Kenmar Associates
Investor protection and education

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REQUEST FOR COMMENT
PROPOSED REPEAL AND REPLACEMENT OF NATIONAL POLICY 58-201
***CORPORATE GOVERNANCE GUIDELINES*,**
NATIONAL INSTRUMENT 58-101 *DISCLOSURE OF CORPORATE GOVERNANCE PRACTICES*, AND NATIONAL INSTRUMENT 52-110 *AUDIT COMMITTEES* AND COMPANION POLICY 52-110CP *AUDIT COMMITTEES*
http://www.osc.gov.on.ca/Media/NewsReleases/2008/nr_20081219_csa-cor-gov-com.jsp

By way of introduction, Kenmar Associates is an Ontario- based organization focused on investor education via on-line papers hosted at www.canadianfundwatch.com. Kenmar also publishes ***the Fund OBSERVER*** on a monthly basis discussing investor protection issues primarily for retail investors. Kenmar routinely submit comments and ALERTS on proposed regulatory changes that could impact Main Street.

We are pleased to provide comments on the new approach proposed by the CSA towards corporate governance. As is well documented, Principles- Based Regulation **(PBR)** has many disadvantages as well as advantages. We focus here on the shortcomings and risks for retail investors.

INTRODUCTION

In a Dec. 2005 speech then Bank of Canada governor David Dodge said "There is a perception in international financial circles that Canadian markets are the "Wild West" and it hurts Canadian companies when they try to raise money abroad. This is a very common refrain that we hear when we visit markets in New York or in Boston or in London or in Europe, a perception that somehow this is kind of a little bit more like a Wild West up here in terms of the degree to which rules and regulations are enforced". This view is shared by many based on hard facts and experience.

Our fragmented regulatory regime is costing hundreds of millions of dollars each year and is still ineffective from preventing major fiascos like YBM, Royal Group, Portus, FMF, Livent, ABCP fiasco, the mutual fund market timing scandal, amongst many others. It also fails to get victims money back leaving victims with expensive and time-consuming civil action as the only option. *

In the 2004 mutual fund market timing debacle, estimated by some at $600 million, regulators required only $205 million in restitution resulting from a negotiated settlement. Only 5 of 20 firms were dealt with. No sanctions, fines, administrative penalties or profit disgorgement was imposed although the most fundamental principles of corporate and fund governance were assertively violated. Even the cost of the OSC investigation was not assigned to the perpetrators. Not a single person or firm was held accountable. The Directors of AGF, Investors Group and CI funds were immunized from the scandal.

We therefore remain very concerned that if such lax investor protection is provided when there are clear rules, what will happen when rules are replaced by untested broad principles in the mal-functioning Canadian regulatory environment. A shift to a principles-based approach would make the complaint/restitution process even more hazardous for retail investors.

PBR: U.K. and Canada

Much of the benchmarking of PBR is based on the U.K.'s experience. (Even the FSA has handed down 8,500 pages of rules and guidance aimed at interpreting its 194 words' worth of principles; the SEC's proposed fiscal year 2008 budget was approximately $905 million, with over a third of that amount, $321 million, allocated to the agency's enforcement program. In contrast, the FSA's proposed budget for the same year was $612 million, with only $76 million allocated to its enforcement program.). Canada's figures are harder to come by, but it is apparent that Commission Chairman are all vowing to increase enforcement resources and spending based on horrific cases of corporate wrongdoing.

It is important to recognize that Britain affords a completely different enforcement environment. There is a sole consolidated regulator, the FSA; there is no provincial or local regulatory enforcement; and there are no private class actions. The U.K. is more characterized by institutional and controlling shareholders rather than retail investors

The situation in Canada is virtually 180 degrees different. Each province has an Attorney General and there are the IMET and Federal agencies such as FCAC. Quebec offers a whole different regulatory structure and a legal system based on Napoleonic law. Canada has a large and growing retail market requiring protection. There is a growing utilization of class action litigation in Canada.eg. Danier Leather, BCE takeover bid, and the decisions regarding corporate governance often surprise even regulators. [In the BCE case, the Québec Superior Court approved a plan of arrangement in March 2008, under section 192 of the *Canada Business Corporations Act* (CBCA) which was to govern the transaction. In May, the Québec Court of Appeal reversed the trial judge in a somewhat surprising decision that, if upheld, would have had significant implications for Canadian corporate law. In June 2008, the Supreme Court of Canada, considering the case on an accelerated timetable, reversed the Court of Appeal and restored the trial judgment. However, it did so with reasons to follow, leaving the basis of the reversal unclear.]

