process

The disclosures of public companies are varied and complex. They include:
- CSA (or SEC) required filings, including financial statements, MD&As, Annual Information Forms (AIFs) (TSX-listed issuers only) and proxy filings
- Oral statements and other information in traditional and social media
- Other corporate disclosures, for example, to stakeholders on their websites, to analysts and through Corporate Sustainability Reporting (or similarly named reports).

Only the regulatory filings are subject to certification requirements. However, civil liability exposure for directors can arise in relation to all of the above disclosures.

Certifying officers should understand the company’s disclosure universe, the various communication channels and the disclosure risk profile so they can determine the appropriate scope of the process to support their certifications. In addition to the scope of certifications required by NI 52-109, the scope can be extended to other disclosures, thereby enhancing the reliability of this additional information.

Certifying officers need to understand which documents are considered “core documents” and included in the certification process. “Core documents” are defined in secondary market civil liability legislation to include documents that issuers are required to file. Certifying officers should weigh the costs and benefits of treating non-core documents as core documents and including them in the certification process.
In designing the certification support process, the primary objective should be to ensure that the CEO and CFO are provided with the information, assessments and assurances they need to prepare the filings and sign their certificates. This can be achieved by establishing:

- A disclosure policy to ensure that all of the issuer's disclosures to its shareholders and the investment community are accurate, complete and timely.
- A disclosure committee to develop and implement the disclosure policy, and review and evaluate the financial and other disclosures made in the filings and possibly outside them.
- A sub-certification process that sets out clear lines of responsibility and accountability for those involved in the financial reporting and disclosure process.
- Disclosure controls and procedures that provide reasonable assurance that the information the issuer is required to disclose is communicated to senior management and the certifying officers on a timely basis.
- Internal control over financial reporting that provides reasonable assurance that the financial statements are prepared and presented in accordance with the appropriate Generally Accepted Accounting Principles (GAAP).

2. Commitment and Resources

The effectiveness of the certification process hinges on top management's commitment to promoting and supporting it and the capabilities and competencies of those involved in executing it. Management should expect audit committees to assess whether the CEO is sufficiently engaged in the process and provides the necessary “tone at the top” and leadership.

Audit committees can also be expected to seek assurance that the people involved in the certification process have the right knowledge, skills and experience to perform their role and the right amounts of time, independence and financial resources to discharge their duties objectively and effectively.

3. Interim Certifications

All issuers are required to provide content certifications in their interim certificates. At a minimum, all issuers should have a process that provides the certifying officers with the information they need to certify that there are no untrue statements of material fact or omissions of material facts necessary to make a statement not misleading and that the information in the filings is fairly presented.
The CEOs and CFOs of TSX issuers must also acknowledge that they are responsible for establishing and maintaining DC&P and ICFR, the essential purpose of which is, among other things, to provide reasonable assurance as to the reliability, timeliness and completeness of the financial statements (in accordance with the issuer’s GAAP) and of other periodic filings or reports called for under securities legislation.

Thus, certifying officers should maintain a current assessment of major financial reporting and disclosure risks together with the controls in place to mitigate or minimize them. Audit committees can be expected to inquire about the effectiveness of these controls.

4. Annual Certification of Effectiveness of DC&P and ICFR
Certifying officers of TSX issuers are required to certify the operating effectiveness of DC&P and ICFR in their annual certificates. Controls should be evaluated in a top-down manner, using a risk-based approach that focuses on entity-level controls that span all parts of an organization and its business units and processes.

Certifying officers are also required to disclose to the external auditors and audit committee or board of directors any fraud that involves management or other employees with a significant role in the issuer’s ICFR. When fraud is discovered or suspected, management, the internal and external auditors and the audit committee must act quickly to prevent further losses and mitigate future risks.

5. Learning & Improvement
Conducting a high-level, experience-based consideration of each element of the process that supports the certifications will identify lessons that may be learned from its design and execution, opportunities for improvement, and the process’s overall value to the organization. The certifying officers should be responsible for carrying out such a review at least annually and for reporting the results to the board or audit committee.

Special Considerations for Venture Issuers
The certifying officers of venture issuers must provide content certifications on the financial information contained in the interim and annual regulatory filings. While venture issuers are exempt from the control certifications, they still must put in place controls over financial reporting to ensure that all financial information is captured, summarized and reported fairly in accordance with GAAP.
The design of the certification support process for a venture issuer should reflect the size of the issuer’s organization and the nature of its business and, at a minimum, it should provide for a disclosure policy, disclosure committee and sub-certifications.

**Conclusion**
An effective support process covering all elements of the certifications, including the annual evaluation of the effectiveness of DC&P and ICFR, constitutes an important entity-level control in all reporting issuers.

An effective process to support CEO and CFO certification can greatly increase confidence that the company’s financial disclosures contain no material misstatements, omit no material facts, and fairly present in all material respects the issuer’s financial condition, results of operations and cash flows.
Importance of CEO and CFO Certification

CEO and CFO certifications of financial filings have been a regulatory requirement for publicly listed companies in Canada since 2004. These certifications aim to prevent fraudulent financial disclosures by emphasizing the CEO’s and CFO’s personal accountability for integrity in financial reporting. As a result of the United States’ SOX, CEOs and CFOs are also exposed to personal civil and criminal liability if they sign false certificates for SEC registrants.

The CSA's reviews of issuers' MD&A disclosures related to CEO & CFO certifications suggest that many companies do not have in place an effective process to support their certifications—whether due to lack of senior management attention, lack of understanding of the certification requirements or inadequate oversight by directors and audit committees. Since CEO/CFO certifications have been required for almost a decade, there is a risk of complacency, so that certification can become just another quarterly routine with dwindling effectiveness.

Whatever the reason, companies without a robust certification support process face significant control, reporting and disclosure risks, including heightened exposure of directors and officers to the possibility of civil liability and litigation.

Among other benefits, an effective certification process:

- Creates a financial reporting environment that focuses management, the audit committee and the board of directors on the quality of financial reporting and other disclosures;
- Ensures that financial reporting and disclosure issues, which often relate to business issues, are communicated to and dealt with promptly by senior management;

1. Introduction
• Ensures that the issuer is in compliance with applicable securities regulation; and
• Fosters a culture of continuous improvement for internal controls over financial reporting and disclosure controls and the management of financial reporting and disclosure risks.

Five Elements of a Certification Support Process
Given the significant risks related to certification and financial disclosures, the CEO and CFO should ensure their company has set up a formal, documented process to support their certifications. Given the importance of this process, many audit committees and certifying officers consider the certification support process as an important entity-level control.

The five key elements shown below should be integrated into every certification support process, even though they may be applied and implemented differently by individual companies.

This diagram depicts the certification support process as a continuous cycle with business objectives (e.g., ongoing identification of business and disclosure opportunities and problems) rather than as an intermittent compliance exercise with multiple sign-offs. The process should be integrated with other continuous
processes, such as those related to risk management, investor relations, internal control, trust building and organizational learning. These five elements are discussed in detail in Chapters 4–8.

**Objectives of this Publication**

This publication aims to help certifying officers and other management establish an effective process to support the content and control certifications that encompasses the five elements above. We also provide practical questions for management to consider as part of their due diligence before making their certifications.³

Audit committee members may also find this publication useful in their review of disclosures and the certification support process, and in developing their reports to the board about financial and other disclosures. A higher-level overview of directors’ responsibilities in overseeing the certification support process is available in CPA Canada’s shorter companion Directors Briefing Guidance for Directors—Disclosure and Certification: What’s at Stake?

Although this publication focuses primarily on the certification requirements for TSX-listed issuers, much of this information is relevant for venture issuers. Other organizations with a financial accountability to donors, such as charities and not-for-profit organizations, government entities that are accountable to taxpayers, and private companies, may benefit from aspects of the discussions in the following pages.

**Key Messages**

CEO and CFO certifications aim to prevent fraudulent financial reporting by emphasizing the CEO’s and CFO’s personal accountability and by exposing them to personal civil liability if they signed false certificates.

To support the certifications made by the CEO and CFO, audit committees should ensure their company has established, as an entity-level control, a formal, documented process appropriate to its size and business circumstances.

³ This publication is based on the securities regulations in effect at the date of publication.
2. Regulatory Requirements and Compliance

Personal Accountability of CEOs and CFOs

Reliable and meaningful reporting and disclosure is important for the effective functioning of Canada’s capital markets and for companies to access the capital they need. Companies that constantly revise or have to explain what they previously disclosed—or worse, must restate previously issued financial statements or re-file previously issued MD&As—will likely lose the trust of the markets and face higher legal liability risks and capital costs.

