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British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission -- Securities Division
Manitoba Securities Commission
Ontario Securities Commission
Office of the Administrator, New Brunswick
Registrar of Securities, Prince Edward Island
Nova Scotia Securities Commission
Newfoundland and Labrador Securities Commission
Registrar of Securities, Northwest Territories
Registrar of Securities, Yukon Territory
Registrar of Securities, Nunavut

Dear Sirs:

Re: Notice and Request for Comments re
Proposed Multilateral Instrument 52-110, Companion Policy 52-110CP and Forms 52-110F1 and 52-110F2

The following are comments on the proposed Multilateral Instrument 52-110, Companion Policy 52-110CP and Forms 52-110F1 and 52-110F2. The comments are the views we have received from one of our clients and are not necessarily the views of our firm. For convenience, we have repeated the questions as you have presented them in your Request for Comments.

1. *Independence is defined in subsection 1.4(1) of the Proposed Instrument as the absence of a material relationship between the issuer and the director. Subsection 1.4(2) provides that a material relationship is one that that could, in the view of the board of directors, reasonably interfere with the exercise of a member's independent judgement.* ***Do you consider this definition of independence appropriate?***

Answer: We are not convinced that "independence" is the holy grail of good corporate governance. That being said, the definition is an appropriate definition of independence.

2. Notwithstanding the definition of material relationship in subsection 1.4(2), subsection 1.4(3) deems certain categories of persons to have a material relationship with the issuer. As a result, these individuals are precluded from serving on the issuer's audit committee.

(a) Do you think that the categories of precluded persons are appropriate? Are there other categories that should be added?

Answer: The categories of precluded persons are broad and exclude many otherwise qualified individuals. They are appropriate if the objective is to exclude a broad variety of individuals, including many who may otherwise have significant attributes to contribute to an audit committee.

No other categories should be added.

(b) Certain of the categories reference a "cooling off" period (or a "prescribed period") of up to three years. Is this period appropriate? Is it too long? Too short?

Answer: The absence of a current relationship should be the focus. We would suggest a shorter period, say 1 year.

(c) Certain individuals may be precluded from serving on an audit committee as a result of their employment, or the employment of an immediate family member. Should these categories be restricted to individuals earning a minimum monetary amount (e.g., $75,000)?

Answer: If it is believed that the receipt of compensation taints the independence of an individual, an arbitrarily determined acceptable threshold amount does not, as a matter of principle, appear justified. The effect upon the recipient of the receipt of compensation may well be dependent upon the particular financial circumstances of the individual. If the underlying basis for the exclusion is correct, it would be difficult to specify an amount which would be sufficiently insignificant in all circumstances.

(d) Some categories contained in subsection 1.4(3) were derived from U.S. legislation (i.e., SOX), while others were based upon the listing requirements of the New York Stock Exchange. Do you believe that all of these categories should be incorporated into the Proposed Instrument, given their differing levels of authority in the United States?

Answer: Yes.

3. Do you believe that the exemption in section 3.3 appropriately addresses the concerns of controlling shareholders?

Answer: No. The approach is overly restrictive in only providing relief for directors who are also a director of the parent, if that director is otherwise "independent". This precludes individuals from serving who are deemed non-independent under other categories. In controlled situations directors may often be non-independent in other categories. The better approach for controlled situations would be to simply allow one "non-independent" director to serve on the audit committee. In other words, for controlled companies the requirement should be to mandate 2 out of 3 independent directors, allowing the third member to be entirely free from the independence criteria, in the discretion of the board.

It would appear that the proposed exemption follows the Sarbanes Oxley model which may well suit the particular circumstances in the U.S. but which may not be appropriate for Canada with its high proportion of controlled and family controlled companies.

4. Section 1.4 provides that a person who is an affiliated entity of the issuer is not independent of the issuer. Section 1.3 defines an "affiliated entity" in terms of its ability to control, or be controlled by, the issuer, and specifically includes a director of an affiliated entity who is also an employee of the affiliated entity. ***In light of this, do you believe that the exemption for controlled companies in section 3.3 is necessary?***

Answer: Irrespective of Sections 1.4 and 1.3, an exemption for controlled companies is necessary (see paragraph 3 above).

