Deloitte & Touche LLP
Brookfield Place
181 Bay Street
Suite 1400
Toronto ON M5J 2V1
Canada

Tel: 416-601-6150
Fax: 416-601-6151
www.deloitte.ca

April 17, 2009

Canadian Securities Administrators
British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
New Brunswick Securities Commission
Nova Scotia Securities Commission
Office of the Attorney General, Prince Edward Island
Securities Commission of Newfoundland and Labrador
Registrar of Securities, Government of Yukon
Registrar of Securities, Department of Justice, Government of the Northwest Territories
Registrar of Securities, Legal Registries Division, Department of Justice, Government of Nunavut

Me Anne-Marie Beaudoin, Corporate Secretary
Autorité des marchés financiers
800, square Victoria 22e étage
C.P. 246, tour de la Bourse
Montréal, PQ H4Z 1G3
FAX: (514) 864-6381
consultation-en-cours@lautorite.qc.ca

Mr. John Stevenson, Secretary
Ontario Securities Commission
20 Queen Street West
Suite 1900, Box 55
Toronto, ON M5H 3S8
FAX: (416) 593-8145
jstevenson@osc.gov.on.ca

Re: Response to 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*

We are writing in response to the request for public comment made by the members of the Canadian Securities Administrators (CSA). We very much appreciate the opportunity to provide our comments and views on what we believe are important proposals with respect to the Canadian capital markets.

Our comments are organized in two parts. In this covering letter we present our main comments, observations and points of principle. The attached Appendix provides a more detailed commentary and addresses the specific requests for comments.

Our firm is very supportive of the CSA's objective of enhancing the standard of governance and confidence in the Canadian capital markets. While Canada's capital markets are only a small part of the global financial markets, we are a nation with large capital needs and a significant dependency on foreign markets and sources of capital. We must ensure that our capital markets remain attractive to both foreign and Canadian investors, both of whom have many options on where they can invest their savings. If we allow the credibility of our markets to deteriorate relative to other countries, the cost of capital for all Canadian companies will increase, placing an additional burden on our economic prospects.

Current economic environment

Current economic conditions pose a considerable challenge for corporate governance and Deloitte has issued several publications commenting on these issues. The demands on boards have escalated sharply over the past year, reflecting very limited visibility about economic performance and a significant escalation in business risk. While responding to these short term demands, boards must still remain focused on strategic issues, including long-term competitiveness and sustainability. Legal and regulatory exposure has increased significantly for most board members.

At the same time, investor confidence has fallen, reflecting the extreme difficulty of making rational capital allocation decisions in the current market. All of these factors make it timely for the CSA to revisit its corporate governance requirements.

We realize the proposed materials are not intended solely to react to current events, and that they represent work largely carried out before the recent decline in economic circumstances and associated events. Even so, we do have some difficulty in wholeheartedly supporting a set of corporate governance proposals that appears largely unrelated to these events. Although it will take time, we believe there are many lessons to be learned and changes to be implemented. In particular, it appears that many boards have failed to fully appreciate and respond to the full extent of the risks attaching to the organizations they oversee. We believe the area of risk oversight deserves additional attention from the CSA, both in setting expectations and in defining disclosure obligations, and have set out our thoughts in this regard in the Appendix. This is of course an international concern, not solely (or even primarily) a Canadian one, and therefore the way forward from here demands international information sharing and collaboration.

For most boards, as they attempt to engage with their many and still-evolving challenges, we believe the proposed materials will add relatively little to their understanding of their minimum basic duties. This is not to say that it is primarily the CSA's responsibility to educate directors on this matter. However, we do think the CSA should play an important role in interacting with boards, institutions, and groups such as the Canadian Coalition for Good Governance, to assist in sensitizing directors to their responsibilities and in contributing to ongoing improvement in practice.

Even if one agrees that the proposed changes in the materials would improve corporate governance, it seems unlikely to us that, in today's volatile economic environment, any board's time would currently be best spent contemplating and fine-tuning these matters. Promoting integrity, managing conflicts of interest and the other principles put forth in the proposed instrument are important, to say the least, and we believe most boards promote these principles and adhere to them in a diligent manner. However, in the current environment, we do not believe board members should devote much of their valuable time and attention to fine tuning these procedures.