CEO and CFO certifications were first introduced in the United States (U.S.) in 2002 as a result of the SOX. U.S. legislators believed that emphasizing the CEO’s and CFO’s personal accountability for proper financial reporting and exposing them to personal civil and criminal liability if they signed false certificates would prevent fraudulent financial reporting. Canadian reporting issuers that are SEC registrants are required to adhere to these certification requirements.

The CSA supported the goal of making CEOs and CFOs personally accountable for the fairness and accuracy of financial reporting. Beginning in 2004, CEOs and CFOs have been required to provide “content certifications” on their interim and annual financial statements and MD&As, with more requirements added in the following years. All current content and control certification requirements are set out in NI 52-109, *Certification of Disclosure in Issuers’ Annual and Interim Filings*. 
After two years of study, the CSA announced in March 2006 that Canada would not adopt control reporting and auditor attestation, as required in the U.S. Instead, the CSA chose to apply specified control certification requirements to TSX issuers, with an exemption for venture issuers. As a result, different certification requirements apply to SEC registrants, TSX-listed issuers and venture issuers.

**Civil Liability of CEOs and CFOs**

Since 2005, civil liability legislation for disclosures made in the secondary markets has applied by statute under securities laws in Canada. Certifying officers who provide a false certification may be subject to quasi-criminal, administrative or civil proceedings under securities laws, as well as to private actions for damages under common law.

Under Canada’s secondary market civil liability legislation, reporting issuers, certifying officers and directors may be liable for errors and misrepresentations in any of their communications. The legislation provides different treatment for disclosures, depending on whether or not the document is a “core document.” The secondary market civil liability legislation defines “core documents” to include documents that issuers are required to file with securities regulators, and, as we discuss in Chapter 4, they encompass a broader range of disclosures than those covered by the certification rules.

According to a NERA Economic Consulting Report, these provisions have resulted in the following litigation activity under the Bill 198 civil liability legislation:

> There have now been a total of 43 Bill 198 cases filed since...the end of 2005. Of these, 28 cases (or 65%), representing more than $19 billion in total claims, remain unresolved. Twelve Bill 198 cases (28% of those filed) have settled, and three (7%) have been dismissed.... The average settlement across these settled Bill 198 cases is $10.5 million.

The twelve settlements have resulted in payments by defendants totalling approximately $100 million.

An effectively implemented process to support the NI 52-109 certifications can be the basis for an effective defence against such litigation. Liability risks for misrepresentations and failure to disclose are discussed in more detail in Chapter 3.

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Content and Control Certifications Required by NI 52-109

The certifications required under NI 52-109 fall into three groups:

1. **Content certifications** about the completeness, accuracy and fair presentation of the financial information in the interim and annual filings (applicable to TSX-listed and venture issuers).

2. **Control design certifications** about the design of internal control over financial reporting (ICFR) and disclosure controls and procedures (DC&P) in the interim and annual filings (applicable to TSX-listed issuers only).

3. **Control effectiveness certifications** which report on the effectiveness of ICFR and DC&P, including the disclosure of any material control weaknesses and the communication of any fraudulent financial reporting incidents in the annual MD&A (applicable to TSX-listed issuers only).

The certifications are reproduced in Appendix A.

Control Definitions—ICFR and DC&P

NI 52-109 requires certification and disclosures for two specific sets of controls:
- Internal control over financial reporting (ICFR)
- Disclosure controls and procedures (DC&P).

The CSA’s definition of ICFR relates to the reliability of financial reporting, focusing on controls over the information contained in the financial statements, as well as on authorization of transactions and protection of assets. The overall purpose of ICFR is to provide reasonable assurance that financial statements prepared for external purposes are in accordance with the issuer’s GAAP.

The definition of DC&P is limited to required filings and does not pertain to voluntary reports, such as analyst briefings or the non-required components of annual reports. Since the definition covers continuous disclosure filings, which include the financial statements, we view ICFR to be a subset of DC&P. Therefore, issuers with a material weakness in ICFR probably also have a material weakness in DC&P.

The following table summarizes the certification requirements for filings of interim and annual financial statements, MD&A and, for TSX issuers, the AIF.
# Summary — Certifications Required Under NI 52-109

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<tr>
<th>Content certifications</th>
<th>Control design certifications</th>
<th>Control effectiveness certifications</th>
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<tr>
<td>When is the certification required?</td>
<td>Interim and year-end filings</td>
<td>Interim and year-end filings</td>
</tr>
<tr>
<td>Which issuers must file the certification?</td>
<td>TSX and Venture issuers</td>
<td>TSX issuers</td>
</tr>
<tr>
<td>What must the CEO/CFO certify?</td>
<td>No material misstatements or material omissions</td>
<td>DC&amp;P and ICFR are established and maintained</td>
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<td>Fair presentation of financial information (no reference to GAAP, which CSA says is not automatically fair presentation)</td>
<td>DC&amp;P and ICFR design meets specified reasonable assurance criteria</td>
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<td></td>
<td>Fair presentation of financial condition, not financial position (i.e., issuers’ future ability to create value from resources on its balance sheet)</td>
<td>Control framework used in designing DC&amp;P and ICFR</td>
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<td>What are the audit committee’s due diligence and oversight responsibilities?</td>
<td>Review the financial statements, the MD&amp;A and earnings press release and recommend them to board for approval before release</td>
<td>Review the certifying officers’ evaluation of DC&amp;P and ICFR and disclosures of material weaknesses in the MD&amp;A (as part of audit committee’s overall MD&amp;A review)</td>
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<td>Discharging this responsibility requires review of the process followed by the certifying officers to support their certifications of financial information</td>
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5 Required by NI 51-102, Continuous Disclosure Obligations, and NI 52-110, Audit Committees.
“No Misrepresentations” Certification
In the content certification, the certifying officers must assert that the filings neither contain an untrue statement of a material fact nor omit to state a material fact necessary to make a statement not misleading. This certification applies to all statements and disclosures contained in the filings, including the financial statements, the MD&A and, where applicable, the AIF.

“Fairly Presents” Certification
The certifying officers are required to certify that the information presented in the financial statements, together with other financial information included in the filings, fairly presents in all material respects the issuer’s financial condition, results of operations and cash flows. The Companion Policy\(^6\) states that this judgment is not restricted or limited to whether the financial statements comply with the issuers’ GAAP. As a result, certifying officers cannot limit the fair presentation representation by relying on compliance with the issuer’s GAAP.

The assessment of “financial condition” is a different and more dynamic concept than “financial position” as reflected in the balance sheet. The CSA does not define financial condition except to state “the term ‘financial condition’ in the annual certificates and interim certificates reflects the overall financial health of the issuer and includes the issuer’s financial position (as shown on the statement of financial position) and other factors that may affect the issuer’s liquidity, capital resources and solvency.”\(^7\) As we saw during the global financial crisis, liquidity problems can erode an enterprise’s financial condition long before they are reflected in its financial position.

The financial disclosures contained in the filing documents are to be assessed individually and in the aggregate. This suggests that the certifying officers should follow a multi-step approach that involves:

- Ensuring the financial statements comply with GAAP;
- Ensuring the MD&A (and AIF and referenced documents in the annual filing) satisfies regulatory requirements and applicable guidance; and
- Assessing whether the complete reporting package “fairly presents” the financial condition, results of operations and cash flows, and concluding that the filings do not contain any untrue statement of a material fact or omit to state a material fact required to be stated to avoid misleading disclosure.

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\(^6\) NI 52-109 Companion Policy Section 4.1.(1).
\(^7\) See note 6.
The MD&A is central to the “fairly presents” assessment. For example, if the certifying officers conclude that the financial statements do not by themselves “fairly present” the results of operations, they may provide the appropriate disclosure in the MD&A so the two documents, together, constitute a fair presentation. The certifying officers are not required to publicly declare that the financial statements alone do not constitute a fair presentation, although nothing prevents them from doing so.

**Materiality**

Management normally determines how the concept of materiality is applied in the preparation of the company’s financial statements (e.g., percentage of net income or net revenue). The audit committee will have agreed on materiality thresholds for financial reporting when they reviewed the external audit plan with the external auditors.

Determining what constitutes a “material fact” can be more challenging, especially when it is not part of the financial statements.

Canadian securities laws define a fact as material when it:
1. Significantly affects the market price or value of a security; or
2. Would reasonably be expected to have a significant effect on the market price or value of a security.

The concept of a “material fact” includes changes in the issuer’s affairs, such as its business, operations, assets or ownership that would be expected to significantly affect the issuer’s market price or value of its securities. The challenge is determining the impact that specific information or disclosures could have on the market price or value of the issuer’s securities. It is often advisable to retain an investment banker or a person with securities market expertise and a more objective perspective to help make this determination.