All these characteristics can lead to inconsistent outcomes in Canada, undermining the goal of principles-based regulation. A common securities regulator and principles-based rulemaking go hand-in-hand, otherwise the result will be inconsistent regulation and enforcement across jurisdictions. In this context, the most pronounced deficiency of a principles-based system is the legal vulnerability it creates for Canadian regulated firms.

Additionally, the FSA follows prudential and risk-based enforcement policies that--at the moment--are unimaginable in North America. In a prudential enforcement system, the objective of the regulator is not enforcement, but compliance. What is the difference? According to the FSA, when the regulator seeks compliance, it is not primarily interested in exacting penalties from regulated firms, but more in instilling an understanding of their obligations.

When the FSA does engage in enforcement, it follows a risk-based policy. This means that it does not undertake enforcement for minor matters, but only in cases in which it believes a significant principle is at stake or in which the firm or firms involved are taking or have taken risks that threaten the stability of the industry or the market. It should be noted that the UK has a robust industry-independent Ombudsman that can deal fairly with financial consumer complaints. In Canada, OBSI is industry- sponsored and funded. Banks are not obligated to be members of OBSI.

Given our much different operating scenario and horrific governance debacles (Hollinger, Bre-X, Nortel, Norshield, non-bank ABCP etc.) restitution and justice are on the minds of increasingly frustrated Canadians. An October, 2006 CSA Investor survey found that three out of four Canadians believe that jailing anyone who breaks the rules is an extremely or very important priority for their provincial financial regulator. Investors are looking for more robust enforcement and it seems PBR may not provide it under our structure.

There were quite extensive comments on principles-based regulation among the submissions made to the Expert Panel on Securities Regulation in Canada.

http://www.expertpanel.ca/eng/consultations/written-submissions/index.php

In her submission, Dr. Pamela Reeve makes reference to the fact that "a different skill-set and attitude on the part of regulators and firms is required with this approach" as per a paper by Julia Black and co-authors. The latter see a principles-based approach as potentially involving a "significant risk" of failure, commenting that "The transition from prescription to Principles is not an easy one for firms. Principles-based regulation … requires senior management to engage with regulatory issues at the highest level, and not regard these as things that can be delegated to compliance."

Julia Black et al, *Making a success of Principles-based regulation," Law and Financial Markets Review* 1/3 (May 2007), §6 on pp. 198-99 and 203,

http://www.lse.ac.uk/collections/law/projects/lfm/lfmr_13_blacketal_191to206.pdf

Moreover, as Reeve notes, "there is an increase in collaboration between the regulator and firms involved in a principles-based approach." She proposes that ideally in this circumstance "an independent consumer body" should be empowered "to monitor the regulatory process."

Dr. Reeve sees the use of industry guidance in principles-based regulation as another aspect that requires an investor advisory panel: "The UK Consumer Panel raised concerns about industry guidance referred to the FSA for confirmation and is now allowed to review and comment on this guidance prior to FSA approval." In view of this, Reeve recommended that "If there is a move to a more principles-based approach in Canada, the same process, involving a review of industry guidance by a consumer advisory panel, should be followed." Overall, she concludes that a principles-based approach should not "be implemented without oversight by an independent third-party with retail investor interests in view."

Pamela J. Reeve, Ph.D.
http://www.expertpanel.ca/documents/submissions/Reeve_ExpertPanelSubmission_15jul08.pdf

In another submission, Professor Laureen Snider makes a similar point regarding the protective effect of third parties: "When integrated into the regulatory equation third parties play a vital role in mitigating the phenomenon of "capture", a well-documented and virtually inescapable fact of regulatory life."

