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March 22, 2006

VIA E-MAIL

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission – Securities Division
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
New Brunswick Securities Commission
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

c/o Rosann Youck, Chair of the Continuous Disclosure Harmonization Committee
British Columbia Securities Commission
and
Anne-Marie Beaudoin, Secretary
Autorité des marchés financiers

Ladies and Gentlemen:

Re: Proposed Amendments to National Instrument 51-102

This letter is in response to the Request for Comments dated December 9, 2005 on proposed amendments to National Instrument 51-102 and certain related amendments. I apologize for submitting this comment after the requested date of March 9, 2006, but I trust that you will nevertheless be able to consider this submission.

The only issue on which I propose to comment is on specific question No. 5 relating to "Guidance on Executive Compensation" and in particular, the proposal to remove the word "primary" from paragraphs (e) and (f) of item 1.4 of Form 51-102F6.

I would normally say that the change of the phrase "the primary purpose of" to "the purpose of" does not in substance alter the meaning of the phrase. The former recognizes that there may be more than one purpose of certain arrangements, while the latter does not.

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However, based upon a review of Section H of Part 2 of OSC Staff Notice 51-706 *Corporate Finance Report* ("OSCN 51-706") and discussions with members of OSC staff, it appears to me that the proposed change may not be so innocuous.

In connection with issuers that have external management companies OSCN 51-706 provides that "we expect the reporting issuer to disclose any compensation payable directly by the reporting issuer to the executive officers, as well as any compensation payable by the external management company to the executive officers that can be attributed to the management fee or other payments from the reporting issuer (e.g. any salary, bonus, dividends, distributions or other payments paid by the external management company to the executive officers)".

This excerpt omits the concept that the arrangement must have the primary purpose of compensating the officers or directors for employment services or office. One could read the phrase "that can be attributed to the management fee or other payment from the reporting issuers" to require a link between the purpose of the payments and the purpose of compensating the officers. However, the discussions that I have had with staff of the OSC has made it clear to me that they are insisting on disclosure regardless of the primary purpose (or <u>the</u> purpose) of the management arrangements.

Therefore, if the intent of the change is to broaden the scope of the requirement, I suggest that the change should not be made. I believe that the original draftspersons of NI 51-102 got it right.

I agree that the term "executive officer" would include those individuals who are performing a policy-making function with respect to the issuer even if they are employed by an external management company. For example, those individuals who perform the function of chief executive officer and chief financial officer should be required to certify financial statements pursuant to Multilateral Instrument 52-109. However, it does not follow that Form 51-102F6 requires disclosure of compensation for all such executive officers.

The main reason for the disclosure is to provide investors with information regarding the determination by the board of directors (or other governance body) (the "Board") as to the pay of its executive officers so that some light is shone on the compensation process and investors can lobby the Board to ensure its appropriateness. For example, if compensation is high, and performance bad, shareholders can put pressure on the Board to require better performance or provide lower compensation. That is why the performance graph and compensation committee report are required. If, however, that compensation is beyond the control of the Board and it is not being paid directly by the issuer, the information would be meaningless.

The principal rule is that "compensation to officers and directors must include compensation from the company and its subsidiaries" as stated in the first sentence in item 1.4(d) of the Form. However, I agree that it would be inappropriate for certain arrangements whereby officers and directors are not paid in that fashion to permit the issuer not to provide executive compensation disclosure. I can envision three circumstances where this would be the case:

1. where the management company pays the officers and directors, but is reimbursed by the issuer;

2. where a management company provides the services of an executive officer pursuant to a management contract;

3. where a management company is retained primarily for the purpose of providing the services of one or more executive officers;

Each of the foregoing circumstances could be entered into to avoid disclosure of executive compensation. In each of those instances, the Board will, presumably, have agreed to the compensation and/or have some control over the compensation through its rights under the management agreements. In each case it should be clear what the requirements for disclosure would be, because in each case it would be determined either based upon the fee payable or the compensation received by the officers. In each of these cases, the "primary purpose" of the arrangements (and, in fact, the purpose) would be for the other entity to compensate the officer or director for employment services or office. Therefore, in those cases the current Form requires disclosure.

However, many of those entities that provide *bona fide* management services to reporting issuers provide services well beyond the provision of executive officers. Typically, the issuers have projects or investments that need some management or oversight, but do not require significant executive decision-making. The primary purpose (or the purpose) is not to provide executive officer services.

If the manager (and its affiliates) provided general management services to the reporting issuer, but also have other businesses or clients, any attempt to provide disclosure of the compensation of the executive officers would appear to be meaningless. In those circumstances, it would be clear, unless particular individuals were designated to act as executive officers full time for the reporting issuer, less than 100% of the compensation paid to those officers could be attributable to the reporting issuer. Assuming that the management company could determine a reasonable proportion of the executive officer's compensation that relates to the managed reporting issuer (by revenue? by income? by hours spent?), the question must be asked whether this is at all meaningful to an investor. It seems to me that what is relevant to the investor is the amount paid to the manager by the reporting issuer, as that is the only amount over which the Board has control and that is the amount that the issuer pays. How the manager determines to compensate its executive officers, especially as the Board has no say or control over it, is irrelevant to investors.

Where the management company provides numerous services but the management company (and its affiliated companies) have no other client or other business, so that all of the activities of the management company relate to the reporting issuer at least than the allocation of compensation (i.e. 100%) would be simple. However, it still strikes me as meaningless information for the investor, as the Board has no control over how the manager happens to allocate its fee among its employees.

I have less experience with the application of paragraph (f) of item 1.4. This covers compensation to an associate, officer or director. It seems to me that an associate, which would include an entity in which the individual owned more than 10% or certain family members, including a spouse, could be legitimately paid for providing other services. It is unclear to me whether the removal of the word "primary" would change or is intended to change the ambit of that section.

In short, I do not think that the change should be considered significant, although I do not think that it is an improvement. If, however, the change is meant to be consistent with the position that the OSC is taking, then it does not accomplish that goal. I strongly believe that a change should not be made to reflect that approach because, in my view, such disclosure would be meaningless and irrelevant to investors. Furthermore, because the disclosure for external management companies would entail disclosure of less than all of the officers' total compensation, without guidance as to how to allocate, not only would comparison with "normal" issues be meaningless, so too would comparisons to other reporting issuers with similar management contracts.

I would, of course, be pleased to discuss this comment letter.

The comments made in this letter are my own and do not necessarily reflect those of my firm.

Yours sincerely,

"Paul G Findlay"

Paul G. Findlay

PGF/ck