The concept of materiality for the “fairly presents” certification is virtually undocumented. It remains to the certifying officers to judge when compliance with GAAP would not constitute a fair presentation, and must be augmented by disclosures in the MD&A so the entire filing constitutes a fair presentation. Management must document how it has interpreted and applied materiality and its underlying rationale. The audit committee will review this documentation carefully.
Key Messages

CEO and CFO certifications aim to prevent fraudulent financial reporting by emphasizing the CEO’s and CFO’s personal accountability and by exposing them to personal liability if they signed false certificates.

Where there are issues in the filings that cause the certifying officers to question whether compliance with GAAP would constitute fair presentation, they may wish to include disclosure in the MD&A.
Directors and certifying officers of public issuers face a significant risk of being named as defendants to a securities class action claim for misrepresentations in public statements made by or on behalf of the issuer or for failing to make timely disclosure in such statements. The risk of a securities class action lawsuit is particularly high when an error or omission is detected and the issuer releases a corrective disclosure, but can arise whenever there is a material drop in the issuer’s share price.

Even when directors and certifying officers have strong defences, securities class actions can be costly and difficult to resolve. They can also divert attention from the business, depress share values, impede the raising of capital, harm reputations and lead to enforcement proceedings.

Directors and certifying officers need to implement and follow procedures that help prevent the circumstances that can lead to securities class action claims and lay the foundation for a strong defence if a claim is commenced. This

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8 This Chapter was written by Larry Lowenstein, a partner in the Litigation Department of Osler, Hoskin & Harcourt LLP, and Andrea Laing, now a partner at Blakes, Cassels & Graydon LLP. The authors also thank Andrew MacDougall and Sylvain Lussier, who are partners at Osler, and Robert Carson, who is an associate at Osler, for their assistance.
section offers an overview of the circumstances that commonly lead to such claims, the defences that may be available, and the implications for directors and certifying officers.

The Broad Scope of Securities Class Actions

Directors and certifying officers face a risk of liability any time a public statement is made by or on behalf of the issuer, either in a document or an oral statement, as well as any time that a public statement ought to be made. They may be named as defendants along with the issuer and other parties, such as experts, whose statements about the issuer may be at issue. The risk of liability and the resulting need to implement effective disclosure compliance controls, therefore, go far beyond what many directors and certifying officers may consider to be their continuous disclosure obligations.

These risks are not new, but they have become a much more serious threat in recent years. The Securities Act of each province and territory (collectively the “Securities Acts”) has been amended to contain a statutory procedure to facilitate class actions alleging misrepresentations and/or failures to disclose in statements made by or on behalf of issuers whose securities trade on secondary markets.

Directors and certifying officers can also be sued under the Securities Acts for misrepresentations in “primary market” documents (such as prospectuses) and under the common law. While all types of claims pose significant risks for directors and certifying officers, this Chapter focuses exclusively on statutory claims in respect of statements made to the secondary market.

The Securities Acts impose liability for misrepresentations in “core” documents (including directors’ circulars, financial statements, and other defined documents). While this may not be surprising, many directors and certifying officers may not be aware that the Securities Acts also impose liability for misrepresentations in “non-core” documents, such as press releases and company websites, in largely the same way that it can attach to misrepresentations in

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9 The Ontario Securities Act defines a wide array of documents as “core documents”, including prospectuses, take-over bid circulars, issuer-bid circulars, directors’ circulars, rights offering circulars, MD&As and AIFs. For certain defendants, such as certifying officers (and directors who are also certifying officers of the issuer), the Act defines additional documents as “core documents”, including annual financial statements, interim financial reports and material change reports. Directors should therefore be aware that the definition of “core document” is broader for directors who are also certifying officers of the issuer.

10 Although the Ontario Securities Act does not define the term, “non-core” documents are any documents released by or on behalf of an issuer that do not fall within the definition of “core documents”. While this captures documents that are released to the market (like press releases) or filed with a regulator, it may also capture statements on an issuer’s website.
core documents. Notably, even oral statements can create exposure when they are made by persons with actual, apparent or implied authority to speak for the issuer.

**Statutory Defences for Directors and Certifying Officers**

Although directors and certifying officers cannot entirely eliminate the risk of being named as defendants to a securities class action, they can implement and follow procedures to deter plaintiffs from commencing claims and lay the foundation for a strong defence if and when a claim is commenced. There are important statutory defences available to protect directors and certifying officers who have taken appropriate steps to ensure the accuracy of disclosures.

**Reasonable Investigation**

Perhaps the most significant defence is that of “reasonable investigation.” Even if a plaintiff demonstrates that the issuer released public statements that contained material misrepresentations, a defendant will not be liable if he or she proves that, before the release of the document or oral statement containing the misrepresentation, he or she conducted (or caused to be conducted) a “reasonable investigation” and had no reasonable grounds to believe that the document or statement contained a misrepresentation. A similar defence applies to omissions.

To determine whether an investigation is reasonable, the court may consider various factors including: (i) the knowledge, experience and function of the director or certifying officer; and (ii) the director’s or certifying officer’s role in the preparation and release of the document or oral statement, or in the decision not to disclose a material change. In the case of a director, the court may also consider whether the director served a dual role with the issuer (i.e., as both director and certifying officer).

The court will also consider the existence and nature of the system in place to ensure compliance with the issuer’s continuous disclosure obligations – and the reasonableness of reliance on that system. It is, therefore, important that directors and certifying officers ensure that appropriate disclosure controls and procedures are implemented and followed. It is also critical to ensure that the entire process is well documented so there is a clear evidentiary record to substantiate a “reasonable investigation” defence. Not only will this be critical at trial, but it may also demonstrate the strength of the defence in settlement discussions.
We note, in particular, that while a good certification process can be an important aspect of a “reasonable investigation” defence, it will only help protect directors and certifying officers in respect of disclosure documents that are certified. Vigilance also needs to be exercised over disclosures not covered by the certification process, such as press releases and public oral statements. This can be challenging, especially with respect to the detection of material omissions, as it can be difficult to ensure that company personnel disclose all necessary facts “up the ladder” to senior management and directors – especially for bad news. Directors and certifying officers should impose processes to ensure that material bad news comes to their attention in the same timely and accurate way as good news.

Reliance on Experts
In certain cases, directors and certifying officers can defend a lawsuit on the basis that they relied on an expert. A defendant will not be liable with respect to any part of a document or oral statement that includes, summarizes, or quotes from an expert report or opinion if the defendant had no reasonable grounds to believe that a misrepresentation or failure to disclose has occurred. Directors, certifying officers and issuers should be careful to involve their experts in the disclosure process to ensure that statements referencing expert reports accurately represent the expert’s opinion.

To rely on this defence, the defendant must also show that the expert consented in writing to the use of the report or opinion and that the defendant fairly represented the expert’s report or opinion. This is worth emphasizing, as other than in the case of audited financial statements and mineral reports, it is generally unusual for experts to provide such consent. It may be difficult to obtain consent in light of the expert’s own concerns about potential liability.

Forward-Looking Information
The Securities Acts offer a “safe harbour” for forward-looking information where certain requirements are met. Directors or certifying officers will not be liable for a misrepresentation in forward-looking information if they can prove that they had a reasonable basis for the conclusion or projection in the forward-looking information and that the document or statement containing the forward-looking information contains:

• Reasonable cautionary language identifying the forward-looking information as such and identifies the factors that could cause the actual results to differ materially from the forward-looking information.
• A statement of the material factors or assumptions applied in making a conclusion, forecast or projection in the forward-looking information.
What Directors and Certifying Officers Can Do to Protect Themselves and Their Companies

Although these defences are important, they are unlikely to protect directors and certifying officers who have not implemented, followed and documented appropriate disclosure controls. Directors and certifying officers can decrease the risks of liability to themselves and their companies by:

- **Ensuring that directors, certifying officers and issuers have appropriate secondary market liability insurance in place.** This is not an area to cut corners. A range of insurance products has been developed in response to the risk of liability and some include features such as coverage for the costs of internal investigations and media relations consultants.

- **Implementing procedures for vetting the accuracy of all public disclosures.** These procedures should include careful documentation of each review that is performed. Diligence is only as good as the diligence that is actually performed and documented. A defence is only as good as the diligence that can be proved to have been performed.

- **Ensuring that procedures are in place for escalating “bad news” within the organization.** Liability attaches to omissions in much the same way that it attaches to misrepresentations.

- **Retaining experts, including accounting and legal advisors.** They can advise on difficult disclosure decisions and help lay the process for defences that may need to be advanced. They can also assist in developing appropriate controls and procedures.

- **Investigating erroneous statements and omissions as quickly as possible.** The way an issuer identifies and corrects an error or omission can have a significant impact on its potential liability. It is critical to get it right the first time. Professional advisors can help.