Laureen Snider, Professor of Sociology, Queen's University

http://www.expertpanel.ca/documents/submissions/Snider,%20Loreen%20edited%20EXPERT%20PANEL%20FINAL%20SUBMISSION%20JUNE%202008.pdf

Nevertheless, neither the CSA nor any provincial regulator current has such a safeguard in place and this Request for Comment does not propose one.

DISCLOSURE ISSUES

A critical aspect of corporate governance revolves around continuous disclosure. In September 2008 the Ontario Securities Commission (OSC) released Staff Notice 51-706 Corporate Finance Branch Report 2008, which summarized the activities of the Corporate Finance Branch for the 2008 fiscal year. A whopping 16% of the issuers reviewed were required to restate and refile materials, to make retroactive changes or to file material that had not previously been filed. The majority of these refilings were as a result of deficient MD&A, non-compliance with both MI 52-109 Certification of Disclosure in Issuers'

Annual and Interim Filings and with the CICA's new financial instruments standards. About 5% of the issuers reviewed resulted in referrals to the Enforcement Branch for further action. The timing of option grants was a major part of the OSC CD review program, resulting in a number of investigations by the Enforcement Branch. These results are hardly a confirmation of robust governance even when rules are delineated. One can only speculate what the numbers would be like under a PBR regime simultaneous with a switchover to IFRS.

On the issue of executive compensation, it is clear that normal good corporate governance failed to lead to transparent disclosure. This has resulted in obscene compensation often tied to grotesque underperformance. In this case, the CSA has wisely risen above principle and caused firms to be more revealing as evidenced by the new prescriptive CD&A format.

On December 31, 2005, significant amendments to the Securities Act (Ontario) (the "Act") created statutory civil liability for public companies (and others) for continuous disclosure violations [Bill 198]. Previously, only investors who purchased securities pursuant to an offering document (e.g. a prospectus) that contained a misrepresentation were provided with a statutory cause of action. Under this regime, investors have a statutory right to sue for misrepresentations in an issuer's continuous disclosure record or a failure to disclose a material change in a timely fashion as required by the Act. Potential defendants include the issuer, its directors and officers who authorized, permitted or acquiesced in the failure to make accurate/timely disclosure, and each influential person (and where applicable, its directors and officers) who knowingly influenced the issuer in the failure to make effective/timely disclosure. How this threat of civil action would play out in a PBR environment is far from clear.

We do not understand why issuers will no longer be required to file a copy of their code of business conduct and ethics or amendments to the code through SEDAR. This has proven of value in making socially responsible investment decisions and in the resolution of disputes, say involving a telephone charge, car deficiency or complaint handling.

ENFORCEMENT, consistency et al

The implication in the Request for Comment documents is that a more principles-based approach to securities regulation could strengthen enforcement. It should be apparent that stronger, more coordinated enforcement is required with the PBR approach. At the same time, there is a generally accepted view that securities enforcement in Canada is not robust. In a Feb. 2008 report, the International Monetary Fund found that Canada's financial system is very stable, and that "banks also appear to be able to withstand specific large single factor shocks for credit, market, and liquidity risk." However, the report noted that enforcement of securities laws is "still in need of considerable improvement. The development of a coordinated approach to enforcement between criminal and securities law enforcement, with clear lines of accountability and benchmarks, seems to be missing," the report found. "Criminal enforcement appears to be particularly weak. While comprehensive statistics are not available, market participants commented that very few cases have been taken for criminal prosecutions and even less have resulted in criminal sanctions." In view of this, it seems highly questionable whether a more principles-based approach should be implemented before long-standing enforcement issues have been resolved.

The essence of a principles-based regulatory (or accounting system like IFRS) is that the principles take precedence over the rules. No matter what the rules say, the regulator, the regulated firm, and the auditor are supposed to use their reason and judgment in support of the principle rather than invoke a wooden adherence to a rule. Regulatory or accounting decisions based on principles, however, may not always be transparent or consistent with one another, and this can have significant competitive effects. For example, a company that receives a favorable ruling from a regulatory agency about how it can or should conduct its business can have a competitive edge over companies that are not aware of the decision or are otherwise differently treated. The same is true, of course, of an accounting system. A company that receives liberal treatment from its auditor may (at least temporarily) do better in the securities market than a company whose auditor takes a conservative view. Although a general principle may have been published, the regulatory or accounting decision that accepts a particular way of doing business might be informal--perhaps made by an examiner who observes it but raises no objection--and thus provides one company with an advantage over its competitors.