5. In your view, does the definition of financial literacy provide sufficient guidance to allow an issuer to adequately assess a member's compliance with the Proposed Instrument?

Answer: Yes.

6. The exemptions in sections 3.2, 3.4 and 3.5 are designed to address certain transitory circumstances where issuers may find it difficult to comply with the independence and, in some cases, the financial literacy requirements contained in the Proposed Instrument. ***Do you believe these exemptions are appropriate? Are there additional exemptions that you believe are necessary?***

Answer: The exemptions are appropriate.

7. An audit committee financial expert, with his or her enhanced level of financial sophistication and expertise, can serve as an important resource for the audit committee as a whole in carrying out its duties. However, because certain issuers may find it difficult to appoint audit committee financial experts to their audit committees, the Proposed Instrument does not require that every audit committee have an audit committee financial expert.

Instead, paragraph 3 of Form 52-110F1 requires that an issuer disclose the identity of the audit committee financial expert(s), if any, that are serving on its audit committee. If the audit committee does not have an audit committee financial expert, an issuer must disclose that fact and explain why.

The disclosure required by Form 52-110F1 encourages issuers to appoint audit committee financial experts to their audit committees. It is not our intention that the designation of the audit committee financial expert should impose on that member any duties, obligations or liability that are greater than the duties, obligations and liability imposed on that member in the absence of the designation. Conversely, we do not intend that the designation of an audit committee financial expert should affect the duties and obligations of other audit committee members or the board of directors. Nevertheless, some concern has been expressed that merely identifying an individual as an audit committee financial expert may result in increased legal liability for that individual.

In light of the foregoing, do you believe this disclosure requirement is an appropriate alternative to requiring every audit committee to have an audit committee financial expert? Can you suggest other meaningful ways to encourage issuers to appoint audit committee financial experts to their audit committees?

Answer: Despite the stated intention, it is not clear that the designated "financial expert" will not be subject to additional liability. Disclosure that the audit committee has financial experts need not specifically identify the individuals to accomplish the stated objective.

8. Section 5.1 requires that an issuer include in its AIF the information required by Form 52-110F1. ***Do you think the AIF is the most appropriate location for this disclosure? If not, why not?***

Answer: The AIF is an appropriate location for the Audit Committee disclosure.

9. An exemption for venture issuers is contained in Part 6. By creating this exemption, we are acknowledging that it may be difficult or impossible for many small issuers to comply with the independence and financial literacy requirements in the Proposed Instrument.

A venture issuer is defined in section 1.1 of the Proposed Instrument as an issuer that does not have any of its securities listed or quoted on any of the Toronto Stock Exchange, the New York Stock Exchange, the American Stock Exchange, the Nasdaq National Market, the Nasdaq SmallCap Market, the Pacific Exchange or a marketplace outside of Canada or the United States.

Part 6 exempts venture issuers from the Parts 3 (Composition of the Audit Committee) of the Proposed Instrument. Consequently, the members of a venture issuer's audit committee are not required to be either independent or financially literate. Venture issuers relying on this exemption are also exempt from Part 5 (Disclosure Obligations); however, venture issuers

must provide, on an annual basis, the alternative disclosure required by Form 52-110F2. Among other matters, Form 52-110F2 requires a venture issuer to disclose:

- *the composition of its audit committee and whether each member is (i) independent, and (ii) financially literate;*
- *if an audit committee recommendation regarding the nomination or compensation of the external auditors has not been adopted by the board of directors;*
- *the service fees (by category) that the venture issuer has paid its external auditors; and*
- *that the venture issuer is relying upon the exemption.*

This disclosure must be provided in the venture issuer's management information circular or in its AIF or management's discussion and analysis.

Do you believe this exemption is appropriate? Should audit committee composition requirements (e.g., independence, financial literacy) be imposed on venture issuers? If so, should these requirements be the same as for other issuers?

Answer: An exemption for smaller issuers is appropriate. A blanket exemption is perhaps too broad. Independence and financial literacy for at least one audit committee member should be considered.

Yours truly,

Perry Spitznagel

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CPS/ljm