**Key Messages**

Directors and certifying officers should think like defendants before they become defendants. Although they can never eliminate the risk of a lawsuit, if directors and certifying officers ensure that appropriate controls and procedures are implemented, followed and documented, they will have laid the groundwork for a solid defence.
4. Scope and Design of the Process
Determining the Scope of the Process

As a first step in establishing a certification support process, certifying officers need to make several decisions regarding the scope of the process to support their certifications, subject to the audit committee’s approval. The scope of the process differs for SEC registrants, TSX issuers and venture issuers since they are subject to different control certification requirements.

While the process must support the certifications required by NI 52-109, it can be designed to cover a broader set of disclosures, thereby enhancing the reliability of this additional information.

Given the costs of designing and implementing a process to support the mandatory certifications, audit committees and certifying officers may wish to consider leveraging that investment to also cover the non-financial information contained in the filings and other important disclosures. For example, investors may consider non-financial performance metrics and disclosures (e.g., “sales per square foot” in the retail industry, “greenhouse gas emission avoidance”) to be as or more important than financial performance measures.

Broadening the supported disclosures may enhance the quality of the issuer’s disclosures and reporting and build trust with investors, regulators and other stakeholders. It also may help in promptly identifying business and/or control issues before they become major financial reporting or disclosure problems.

Further, NI 52-109 defines DC&P as including the financial and non-financial information contained in the filings as well as all material information that should be communicated to the CEO and CFO. This is important for the MD&A, which contains both financial and non-financial information. For this reason, the certification process should cover both financial and non-financial information included in the filings. Other disclosures may be of sufficient importance or have sufficient risks associated with them that they should be included in the certification support process.

Understanding the Disclosure Universe

Disclosures are varied and complex, including paper-based, electronic and oral statements, reports and other disclosures made through a range of channels (such as the System for Electronic Document Analysis and Retrieval (SEDAR) filings, websites, public speaking programs, analyst calls and social media). Reporting issuers make mandatory disclosures that are filed with securities regulators, such as financial statements, MD&A, AIF, information circulars, corporate governance disclosures and material change reports. Organizations also
make voluntary disclosures, which comprise other oral or written statements, such as press releases, annual reports (other than the financial statements and MD&A), analyst briefings, electronic postings and messages, and sustainability reports. And under the Securities Acts’ civil liability provisions, some documents are considered core, while others are non-core.

Although managing this disclosure universe is beyond the scope of this publication, it is the starting point for determining the documents to include in the certification support process. The diagram depicts the corporate disclosure universe. The inner two circles include the filings subject to CEO/CFO certification.

Although the CSA’s definition of DC&P applies only to the inner two circles, civil liability exposure can arise in relation to all disclosures in the diagram. It is important to assess the disclosure risks in the non-financial information included in the filings and other public disclosures. Our experience suggests that these risks are often not as rigorously assessed as financial reporting risks.
Key Considerations in Determining Scope

In deciding whether to develop a process that covers disclosures beyond those required to support the CEO/CFO certifications, management (with subsequent review by the audit committee/board) should consider:

- The strength of the issuer’s continuous disclosure policy, and the level of adherence and commitment to its implementation.
- The nature and frequency of the issuer’s disclosures beyond the required filings.
- The level of risk associated with these disclosures.
- Perceived level of control currently exercised over disclosures.
- History of disclosure issues (e.g., letters from securities regulators) or indicators of disclosure problems (e.g., responses to the issuer’s whistleblowing program).

A top-down, risk-based approach should be used to determine which core and non-core documents to include in the support process. Certifying officers should initially assess the risk potential in a disclosure document without considering any of the issuer’s existing controls. This approach enables the identification of risks in a document (or combination of documents) that could cause a material misstatement in the required filings or in a voluntary disclosure. Including high-risk disclosure documents in the support process helps ensure that the disclosure controls put in place to mitigate these risks are assessed and tested annually.

The assessment of which core and non-core disclosure documents to include in the support process should be made by the certifying officers together with corporate counsel. The assessment should be reviewed by the chairs of the board and the audit committee, since the disclosure documents included in the support process fall within the audit committee’s purview.

Management should then assess the controls over the processes that produce the documents to be included in the certification support process. These documents should be subject to the design and assessment requirements for disclosure controls and procedures set out in NI 52-109.

Legal Liability—“Core” and “Non-Core” Documents

When determining which disclosure documents to include in the certification support process, it is important to consider their potential for giving rise to legal liability, particularly the different treatment for core and non-core documents under the civil liability provisions of the Securities Acts.
“Core documents” are defined in the secondary market civil liability legislation to include documents that issuers are required to file. In the event of litigation, the plaintiff generally is not required to prove that the defendant intentionally made the misrepresentation in a core document. If a misrepresentation is proven to exist, the onus is on the defendant to establish a due diligence defence in order to avoid liability.

The plaintiff has a greater burden of proof to establish liability for misrepresentations in non-core documents and public oral statements. If a misrepresentation or failure to disclose a material fact is proven to exist in a non-core document, plaintiffs must also prove that the defendant knew of the misrepresentation or omission, deliberately avoided acquiring that knowledge, or engaged in gross misconduct.

Plaintiffs do not have to prove that they relied on a misrepresentation or failure to make timely disclosure in either core or non-core documents to succeed in a statutory civil liability claim.

What About Excluded Documents?
When choosing documents to include in the certification support process, a question also arises about the oversight to be given to core documents not included in that process. For example, documents such as the management information circular or proxy circular are core documents that contain executive compensation and governance disclosures related to the board. For this reason, their oversight might be assigned to the compensation and governance committees. Similarly, oversight of a sustainability report (a non-core document) might be given to the environment or social responsibility committee of the board. The chairs of these committees, in consultation with the board chair, should report to the board on how they discharged their oversight responsibilities for the disclosure documents allocated to them.

The review and approval of non-core documents that are neither included in the certification support process nor allocated to a board committee should be governed by the procedures set out in the issuer’s disclosure policy. Management should keep this policy current, monitor its implementation, and ensure all affected employees understand its objectives and requirements.
Key Messages

The disclosure universe is expanding. The size and complexity of the financial statements and related notes, MD&A and other disclosures continues to grow, the number of disclosure documents is increasing and the Internet and social media give readers 24-hour access to that information and more opportunity to critique it.

The risks of not disclosing material facts within the prescribed timeframes, not clearly explaining important issues, or making material misstatements are escalating. At the same time, changes in financial reporting, disclosure requirements, voluntary disclosures, and advances in information technologies and social networking create additional risks.

Canadian certification requirements range from “content only” certifications for venture issuers to SOX 404 compliance with auditor attestation for issuers that are SEC registrants. Non-SEC registrants should still consider the potential benefits of broadening their support process beyond the certifications covered by NI 52-109. For example:

- **Non-SEC registrants** should determine whether to adopt more rigorous certification requirements, which would strengthen their ICFR and entity-level controls.
- **Venture issuers** should assess whether the benefits outweigh the costs of voluntarily adopting the requirements to design and evaluate DC&P and ICFR.
- **TSX issuers** that are not SEC registrants should assess whether greater auditor involvement would strengthen the discipline and credibility of their certification process.
- **Privately held companies** should consider implementing the main features of a certification support process, especially if they intend to make a future public offering of their shares.

Where issuers choose to expand the scope of their support processes beyond the core disclosure documents, these additional objectives must be clearly understood by everyone involved.

Designing the Process

In designing the certification support process, the primary objective should be to ensure that the CEO and CFO are provided with the information, assessments and assurances they need to prepare the filings and sign their certificates.
Certifying officers can ensure they get the information and assurances they need to support their certifications and the reliability of the issuer’s disclosures by establishing a process that includes at least these components:

- **A disclosure policy** to ensure that all disclosures the issuer makes to its security holders or the investment community are accurate, complete and timely;
- **A disclosure committee** to develop and implement the disclosure policy, and review and challenge the financial and other disclosures made in the filings and possibly outside them;
- **A sub-certification process** that sets out clear lines of responsibility and accountability for those involved in the financial reporting and disclosure process;
- **Disclosure controls and procedures** that provide reasonable assurance that the information the issuer is required to disclose is communicated to senior management and the certifying officers; and
- **Internal control over financial reporting** that ensures the financial statements are prepared and presented in accordance with the appropriate GAAP.

We discuss each of these elements in more detail below.

**Disclosure Policy**

All reporting issuers should have a disclosure policy that is designed to ensure that all of the issuer’s disclosures to its shareholders or the general public are accurate, complete and timely, as required by applicable laws, regulations and stock exchange requirements.

The issuer’s disclosure policy should be developed by management, approved by the board or audit committee, and reviewed annually. The disclosure policy usually applies to subsidiary companies. The board should assess whether it should be applied to other affiliates, joint ventures or partnerships.