Thus, principles-based systems are also extremely difficult to administer consistently over time, leading to differences in treatment that can have competitive effects. Whether a particular way of doing business conforms to the principle involved can be a matter of a particular regulator's opinion, and as regulators and circumstances change, so do interpretations. An activity previously disapproved can become acceptable--and vice versa. The existence of detailed written rules assures that both the regulator and the regulated know what the rules are, despite a change in personnel on either side. In a rules-based system, if changes in technology or the market make it imperative that the rules change, a diligent regulator will change the written language of the rule through "notice and comment" rulemaking. This puts all competitors on an equal footing. In a principles-based system, however, there may be no need to revisit the principle, even if the interpretation has changed, and some competitors may find themselves at a disadvantage if the new interpretation is not widely known or consistently applied.

Making up supposed policy reasons to protect favored industries from competition is easy in a principles-based regulatory structure. In a rules-based system, it is usually true that unless a rule forbids it, an action is permitted. Thus, a PBR approach could potentially reduce competition to the disadvantage of ordinary Canadians. To the extent such differences impact investor protection, it is to that extent we are concerned about the risks of PBR introduction for retail investors.

INSIDER MANIPULATIONS – an indicator of market integrity

In his 2003 study of mergers and acquisitions in 52 countries from Jan., 1990, to Dec., 1999, Yale University professor Arturo Bris found that pre-announcement price run-ups were the most significant in Canada. Insiders in Canada captured 35.2% of takeover trading profits, far ahead of second-place Hong Kong (3.1%) and third-place Norway (2.3%). The author reports evidence that the effect of insider trading laws on insider behavior depends on the toughness of the penalty violators face if ever detected. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=248417 *Do Insider Trading Laws Work?*

In a 2003 research paper, *Do Insiders play by the rules?* , the authors studied compliance with insider trading regulations of the Ontario Securities Act (OSA) and the Toronto Stock Exchange. In contrast to the scarcity of prosecutions, they found large-scale evidence of insider trading and reporting violations. For example, from 1987 to 2000, approximately 50 percent of firms engaging in stock buybacks did not disclose their trades to the Ontario Securities Commission as required under the OSA. Furthermore, the volume of insider trading is much higher than expected before material news announcements. The authors, William J. Mcnally and Brian F. Smith observe:

"It appears that *insiders do* not. fear prosecution by the OSC, which is probably due. to the fact that the OSC has seldom enforced its own. *rules* and has secured relatively few convictions. ..The efficacy of Insider trading laws is affected by the extent to which they are enforced .If they are not enforced, the insider trading is limited only by the compunction of market participants not to violate the law. Worse, a lack of enforcement may send a signal to market participants is not a serious crime.."
http://economics.ca/cgi/jab?journal=cpp&view=v29n2/CPPv29n2p125.pdf

A 2006 report suggested that some of Canada's largest companies may be manipulating the timing of stock-option grants to give executives bigger bonuses. An analysis of options granted over the past three years by Canada's 60 largest and most heavily traded companies shows a troubling pattern of share prices falling in the days before options are granted, followed by a sharp upturn shortly afterward. Sam La Bell, an analyst with Toronto-based Veritas Investment Research Corp., which produced the study said: "While there may not be a smoking gun, there is a disturbing pattern that suggests that the timing of option grants is alive and well in Canada." According to the Veritas study, stock prices for the 60 companies examined dropped an average of half a percentage point in the 10 days before options were granted and then rose more than one percentage point over the next 15 days. Grant dates chosen at random should show no such pattern. Timing options to create built-in gains undermines the whole point of the bonuses, from a shareholder perspective. "This trend suggests that management may be timing option grants to precede positive announcements or to follow bad news," the report states.