Moving away from a "comply or explain" model

We worry that the shift from a "comply or explain" to a principles-based approach to disclosure could reduce the degree of rigour the current disclosure requirements contribute to corporate governance.

For example, current form 58-101F1, item 7(b) prescribes: "If the board does not have a compensation committee composed entirely of independent directors, describe what steps the board takes to ensure an objective process for determining such compensation." This requirement at least provides a general starting point for assessing the compensation-setting process's objectivity, and ensures some degree of comparability as to how issuers address this area in their disclosures. 7(c) then requires a specific description of the compensation committee's responsibilities, powers and operation.

The proposed materials replace this guidance with: "Describe any practices the issuer uses to establish and maintain appropriate compensation policies for executive officers and directors." On the face of it, this requirement could be satisfied with a vague description of the fact of having a compensation committee and of its broad mandate. A plain reading suggests then that overall disclosure quality might well deteriorate under the proposed new model; it is certainly difficult to see how the proposals would promote better disclosure than currently provided.

For the same reason, it is difficult to see how the proposed wording would promote any particular consistency or comparability between one issuer's disclosure and the next. This would only create difficulties for any users seeking to make comparisons between the governance practices of different companies.

The "comply or explain" approach is not without its issues. But to take one point of comparison, the general perception in the United Kingdom, which follows such an approach under its "Combined Code on Corporate Governance," is that explanations are usually the basis for discussion with shareholders and facilitate a better understanding of the organization; such disclosure can promote meaningful dialogue over what constitutes sensible departures from the guidance provided. We would encourage the CSA to liaise with the U.K.'s Financial Reporting Council, which is currently performing a review of their Code and specifically requesting comments on, among various other matters, how the "comply or explain" mechanism can be improved.

Overall recommendation

Overall, we would encourage the CSA to study carefully the comments it receives on its proposal, but also to extend the scope of its thinking to consider the broader question: What actions will maximize the likelihood that Canadian public entities receive the optimum quality of corporate governance, relative to the complex mix of stakeholder needs and to the challenges in the external environment? Again, we realize that the CSA's role in this is a subtle one, limited by the nature of its role and its rule-making authority. However, we believe the proposed materials would be more effective and impactful as part of a "strategic package" rather than as a stand-alone initiative. This "package" might include better defined collaboration with other key parties, a more prominent focus on corporate governance in the CSA's key messaging, a greater role in director education (communicating best practices and so forth) and more active and visible participation in global governance initiatives.

In this regard, we think that the Organisation for Economic Co-operation and Development's (OECD) recent report *Corporate Governance Lessons from the Financial Crisis* is an excellent starting point for further discussion and activity, focusing in particular on how and why corporate governance arrangements have so often failed to guard against excessive risk-taking by the underlying entities. We also expect there to be extensive examination of expectations for compensation committees, and encourage the CSA to play an active role in further evolving and enhancing this crucial aspect of governance.

This strategic package could also include more explicit connections between different CSA initiatives. For example, although we realize the reasons behind it, it seems unfortunate that no specific requirements have been defined for compensation committees in reviewing or approving the executive compensation disclosures set out in Form 51-102F6, or that no specific commentary has been provided on what constitutes continuing “financial literacy” for audit committee members in connection with the transition to International Financial Reporting Standards (IFRS).

Again, we appreciate the opportunity to comment on the proposed materials. We will be pleased to discuss any of our comments further if required.

Yours truly,

Deloitte & Touche LLP

Don Wilkinson
Vice Chair
Deloitte & Touche LLP

Appendix A

Responses follow to the specific requests for comment:

Principle 6 - Recognize and manage conflicts of interest, Principle 7 – Recognize and manage risk, Principle 9 – Engage effectively with shareholders

1. We think the usefulness of the guidance provided for these principles would likely vary heavily from one board to the next, being most useful in general for boards of smaller organizations seeking to improve their practices. We doubt that the guidance would be particularly useful for more sophisticated boards. Principle 6, on conflicts of interest, is described in the most detail and may be the most useful overall. Principle 9, regarding engaging effectively with shareholders, goes no further than a very high-level discussion of *some* aspects of stakeholder engagement. In our view, Principle 7, regarding the recognition and management of risks, is inadequate: this material would not likely be sufficient to sensitize board members to their responsibilities, nor to the information they should expect from management, to the extent we believe would be desirable.