The disclosure policy should cover the issuer’s disclosure universe, including:

- Communications with the financial press and other media, analysts and shareholders
- Release of corporate information in news releases and other disclosure documents
- Disclosure of technical and sales/marketing information, environmental and health and safety reports, speeches and presentations
- The maintenance of, and disclosure of, information on the issuer’s website and the websites of any subsidiaries and affiliates.
The disclosure policy should be aligned with other corporate policies, such as the issuer’s Code of Conduct and Ethics and insider trading and reporting policies.

All directors, certifying officers and employees must have access to the disclosure policy and management should ensure strict adherence to it.\textsuperscript{11}

**Disclosure Committee**
The CSA suggests, but does not require, that issuers establish either a committee of company personnel or assign a senior certifying officer to be responsible for:

- Developing and implementing the issuer’s disclosure policy
- Monitoring the effectiveness of and compliance with the disclosure policy
- Educating directors, certifying officers and employees about the disclosure policy and disclosure issues
- Reviewing and authorizing disclosures (including electronic, written and oral) in advance of their public release, and
- Monitoring disclosures on the issuer’s websites.\textsuperscript{12}

In our opinion, all issuers should establish a disclosure committee—as a management committee, not a board committee—to ensure that the issuer’s disclosure policy is implemented and that all disclosures comply with that policy.

Among issuers that have established disclosure committees, committee membership varies widely and may include the issuer’s CEO, CFO, treasurer, chief internal auditor, legal counsel, director of investor relations and senior executives of the issuer’s business units.

**Sub-Certification Process**
Sub-certification is a process through which executives involved in the financial reporting and disclosure process provide formal representations to the certifying officers, stating that they are satisfied that all material facts and information pertaining to their area of responsibility or business have been fairly presented in the financial statements and MD&A. Executives also state that they are not aware of any issues that have not already been communicated to the certifying officers, such as:

\textsuperscript{11} For an example of such a disclosure policy, see *Standards and Guidance for Disclosure and Model Disclosure Policy—Fourth Edition*, published by the Canadian Investor Relations Institute. This publication also provides more in-depth guidance for developing such a disclosure policy and best practices for handling a variety of disclosure situations.

\textsuperscript{12} See CSA National Policy 51-201, *Disclosure Standards*, at section 6.3.
• Material facts or information affecting the issuer’s financial reporting, financial condition, future prospects and other disclosures.
• Violations of the issuer’s disclosure policy during the quarter.
• Serious breakdowns or weaknesses in DC&P or ICFR that occurred during the quarter.
• Fraud or conflicts of interest.

The sub-certification process should document the reliance that the certifying officers place on other executives. Although the certifying officers are ultimately responsible for their certifications, the sub-certification process provides them with greater comfort that other executives are not withholding important information and have appropriately discharged their financial reporting and disclosure responsibilities.

Today, many public companies have established sub-certification processes that:
• Assign responsibility for the process to an executive with the authority, experience and time to manage it effectively.
• Are performed quarterly, with additional representations in the fourth quarter for testing of effectiveness for DC&P and ICFR.
• Include, as a minimum, all direct reports to the certifying officers, members of the disclosure committee, and others with a significant role in the financial reporting process or responsibility for managing a business unit.
• Are completed prior to the audit committee’s and board’s approval of the reports and filings.
• Include guidance and instructions to each sub-certifier about the due diligence activities they must undertake before signing and submitting their sub-certifications.
• Include customized representations based on the sub-certifier’s areas of responsibility.
• Include a process for encouraging, assessing and dealing with exceptions reported as part of the sub-certification process.
• Report results to the disclosure committee, certifying officers and audit committee.

The sub-certification process reinforces the accountability for financial reporting, compliance with the issuer’s disclosure policy, and effective control beyond the certifying officers. In addition, participating in the sub-certification process can help educate non-financial executives about financial reporting, disclosure and investor communication issues.
Disclosure Controls and Procedures
Certifying officers of TSX issuers are required to certify the design of DC&P (and ICFR; see next section) in their first, second and third quarter certificates. In the annual certification, they must also certify the effectiveness of DC&P (and ICFR), which requires them to test and assess the effectiveness of DC&P in the fourth quarter.

Certifying officers of SEC registrants are required to certify the effectiveness of DC&P (but not ICFR) in the first, second and third quarters, which requires them to test and assess the effectiveness of DC&P each quarter. Presumably, this is intended to limit the certifying officers’ ability to claim they were unaware of material facts or information that should have been reported to them.

Internal Control Over Financial Reporting
Certifying officers of TSX issuers are required to certify the design of ICFR in their first, second and third quarter certificates. In the annual certification, they must also certify the effectiveness of ICFR, which requires them to test and assess the effectiveness of ICFR over the course of each year.

As sound business practice and to minimize the risk of misrepresentations (i.e., regardless of certification requirements), externally reporting companies of all sizes need to establish suitable ICFR to provide reasonable assurance regarding the reliability of financial reporting and preparation of financial statements according to the applicable GAAP, including controls relating to authorization of transactions and protection of assets.  

Because changes continually occur, for example, in business conditions, systems, and people’s jobs, it is important to document the process that supports the certifications, including any changes in its design, to better ensure that it is applied consistently and effectively over time. Placing the support process on an internal network or website, for example, makes it accessible by everyone involved and gives management the means to review and provide details of the process followed in any particular quarter.

Key Messages
The design of a TSX issuer’s certification support process should include a disclosure policy, disclosure committee, sub-certification process and appropriate design and documentation of DC&P as well as of ICFR.

The support process should be designed and documented so everyone involved in it understands what is expected of them, including the roles of the internal auditors.

The design of the certification support process should be reviewed annually and updated as necessary in response to changes in the issuer’s strategies, structure and business circumstances.

For venture issuers, certification of the design (and evaluation of the effectiveness) of DC&P and ICFR is optional, but the need for such controls is not.

Questions for Management to Consider
• What steps have been taken to ensure that the scope of the disclosures covered by the support process is appropriate?
• What oversight processes and accountabilities are in place for core and non-core documents that are not included in the certification support process?
• What processes are in place to ensure that the disclosure policy and certification process are designed, documented and readily accessible so that all directors, certifying officers and affected employees understand their responsibilities?
• What changes, if any, were made in the disclosure policy and certification process to address:
  — Any new significant disclosure and financial reporting risks identified in the current quarter?
  — Significant changes in the strategy, structure, systems or business circumstances in the current quarter?
5. Commitment and Resources
“Tone at the Top”
Two companies of similar size in the same industry may design similar processes to support their certifications. The effectiveness of each process may be very different, however, depending on top management’s commitment to promoting and supporting the process and the capabilities and competencies of those involved in executing it.

The CEO and CFO are at the centre of the support process. NI 52-109 requires them to sign separate certificates, so both must exercise reasonable diligence in making their assessments. In practice, CFOs usually organize and manage the support process on a day-to-day basis. The CEO should be engaged in the process and provide the necessary “tone at the top” and leadership. The extent of the CEO’s involvement is, of course, a professional judgment, based on the issuer’s business and financial reporting circumstances.

An effective certification support process depends on getting the right people involved, with the right leadership and the right attitude. The process is demanding, performed quarter after quarter, so complacency is a major risk.

Appropriateness of Resources
Management should ensure that the appropriate people are involved in the support process in the business units and at corporate headquarters. Everyone involved – including audit committee members and, in particular, new members of management – needs sufficient education, training and experience to understand the process and their role in it.

People also need time to carry out their responsibilities effectively and they should consider their role in the process to be important. For example, participating in the certification process should be an objective in their personal goal setting and a consideration in their performance reviews.

Organizational Changes
Organizational changes that occur during a quarter may impact the control environment as well as the commitment and/or capability of those leading or supporting the support process. Changes in the composition of a disclosure committee may also affect the support process.
Key Messages
The effectiveness of the certification support process hinges on top management’s commitment to providing the necessary “tone at the top” and leadership.

Management should ensure that the people involved in the certification process have the right knowledge, skills and experience to perform their role and the right amounts of time, independence and financial resources to discharge their duties objectively and effectively.

Questions for Management to Consider
• As the certifying officers, what additional steps could we take to provide effective leadership for the support process?
• How are certification-related responsibilities allocated among the certifying officers?
• How are people’s certification-related activities linked to their performance objectives and evaluation and assessed in determining their compensation?
• What plans are in place to resolve any resource constraints or capacity issues identified in prior quarters?
• What adjustments to the support process are needed to address organizational or personnel changes?
6. Interim Certifications

Assessing Financial Reporting Risks and Controls
All issuers are required to provide content certifications in their interim certificates. At a minimum, all issuers should have a process that provides the certifying officers with the information they need to certify that there are no untrue statements of material fact or omissions of material facts and that the information in the filings is fairly presented.
The CEOs and CFOs of TSX issuers must also acknowledge that they are responsible for establishing and maintaining DC&P and ICFR, the essential purpose of which is, among other things, to provide reasonable assurance as to the reliability, timeliness and completeness of the financial statements (in accordance with the issuer’s GAAP) and of other periodic filings or reports called for under securities legislation.