The previously mentioned Rankin case demonstrates just how ineffective prosecution of insider trading is. Respected governance expert J. Robert Finlay who heads the Centre for Corporate & Public Governance has commented on the case.”..The settlement, which involves Mr. Rankin’s paying $250,000, resolves all outstanding matters related to Mr. Rankin and the OSC. The costs of the OSC’s investigation and prosecution of this case would be significantly beyond the sum paid for settlement. As part of the settlement, Mr. Rankin admitted to wrongdoing under the Securities Act by providing insider information to Daniel Duic, a friend, who later profited from the trades. Mr. Duic previously admitted to Securities Act violations and gave evidence in court against Mr. Rankin under his settlement agreement with the OSC. The result of the investigation and trial is that while both parties have admitted to serious violations, neither will have a criminal record nor spend time in jail.

The regulator's decision gives rise to troubling questions as to whether this is the proper outcome in light of the facts of the case and the high costs incurred by the OSC, and whether it will serve as an adequate deterrent to stock tipping and insider trading in the future. In addition, there are concerns being expressed widely within and outside Canada about the OSC's judgment and overall competence in the enforcement field, given this and other events in the recent past. It is The Centre's view that this latest result, seen against the backdrop of a succession of recent setbacks and criticisms against Canada's largest securities regulator, will further compromise public confidence in the OSC. The Centre reiterates its position that the OSC's enforcement failures and declining reputation are the result of an oversight system that is neither adequate nor transparent. Ultimately, it is the duty of the legislature and the government of Ontario to ensure that the OSC is acting in the best interests of the investing public. The Centre for Corporate & Public Governance believes lawmakers should act swiftly on their oversight responsibility to ensure that the OSC is meeting that standard." Source: http://thecentreforgovernance.org/?p=122#comment-442

These reports suggest that corporate governance in Canada and regulatory enforcement are a long way off from the goal of creating fair markets for retail investors.

SPECIFIC CONCERNS/ISSUES

We have not provided detailed comments as we have so many times in the past. Given the sweeping nature of the proposed changes we believe a macro high level feedback approach is more suitable in this instance. Besides our regulatory-related observations above, we have a number of specific practical concerns and comments as follows:

1. Given the enormous economic stress that Canadians firms are facing, we do not feel additional workload for officers or directors is appropriate at this time.
2. There is no persuasive evidence provided that a principles based regime is appropriate for a country with 13 disjointed securities regulators and Acts
3. The ASC raises very good questions and cost-benefit issues that need to be addressed
4. Management, Boards and Audit Committees are heavily loaded dealing with many other CSA regulatory changes
5. Conversion to IFRS by 2011 is creating expenses and diverting precious resources that leaves little room for yet another major CSA initiative. (IFRS is itself a controversial approach to PBR in financial reporting; independent observers claim the approach adds additional risks for investors and significant expenses for issuers)

6. This initiative is not a priority for investor protection .We have stated many times what our concerns are. These include, but are not limited to, increasing limitation Act time periods, oversight of IIROC/MFDA, making complaint handling work, oversight of OBSI, real mutual fund governance, improved industry sales practices /POS disclosure, investor restitution and dramatically improved regulatory monitoring and enforcement, regulatory and criminal.
7. Regulatory exemptions always seem to undermine intent (and often investor protection) and we have no assurance that such practices would not continue under a PBR environment. The 9 principles proposed by the CSA are so broad that it is difficult to see how they are more than a mere restatement of the basic legal and practical duties of a board of directors already in place.
8. A justice system that does not treat white-collar crime as a vicious act of financial assault, a prevailing light touch, wrist-slap attitude that could potentially be amplified under PBR.
9. A lighter approach to regulation might attract more issuers to Canada and business for the TMX (as it has for the LSE) but are these the kind of issuers that will help create retail investor wealth or further savings destruction? Could it be that the commercial interests for the City of London are promoting the principles-based nature of the FSA's regime to gain a competitive advantage over the TMX and NYSE?
10. Before moving to a principles based regulatory regime, a well funded/resourced and independent enforcement arm of a national regulator working under a National Securities Act is required.

We add parenthetically our concern about the role of auditors and corporate governance. Accountants have sought comfort from the 1997 Supreme Court of Canada decision, Hercules Management Ltd. V. Ernst & Young , which found that financial statements in that specific case were not meant to be used for making business investment decisions, but rather to evaluate the performance of management. Although there were misrepresentations in the firm’s financial statements, the court decided that the auditors were not at fault and could not be sued. In effect, in Hercules, the Supreme Court of Canada said that investors cannot sue auditors because of public policy reasons. The law must be changed so that auditors cannot argue that they have no individual "duty of care" to shareholders.