   We agree that boards play a critical role in overall risk oversight and in ensuring that the appropriate systems are in place to effectively manage an entity's principal risks. From our perspective, board responsibilities with respect to risk oversight include:

   - Setting the tone at the top, communicating the risk-taking philosophy and defining risk information requirements;
   - Reviewing and approving the company's integrated risk management (enterprise risk management) framework;
   - Linking the risk framework with the company's corporate strategy;
   - Approving the company's risk appetite and tolerances as part of the annual business plan;
   - Ensuring appropriate risk metrics are selected to track organizational and executive performance;
   - Approving a risk inventory and fundamental risk parameters, such as risk measurements, risk appetite, and tolerance levels; and
   - Monitoring the quality of integrated risk management program implementation and ongoing effectiveness of risk management.

   We believe disclosing the key elements of an organization's risk management, including the board's oversight, would provide investors with important information, of a kind that might truly impact their investment decisions. Disclosing this information would also help achieve the overall objectives of effective corporate governance. We suggest that companies should be required to disclose the following with respect to their framework for risk oversight and management:

   - Whether overall risk policies are in place and have been approved by the board, and whether such policies include articulating the company's risk tolerance;
   - Whether an overall risk framework has been established by management and approved by the board;
   - The nature and frequency of reporting to the board by management about the principal business risks impacting the organization;
   - Whether risk indicators have been established by management to monitor key risks, and whether this information is regularly reviewed by the board;

- The nature and reporting to the board by management regarding scenario planning and sensitivity analysis around reasonably possible outcomes; and
- How risk management has been embedded into the company's performance management and resource allocation processes.

If, for whatever reason, the CSA does not want to require these disclosures, we recommend at a minimum that these key elements of risk management and oversight be included within the "examples of practices" attached to Principle 7.

Level of detail

2. As set out above, we do not think the level of detail in the commentary and examples of practices will consistently provide useful guidance, at least for larger public companies; perhaps they will be more useful for some smaller public companies. It is also difficult to see how a "principles" approach will provide more assistance to investors than the existing requirements currently provide. Although the existing requirements may frequently have generated boilerplate information, and did not address some areas encompassed by the proposed disclosures, we suspect these problems could be dealt with through incremental amendments and by principled regulatory example-setting, rather than through the change of direction envisaged.

   Moreover, some of the items specifically included in the current instruments appear to have been omitted from the proposed materials. For example, NP 58-201 (3.4(f)) specifically refers to internal controls and management information systems as an area for which the board should explicitly acknowledge stewardship responsibility in its written mandate. This area is not specifically included anywhere in the proposed materials. In the United States, responsibility for oversight of internal controls is specifically allocated through the Sarbanes-Oxley Act (SOX) requirements to the audit committee, and the New York Stock Exchange (NYSE) requirements allocate this oversight responsibility to the full board.

Merits of a principles-based approach versus a "comply or explain" model

3. We do not have an overarching philosophical position on the relative merits of principles-based and "comply or explain" disclosure. However, on the specific subject of corporate governance, given the general nature of the proposed principles and the fairly minimal guidance on what is to be disclosed, we do question whether the proposed materials will result in better disclosure than the current requirements, whether measured by degree of detail, overall clarity, or consistency between reporting issuers.

Appropriateness of level of disclosure

4. As noted above, we do question whether the level of disclosure will generally be useful. Principle 7 again provides the best example of the likely limitations. Investors currently have, and are likely to have for the foreseeable future, considerable anxiety regarding whether public companies are adequately identifying, managing and disclosing risk. Risk management, if implemented appropriately, is typically an enormously complex, multi-faceted process involving difficult judgments and constant reassessment. Disclosing "a summary of any policies on risk oversight and management" would not likely add materially to an investor's understanding of, or confidence in, this area.

Venture issuers

5. With respect to venture issuers generally, we are strong supporters of "proportionate regulation," as one size does not necessarily fit all; we believe it is appropriate to take a pragmatic perspective. The current requirements make distinctions between the requirements for venture and non-venture issuers. We support continuing such distinctions in the replacement requirements, to help venture issuers develop corporate governance practices that are appropriate, accretive and meaningful for issuers of their size.