Certifying officers should maintain a current assessment of major financial reporting and disclosure risks together with the controls in place to mitigate or minimize them. The minimization or mitigation of all identified risks would be a good indication of a robust DC&P design. Risks that are not mitigated could represent a significant or even material design weakness in DC&P and/or ICFR.

CEOs and CFOs of TSX issuers also are required to certify that the issuer has disclosed in the MD&A any material change in ICFR that occurred during the quarter.

**Disclosure of Control Design Framework**

In their interim and annual certificates, the certifying officers must state the control framework used to design the issuer’s ICFR. Most Canadian companies have implemented the Committee of Sponsoring Organizations’ (COSO) Internal Control Process, first published in 1992. In 2013, COSO published an updated version of the process, replacing the 1992 version by the end of 2014. Other control models include the concepts contained in The Turnbull Report, published in the United Kingdom. Management should ensure that the appropriate and most current edition of the chosen control framework is being used.\(^1\)

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\(^{1}\) A further discussion of design of ICFR is included in the publication *Internal Control 2006: The Next Wave of Certification – Guidance for Management* (CICA, 2006).
Key Messages
All issuers need controls to ensure that material facts are made known to the senior certifying officers and that the financial statements and MD&A are complete and properly prepared. Issuers, therefore, need to design DC&P and ICFR appropriate to their size, type of business and organizational structure.

All organizations should evaluate and test the effectiveness of DC&P and ICFR at least annually, even if they are not required to do so under their certification requirements.

TSX issuers are required to disclose material weaknesses in ICFR in the MD&A. We recommend that venture issuers voluntarily disclose any material weaknesses in ICFR in their MD&As.

Questions for Management to Consider
• What measures have been taken to align the disclosure policy with other corporate policies, such as the code of business conduct?
• What were the disclosure committee’s greatest concerns and how were they resolved?
• Have all sub-certifications been obtained from those required to submit them? Were any concerns or issues raised or identified in the sub-certification process? If so, how were they resolved?
• Do the internal audit results, external audit reports, whistle-blower information or errors detected by the finance or other functions during the quarter suggest the existence of material weaknesses in the design of the DC&P or ICFR? If so, how were these addressed?
• How have material weaknesses in DC&P and ICFR disclosed in prior quarters been remediated? If they have not been remediated, how are ICFR weaknesses presented in the current MD&A disclosure?
• What processes are in place to ensure the design of DC&P and ICFR address new disclosure and financial reporting risks identified in the current quarter?
• Is management aware of any criticisms from regulators or others regarding the issuer’s disclosures? If so, how have these criticisms been addressed?
7. Annual Certification of Effectiveness of DC&P and ICFR

Top-Down, Risk-Based Approach
Certifying officers of TSX issuers are required to certify the operating effectiveness of DC&P and ICFR in their annual certificates. Therefore, they need to implement evaluation procedures that include an appropriate amount of
control testing, which may include observation, examination of documents, and the re-performance of control activities. The work of internal auditors may be useful in this regard.

Controls should be evaluated in a top-down manner, using a risk-based approach that focuses on entity-level controls that span all parts of an organization and its business units and processes. Entity-level controls include tone-at-the-top, the control environment, monitoring by senior management, planning and budget controls, and period-end financial reporting activities.

Management is responsible for designing and annually assessing the effectiveness of DC&P and ICFR. This entails:

- Organizing the team to evaluate and test DC&P and ICFR and designing an appropriate evaluation and testing strategy.
- Evaluating the design and operating effectiveness of entity-level controls and whether that evaluation is consistent with the findings and conclusions in internal audit reports and the external audit of the financial statements.
- Identifying and classifying the issuer’s major financial reporting and disclosure risks and any changes in the risk assessment from prior quarters.
- Developing mitigating strategies and action plans to fix control weaknesses and deficiencies.
- Ensuring that the disclosure in the MD&A of the effectiveness of DC&P and ICFR and any material weaknesses is fairly presented and consistent with the control evaluation and testing.

With the audit committee’s approval, management may engage the external auditor to carry out additional evaluation and testing of DC&P and ICFR.

The Companion Policy to NI 52-109 provides helpful guidance for management on evaluating the effectiveness of DC&P and ICFR, assessing the materiality of identified ICFR weaknesses, and the implications for DC&P certification where a material ICFR weakness exists.

**Responding to Discovered or Suspected Fraud**

Certifying officers are required to disclose to the external auditors and audit committee or board of directors any fraud that involves management or other employees with a significant role in the issuer’s ICFR. External auditors are required to assess fraud-related risks when conducting their audit and promptly communicate their discovery or suspicion of fraud to the audit committee.
When a potentially significant fraud is discovered or suspected, management, the internal and external auditors and the audit committee must act quickly and decisively to prevent further losses of assets, recover lost assets, determine the magnitude of the fraud, and identify who was involved and deal with them. In addition, longer-term issues must also be addressed, such as the design and effectiveness of the issuer’s ICFR and its whistleblowing process.

**Key Messages**

Management is responsible for designing and annually assessing their effectiveness of DC&P and ICFR. Management should be prepared to explain to the audit committee:

- The reasonableness of management’s evaluation and testing strategy.
- How the findings were evaluated and how the resulting conclusions were determined.
- Its action plans to fix control weaknesses and deficiencies.
- The fairness of the disclosure provided in the MD&A.

Certifying officers must disclose to the external auditors and audit committee or board of directors any fraud that involves management or other employees with a significant role in the issuer’s ICFR.

**Questions for Management to Consider**

- How does the overall certification process support the conclusions reached about the effectiveness of DC&P and ICFR at the financial year-end?
- How does management’s assessment of the effectiveness of DC&P address disclosure problems or issues of non-compliance with the disclosure policy (if any)?
- How do the certifying officers’ tests and evaluation support the disclosures in the annual MD&As about the effectiveness of DC&P and ICFR at the year-end?
- Have the certifying officers’ tests and evaluation detected any weaknesses in the design or operating effectiveness of DC&P or ICFR? If so, how have these weaknesses been rectified? If material weaknesses were detected in ICFR, how were they disclosed in the annual MD&A?
- Have any instances of fraud been detected during the quarter? If any detected fraud involves management or other employees with a significant role in the issuer’s ICFR, has the fraud been disclosed to the external auditors and the board or audit committee?
8. Learning & Improvement
Continuous Improvement

Conducting a high-level, experience-based consideration of each element of the process that supports the certifications will identify lessons that may be learned from its design and execution, opportunities for improvement, and the process’s overall value to the organization. Improvement opportunities could include:

- Re-designing certain timings and efficiencies.
- Adjusting the extent of reliance on work conducted by the external auditors.
- Adjusting the role and work of internal audit.
- Conducting ongoing rather than annual reviews of principal disclosures.
- Reporting risks over which controls are needed.

The certifying officers should be responsible for carrying out such a review and for reporting the results to the board or audit committee. This includes informing the audit committee about any communications, criticisms or notices from securities regulators about the issuer’s filings and CEO/CFO certificates, or the issuer’s complaints/whistle blowing system, and how these matters have been addressed and resolved.

Maintaining an effective process to support the certifications over the longer term requires active leadership and a commitment to continuous improvement. Without either, the support process would likely deteriorate, exposing certifying officers and directors to the extent that a legal defense based on a “reliance on certification” and “reasonable investigation” may not be available when it is most needed.

Questions for Management to Consider

- What insights have been gained during the latest certification cycle that may indicate benefits to the company beyond regulatory compliance, or opportunities to enhance the efficiency of the process in the future?
- Were any matters raised in the certification process that, although not material at this time, could become more serious if not dealt with immediately? What plans are in place to deal with these matters?
- What issues were identified in the certification process that might also have implications for disclosures not covered by the certification process?
- What mechanisms have been established to ensure that the effectiveness of the certification process is sustainable?
9. Special Considerations for Venture Issuers

The CSA requires venture issuers to provide content certifications but exempts them from the requirement to certify their DC&P and ICFR. These exemptions aim to relieve costs for venture issuers because many of them are small and have relatively simple organizational structures.

However, many venture issuers face similar disclosure risk and control effectiveness issues as their TSX-listed counterparts, even though they are not required to provide control certifications. Nevertheless, we believe that venture issuers should design and implement cost-effective disclosure controls and procedures to ensure their disclosures are complete, accurate and reported in the appropriate timeframes.

DC&P and ICFR are essential underpinnings of reliable disclosures. The boards and management of venture issuers may opt to decide that management should expand the process that supports their content certifications to include the assessments needed to support the DC&P and ICFR certifications required of TSX issuers. This consideration is discussed below under “DC&P and ICFR”.