Also , an issuer will risk being second-guessed by institutional investors , investor advocates and corporate governance rankings, which in many cases use more stringent definitions of independence (and may argue that their views best represent the "perception" of independence that is contemplated by the new principles-based approach).This adds risks to issuers and could lead to more lengthy/costly trials in the event of disputes . Additionally, rather than specifying that a board should comprise a majority of independent directors, the proposals identify this as one example of a practice an issuer could adopt to achieve the principle of structuring the board to add value. The proposals treat the composition of the nominating and compensation committees in the same manner. Given all the outrage concerning executive compensation , we are surprised at this, While the proposals maintain the requirement for an issuer to at least have an audit committee that comprises solely independent directors, independence would be determined using the new less specific principles-based definition .

GOVERNANCE related priorities for retail investors

The lack of accountability for the multi-billion dollar Bre-X scandal is incredible. The fact that the Conrad Black had to be tried in the U.S. is shameful as is the sharply reduced jail term for convicted felon David Radler upon his return to Canada from a U.S. prison. The dismal result of the Andrew Rankin tipping/insider trading court case and subsequent OSC settlement was disturbing This was followed by the wrist-slap penalty (a letter of reprimand) in the well-publicized ComDev option backdating case. These outcomes detract from the credibility of regulators and the justice system to effectively deal with economic crime and financial assault. Not only do they not promote deterrence, they embolden chicanery and mal-governance .For Main Street, bread and butter issues are far more important than PBR. For example, to name a few:

1. Require proxy Circulars to permit voting *against* a Director or resolution rather than *with-hold*. [Although directors must be elected by shareholders, we note that traditionally a candidate needs only a plurality of votes to win an election. Maybe regulators should require that candidates receive at least 50% of votes cast to win. We also note also that, according to a 2008 CCGG study, a little more than half of issuers either reported voting results using a "show of hands" or the method was not disclosed or the directors were reported as having been "acclaimed"," passed" or appointed by way of resolution. The CCGG considers any method of disclosure other than the number of ballots cast as sub-optimal. [http://www.ccgg.ca/media/files/reports/The%20Timeliness%20and%20Utility%20of%20Voting%20Results.pdf
2. Introduce rules on "Say on pay". To aid in the access of relevant information for analysis by interested stakeholders and securities analysts, the CSA should follow the SEC lead and implement a requirement to add XBRL tags to compensation data in SEDAR filings.[Are boards/HRCC's on top of executive compensation? The 100 highest paid CEOs of Canadian publicly traded corporations received an average of $10,408,054 in total compensation in 2007. Average CEO pay for the top 100 was up 22% from its $8.5 million average in 2006. Many of the top 100 include Canada' s big bank CEOs, who recently received billions in federal government bailout money to purchase mortgage loans, and energy CEOs who, until recently, were surfing the big wave of crude oil price increases. In 2007, Canada's top 50 CEOs earned 398 times more than the average worker, compared with 85 times in 1995.This is not just a governance issue, it is a social issue. The CEO report is available at www.growinggap.ca and www.policyalternatives.ca.] . See also the OECD's recent comment indicating that income inequality and poverty in Canada have increased sharply since the mid-1990s and is now "reaching levels above the OECD average." http://www.oecd.org/dataoecd/44/48/41525292.pdf