The longer-term growth strategies of many venture issuers often include the possibility of seeking a TSX listing at some point in the future to enable them to attract new capital. Their early adoption of the control certifications and a comprehensive support process may ease their transition to a TSX listing and enhance their credibility in the eyes of analysts and investors.
Content Certifications: No “One Size Fits All” Solution

The nature and extent of a process that is adequate to support an issuer’s content certifications varies according to the size and complexity of the company and its industry. While these support processes are typically more extensive, involve more people, take greater time and effort and can be more challenging to manage in larger entities, the support process will be simpler, involve less people and be easier to manage in smaller organizations.

In all cases, a process that supports the content certifications should be designed to ensure that:

- The financial reporting and disclosure in the filings, and any other documents included in the support process, are free of material misstatements or omissions, and are fairly presented.
- Directors, the certifying officers and the issuer have the foundation for a due diligence defence if needed.

While it may make sense from a legal liability perspective for a venture issuer to implement a process to support its certifying officers’ content certifications, such a process should also be cost-effective. Developing practical and cost-effective support processes should be possible if the certifying officers and the board focus on the objectives and principles of the certifications and the processes that support them. There is no “one size fits all” approach, and just because something works in a larger issuer does not mean it will be practical and cost-effective in a venture insurer.

Policies and practices that the certifying officers and directors of smaller issuers may wish to consider when developing a process to support the content certifications are outlined below.

Disclosure Policy

Developing a disclosure policy provides an opportunity for the certifying officers and other senior management to build a shared understanding about the various disclosure requirements applicable to reporting issues, such as periodic reporting, timely disclosure, insider trading, and blackout periods. Developing an understanding of these disclosure requirements and their related risks is particularly important for the management and board of an issuer that has recently transitioned from operating as a private company.
One of the most important disclosure risks faced by new public companies is the risk of selective disclosure. This occurs when material information is disclosed to a single person or a group of people instead of to all investors at the same time. Such a disclosure may occur unintentionally. For example, a well-meaning employee proudly informs some suppliers just before the company’s year-end, that “business is great,” the company’s revenues are greater than last year’s and the company will be increasing its material orders from these suppliers. The employee has no idea whether the suppliers are investors or how they will use this information. In a private company, such a disclosure would not create a problem; in a public company, it may.

All issuers, therefore, need to identify who is authorized to speak on the issuer’s behalf and to release documents to regulators and the public. In smaller venture issuers, the appropriate spokesperson may be obvious, but this still should be clearly stated. It is also important to limit who within the company has access to material undisclosed information, as this may offer a more effective control than clear rules about who is authorized to say what.

Venture issuers that have recently become public companies should consider asking their legal advisors and external auditors for advice and guidance on their reporting and disclosure responsibilities, disclosure risks and how these risks can be controlled.

**Disclosure Committee**

In very small venture issuers, the disclosure committee will likely be identical to the senior management team. In such circumstances, the challenge for these executives, who may have limited public company experience, is determining how to obtain the knowledge to make the proper reporting and disclosure decisions. One solution is to involve the company’s legal advisors and its external auditors.

As the venture issuer grows, determining the appropriate membership of the disclosure committee becomes more challenging.

**Sub-Certification Process**

The sub-certification process helps ensure that everyone involved in the financial reporting and disclosure process understands their public reporting responsibilities. Consequently, a sub-certification process should be established whenever more than just the certifying officers are involved in the financial reporting process.
**DC&P and ICFR**

Although venture issuers are exempted from the requirement to certify disclosure controls and procedures and internal control over financial reporting, they are not exempt from the need to maintain effective controls over their financial reporting and related disclosures. The exemption only means that these issuers do not have to provide control certifications or report on any material weaknesses.

Many venture issuers lack personnel with accounting training or the resources needed to develop and implement effective information technology systems and controls. Because of this, these issuers may be more susceptible to errors in their financial reporting. Control weaknesses can occur in all organizations, but venture issuers may be particularly vulnerable due to a lack of resources and difficulty or inability to implement fundamental controls, such as a proper segregation of duties.

While they are not required to do so, the certifying officers and audit committees of venture issuers still need to assess and understand whether material weaknesses exist in their disclosure controls and procedures or their internal control over financial reporting. The external auditors can help the certifying officers and audit committee members develop this understanding, even if the external auditors did not employ a control reliance strategy in their audit.

For example, the external auditors’ discovery of material and/or numerous errors when conducting their audit would indicate significant deficiencies and, perhaps, material weaknesses in internal control over financial reporting. Such a situation would pose a serious dilemma for the certifying officers and the board. If significant or material control weaknesses have been found to exist that are not effectively mitigated, there is a risk that these weaknesses could produce material errors or omissions in the issuer’s quarterly reporting that will remain undetected until the next annual audit.

If detected errors represent material misstatements of revenue or expenses reported in prior quarters, the auditors should be asked about the likelihood of these errors being repeated in the future or of these errors becoming cumulatively material. If they are, management should take action to improve ICFR. If the errors cannot be remediated, the certifying officers and board should consult with legal counsel as to the appropriate course of action.
The Companion Policy to NI 52-109 states that venture issuers that voluntarily discuss the design or operation of one or more components of DC&P or ICFR in the MD&A or other regulatory filings should also consider disclosing in the same document that:

- The venture issuer is not required to certify the design and evaluation of DC&P and ICFR and has not completed such an evaluation.
- Limitations on the certifying officers’ ability to design and implement cost-effective DC&P and ICFR may result in additional risks to the quality, reliability, transparency and timeliness of the filings and other reports provided under securities legislation.

### Key Messages

The certifying officers of venture issuers must provide content certifications on the financial information contained in the interim and annual regulatory filings. While venture issuers are exempt from the ICFR certifications, they still must put in place cost-effective controls to ensure that all financial information is captured, summarized and reported fairly in accordance with GAAP.

The certifying officers should ensure they have a reliable process in place to support their certifications. The design of the certification support process should reflect the size of the issuer’s organization and the nature of its business. At a minimum, it should provide for a disclosure policy, disclosure committee and sub-certifications.

Management should evaluate whether it should annually assess the design and operating effectiveness of DC&P and ICFR, even though the CEO and CFO are not required to provide these certificates.

The certifying officers should alert the audit committee to any indications that could suggest significant or material ICFR weaknesses (e.g., material and/or numerous year-end adjustments). If serious ICFR weaknesses exist that are not or cannot be remediated, the certifying officers and board should consult with legal counsel as to the appropriate course of action.
An effective support process covering all elements of the certifications, including the annual evaluation of the effectiveness of DC&P and ICFR, constitutes an important entity-level control in all reporting issuers. The certifications establish the certifying officers’ public accountability for the filings, and the support process establishes the accountabilities and responsibilities of people within the organization involved in preparing the information to be included in the filings.

An effective support process provides:

• The foundation for avoiding surprises and building trust with investors, regulators and other stakeholders.

• The basis for a solid legal defence in the event the certifying officers and directors are sued for misleading disclosure.

• A mechanism for continuously improving the effectiveness and efficiency of the certification support process.

So what’s at stake when it comes to certification and disclosure? To answer the question we pose in our title, the biggest risks ultimately involve the issuer’s reputation and brand, which take a lot of time and effort to build and can be destroyed almost instantly.

An effective process to support CEO and CFO certification can greatly increase confidence that the company’s financial disclosures contain no material misstatements, omit no material facts necessary to make a statement not misleading, and fairly present in all material respects the issuer’s financial condition, results of operations and cash flows. But above all, an effective certification support process helps protect the issuer’s brand, sustain its reputation and build trust with its investors.
## Appendix A — Annual and Interim Certificates

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**FORM 52-109F1 CERTIFICATION OF ANNUAL FILINGS FULL CERTIFICATE**

1. **Review**: I have reviewed the AIF, if any, annual financial statements and annual MD&A, including, for greater certainty, all documents and information that are incorporated by reference in the AIF (together, the “annual filings”) of <identify issuer> (the “issuer”) for the financial year-ended <state the relevant date>.

2. **No misrepresentations**: Based on my knowledge, having exercised reasonable diligence, 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, for the period covered by the annual filings.

3. **Fair presentation**: Based on my knowledge, having exercised reasonable diligence, the annual financial statements together with the other financial information included in the annual filings fairly present in all material respects the financial condition, financial performance and cash flows of the issuer, as of the date of and for the periods presented in the annual filings.

4. **Responsibility**: The issuer’s other certifying officer(s) and I are responsible for establishing and maintaining disclosure controls and procedures (DC&P) and internal control over financial reporting (ICFR), as those terms are defined in National Instrument 52-109 Certification of Disclosure in Issuers’ Annual and Interim Filings, for the issuer.

5. **Control process**: The control process the issuer’s other certifying officer(s) and I used to design the issuer’s ICFR is <insert the name of the control process used>.

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<insert paragraph 5.2 or 5.3 if applicable. If paragraph 5.2 or 5.3 is not applicable, insert "5.2 N/A" or "5.3 N/A" as applicable. For paragraph 5.3, include (a)(i), (a)(ii) or (a)(iii) as applicable, and subparagraph (b).>

5.2 **ICFR** — material weakness relating to design: The issuer has disclosed in its annual MD&A for each material weakness relating to design existing at the financial year-end
(a) a description of the material weakness;
(b) the impact of the material weakness on the issuer’s financial reporting and its ICFR; and
(c) the issuer’s current plans, if any, or any actions already undertaken, for remediating the material weakness.

| Y | N | N |

5.3 **Limitation on scope of design:** The issuer has disclosed in its annual MD&A
(a) the fact that the issuer’s other certifying officer(s) and I have limited the scope of our design of DC&P and ICFR to exclude controls, policies and procedures of
   (i) a proportionately consolidated entity in which the issuer has an interest;
   (ii) a special purpose entity in which the issuer has an interest; or
   (iii) a business that the issuer acquired not more than 365 days before the issuer’s financial year-end; and
(b) summary financial information about the proportionately consolidated entity, special purpose entity or business that the issuer acquired that has been proportionately consolidated or consolidated in the issuer’s financial statements.

<insert subparagraph 6(b)(ii) if applicable. If subparagraph 6(b)(ii) is not applicable, insert "(ii) N/A".>

| Y | N | N |

6. **Evaluation:** The issuer’s other certifying officer(s) and I have
(a) evaluated, or caused to be evaluated under our supervision, the effectiveness of the issuer’s DC&P at the financial year-end and the issuer has disclosed in its annual MD&A our conclusions about the effectiveness of DC&P at the financial year-end based on that evaluation; and
(b) evaluated, or caused to be evaluated under our supervision, the effectiveness of the issuer’s ICFR at the financial year-end and the issuer has disclosed in its annual MD&A
   (i) our conclusions about the effectiveness of ICFR at the financial year-end based on that evaluation; and
   (ii) for each material weakness relating to operation existing at the financial year-end
      (A) a description of the material weakness;
      (B) the impact of the material weakness on the issuer’s financial reporting and its ICFR; and
      (C) the issuer’s current plans, if any, or any actions already undertaken, for remediating the material weakness.

| N | N | N |

7. **Reporting changes in ICFR:** The issuer has disclosed in its annual MD&A any change in the issuer’s ICFR that occurred during the period beginning on <insert the date immediately following the end of the period in respect of which the issuer made its most recent interim or annual filing, as applicable> and ended on <insert the last day of the financial year> that has materially affected, or is reasonably likely to materially affect, the issuer’s ICFR.

| Y | N | N |

8. **Reporting to the issuer’s auditors and board of directors or audit committee:** The issuer’s other certifying officer(s) and I have disclosed, based on our most recent evaluation of ICFR, to the issuer’s auditors, and the board of directors or the audit committee of the board of directors any fraud that involves management or other employees who have a significant role in the issuer’s ICFR.

| N | N | N |

Date: <insert date of filing> __________________________ [Signature] [Title]
Appendix B—List of Questions for Management to Consider

1. Scope and Design of the Process
   • What steps have been taken to ensure that the scope of the disclosures covered by the support process is appropriate?
   • What oversight processes and accountabilities are in place for core and non-core documents that are not included in the certification support process?
   • What processes are in place to ensure that the disclosure policy and certification process are designed, documented and readily accessible so that all directors, certifying officers and affected employees understand their responsibilities?
   • What changes, if any, were made in the disclosure policy and certification process to address:
     — Any new significant disclosure and financial reporting risks identified in the current quarter?
     — Significant changes in the strategy, structure, systems or business circumstances in the current quarter?
2. Commitment and Resources

- As the certifying officers, what additional steps could we take to provide effective leadership for the support process?
- How are certification-related responsibilities allocated among the certifying officers?
- How are people’s certification-related activities linked to their performance objectives and evaluation and assessed in determining their compensation?
- What plans are in place to resolve any resource constraints or capacity issues identified in prior quarters?
- What adjustments to the support process are needed to address organizational or personnel changes?

3. Interim Certifications

- What measures have been taken to align the disclosure policy with other corporate policies, such as the code of business conduct?
- What were the disclosure committee’s greatest concerns and how were they resolved?
- Have all sub-certifications been obtained from those required to submit them? Were any concerns or issues raised or identified in the sub-certification process? If so, how were they resolved?
- Do the internal audit results, external audit reports, whistle-blower information or errors detected by the finance or other functions during the quarter suggest the existence of material weaknesses in the design of the DC&P or ICFR? If so, how were these addressed?
- How have material weaknesses in DC&P and ICFR disclosed in prior quarters been remediated? If they have not been remediated, how are ICFR weaknesses presented in the current MD&A disclosure?
- What processes are in place to ensure the design of DC&P and ICFR address new disclosure and financial reporting risks identified in the current quarter?
- Is management aware of any criticisms from regulators or others regarding the issuer’s disclosures? If so, how have these criticisms been addressed?
4. Annual Certification of Effectiveness of DC&P and ICFR

- How does the overall certification process support the conclusions reached about the effectiveness of DC&P and ICFR at the financial year-end?
- How does management’s assessment of the effectiveness of DC&P address disclosure problems or issues of non-compliance with the disclosure policy (if any)?
- How do the certifying officers’ tests and evaluation support the disclosures in the annual MD&As about the effectiveness of DC&P and ICFR at the year-end?
- Have the certifying officers’ tests and evaluation detected any weaknesses in the design or operating effectiveness of DC&P or ICFR? If so, how have these weaknesses been rectified? If material weaknesses were detected in ICFR, how were they disclosed in the annual MD&A?
- Have any instances of fraud been detected during the quarter? If any detected fraud involves management or other employees with a significant role in the issuer’s ICFR, has the fraud been disclosed to the external auditors and the board or audit committee?

5. Learning & Improvement

- What insights have been gained during the latest certification cycle that may indicate benefits to the company beyond regulatory compliance, or opportunities to enhance the efficiency of the process in the future?
- Were any matters raised in the certification process that, although not material at this time, could become more serious if not dealt with immediately? What plans are in place to deal with these matters?
- What issues were identified in the certification process that might also have implications for disclosures not covered by the certification process?
- What mechanisms have been established to ensure that the effectiveness of the certification process is sustainable?
About the Authors

James L. Goodfellow, FCPA, FCA

James L. Goodfellow, FCPA, FCA is a corporate director and a retired partner and vice chairman of Deloitte. He is a graduate of Dalhousie University, and practiced public accountancy with Deloitte and various predecessor firms for 40 years. In 2009, Jim was awarded the Ontario Institute of Chartered Accountants’ Award of Outstanding Merit, which is the highest honour that CPA Ontario can bestow upon its members.

He is a past chairman of the CICA Accounting Standards Board as well as a past chairman of the CICA Canadian Performance Reporting Board. He is a frequent speaker on issues related to financial reporting, corporate governance and audit committees.

Jim co-chaired the 2011 and 2012 Audit Quality Symposia that brought together thought leaders and policy makers from Canada and around the world to discuss issues related to audit quality. He was also a member of the Enhancing Audit Quality Audit Committee Working Group that has developed guidance for audit committees in overseeing the work of the external auditor.

Alan D. Willis, CPA, CA

Alan D. Willis is a Chartered Professional Accountant who, as an independent consultant and author, provides research, writing and advisory services in the areas of performance measurement and business reporting, sustainability, risk and corporate governance.


Over the last two decades, his numerous projects for the Canadian Institute of Chartered Accountants and other national and international institutions have addressed the business, investment, accounting and reporting implications of a wide range of sustainability issues facing companies today, as well as associated assurance and verification issues. Related CICA guidance publications which he has authored or co-authored include Sustainability: Environmental and Social Issues Briefing: Questions for Directors to Ask; Climate Change Briefing: Questions for Directors to Ask; Long-Term Performance Briefing: Questions for Directors to Ask as well as the Discussion Brief Environmental, Social and Governance (ESG) Issues in Institutional Investor Decision Making.

He has worked extensively with major Canadian and international initiatives and standards setters to advance best practices in performance measurement and business reporting, particularly as these relate climate change and corporate sustainability issues, and, through the International Integrated Reporting Council, their integration with financial performance measurement and reporting. He is a member of the International Corporate Governance Network and its committee on Integrated Business Reporting, and an advisor to the Sustainability Accounting Standards Board.

In 2012, Alan was awarded the Queen Elizabeth II Diamond Jubilee Medal for his significant contribution to Canada’s CA profession as a leader in corporate sustainability in Canada and internationally.