3. Prohibit the sale of SPAC's to retail investors (in fact, the CSA has ignored our suggestion and permitted these high risk companies to be sold to Main Street! in the middle of a 1929 –like market meltdown!)
4. Expand the scope and penalties under civil liability provisions
5. Require that AGM's include the CEO presentation and Q&A as integral parts of the meeting that need to be recorded and minuted.
6. Dramatically increase the dollar value of administrative and other penalties that regulators can impose for regulatory violations.
7. Regulate hedge funds, require mutual funds to install governance boards and eliminate securities lending at least by retail mutual funds (and the voting rights of borrowed securities.). This will not only reduce fund risks but also reduce the subversion of corporate democracy " empty voting" causes. (One of the essential tenets of modern corporate governance is that shareholders control corporate managers through shareholder voting. This notion is founded on the premise that shareholders will vote their economic interests, and the weight of their vote will be proportionate to their economic interest. However, research by University of Texas law professors Henry Hu and Bernard Black reveals that as a result of recent capital markets developments, hedge funds and other large investors can "decouple" voting rights from economic ownership of shares. For example, a hedge fund borrowing shares from institutional investors can acquire the voting rights of the borrowed shares, even though the shareholder who owns the shares retains the economic interest in the shares. Ref http://papers.ssrn.com/sol3/papers.cfm?abstract_id=904004)
8. Decrease insider reporting timeline to 2 days as in the U.S. and increase late filing fees and the cap
9. Clamp down on insider trading and option backdating with serious monetary penalties and other sanctions
10. Director independence, while very important, is not a sufficient criteria. Prohibit issuers from allowing convicted felons to serve as Directors or Investor relations representatives. Directors should be prohibited from serving on public company boards if they are found, in regulatory, civil or criminal proceedings, to have failed in their duties as directors. This would also apply to settlements reached through out-of-court negotiations when such failures are admitted. Directors should also be prohibited from serving on an excessive number of public company boards – in YBM Magnex's case, one director served on 15 boards. Finally, consideration should be given to requiring that all public company board members complete an accredited director education program. Completion or non-completion would be disclosed to shareholders in public documents.
11. Give HRCC's and Disclosure Committees the same stature and prominence as Audit Committees or at least formalize a requirement for their establishment
12. Work with the justice system and IMET to bring more cases to court faster and more effectively

Additionally, Kenmar suggest that certain provisions of the ICGN Statement on Global Corporate Governance Principles regarding shareholder rights be enshrined in the new Instrument. These rights include *Shareholder Participation in Governance,*

Shareholders' Right to Call a Meeting of Shareholders, the right to put resolutions to a shareholders meeting, and the right to participate in major decisions such as a major acquisition.
http://www.icgn.org/organisation/documents/cgp/revised_principles_jul2005.php

We believe these actions will provide far better, faster and more assured benefits to retail investor protection than a change in corporate governance approach.

SUMMATION:

The year 2008 was the worst for investor protection since we have been making assessments. The protective systems have been in decline for years. Please see our Report *Investor Protection in Perspective 2008* available at www.canadianfundwatch.com Investors (victims) quite frankly can't take much more abuse or risks. Our middle class is being decimated. A new corporate governance regime only adds to risks at this juncture.

The proposals leave key governance requirements up to the board to decide if they want to adopt them and how they are to be applied. We do not see how these proposals, as written, will lead to an improvement in shareholder democracy , improved retail investor protection or improved investor confidence in markets. Indeed, we see potential for the opposite effect.

We therefore urge the CSA not to proceed with these proposed changes to corporate governance given the sorry state of investor mood, financial condition and willingness/ability to face any additional risks to their retirement nesteggs. As we believe we've demonstrated herein , corporate governance and regulatory enforcement in Canada have not evolved to the point where a PBR regime can be safely implemented. Investors have lost faith and confidence in the capital markets as a result of scandals, fiascos, excessive executive compensation and lax regulatory enforcement. As we have said so many times before, rules (and/or principles) without enforcement are of little protective value.

There are many foundations to be built before migrating to a principles-based approach to corporate governance/regulation in Canada. We suggest that there are much higher priority actions needed right now to protect small investors, seniors and retirees. Kenmar regard this proposed rule change as not moving in the right direction at this time and therefore not in the public interest.

We hope this submission proves useful to the CSA.

Should you require any additional information, do not hesitate to contact us.

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Investor protection and education

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* The 2004 reduction in limitation periods (2 years in Ontario) is detrimental to victims of financial assault who need more time to deal with such a life-altering issue, yet regulators allowed this legislation to slip quietly by without a word on behalf of investors even though the OSC had taken the initiative to gain an exemption for ***itself*** from the statute of limitation period reduction. demonstrating that the OSC appreciated the compromising nature of the reduction