Definition of independence and removal of bright-line tests

6. We agree that the concept of perception is broader in this context than that of expectation. However, taken in plain language terms, it is not clear to us that the proposed revision can be applied more effectively than the current standard. It appears to us that the existing standard allows the board of directors, using their best judgment and applying their knowledge of their fellow board members, to make an assessment that a particular member will apply independent judgment. Some existing circumstance might cause some external observers, who may not have full knowledge of the relevant facts, to disagree with this assessment, but if so they can factor this disagreement into their decision-making about the issuer. The proposed revision would require the board to identify any such perceptions that might exist and then, further, to assess whether those perceptions are reasonable. This seems to us a hopelessly difficult standard. It is very difficult to conclude objectively that a third party's perception, if based on at least *some* knowledge of the facts and on having engaged with the specific circumstances, is not reasonable, even if a knowledge of all the facts would have changed that party's perception.

   The guidance in part 3 .1 of the proposed companion policy 52-110CP states that "a director's independence could be affected if he or she…" and then lists seven sets of circumstances. However, if these situations are pre-defined as possibly affecting independence, then it follows logically that a perception of possible interference with independent judgment in those circumstances cannot be entirely unreasonable. The board may have satisfied itself in particular circumstances that no concern exists, but it would appear impossible to conclude that an external observer not as intimately acquainted with the individual or with all the detailed facts would be "unreasonable" in continuing to perceive a possible challenge to independent judgment.

   We also have concerns that the proposed changes may have a significant adverse affect on venture issuers' ability to attract competent board members. With venture issuers, competency is of paramount importance – to lose a highly competent board member because a "reasonable" (but even so mistaken) person *might* perceive that they *might* not act independently would be an unfortunate outcome. We also emphasize the importance of ensuring that any change in the CSA's requirements be fully reflected in the TSX Venture Exchange's independence definition, to avoid potential confusion and/or unwieldy disclosure.

   Overall, we agree with the concerns expressed by the Alberta Securities Commission (ASC) and we believe the general direction they propose (depending on how specifically articulated) would likely be preferable.

"Reasonably perceived" standard

7. We believe it is sufficiently clear that the phrase "reasonably perceived" applies a reasonable person standard. However, as set out in the preceding point, we do not believe the issue of assessing the independence of an individual committee member is best approached through such a standard.

Sufficiency of guidance to appropriately determine independence

8. We agree that the factors set out in the policy are valid examples of instances in which a director's independence could be affected. However, we are not sure this is the most compelling issue at the current time. The proposed materials do not contain any additional commentary or amended requirements, for example, regarding the financial literacy of audit committee members. However, if there is an expectation gap between what investors might expect from the audit committee and what it can reasonably provide, this is much more likely to lie at the heart of the problem. Rapid changes in accounting standards, almost always generating additional complexity and subtlety, and the challenges of applying existing standards in the current economic climate (given, for example, the additional difficulty in matters relating to fair value accounting, recognizing and measuring impairment and so forth) place considerable strain on the abilities of even the most up to date and expert practitioners. The pending transition to IFRS will likely considerably dilute the value of committee members' historical experience in overseeing the application of accounting standards. Overall, while a challenge to a director's independence may or may not in practice undermine their contribution to the audit committee, a weakness in their financial literacy certainly will do so. We think any consideration of corporate governance at the present time should provide at least some updated commentary on how committee members should consider their obligations in this area.

Independence from issuer and management and not from control person or majority shareholder

9. (a) and (b) We do not object to excluding a relationship with a control person or significant shareholder from the list of specified relationships that could affect independence. There appears to be little question that individuals subject to such relationships could in some circumstances carry out an audit committee member's duties with sufficient independence. If this is not true for any individual member, this should be detected through the operation of the other principles articulated.

   (c) If the CSA is satisfied that such relationships need not be defined as relationships that could affect independence, then some caution would be required in suggesting that a certain proportion of such relationships would be inappropriate for a board as a whole. We understand that in particular circumstances there may be strong perception-based or other reasons why a board may, for example, wish to demonstrate greater diversity, but these need not entail that the board could not have added appropriate value or been fully effective otherwise. Still, perhaps a well-articulated discussion on this point would help in stimulating discussion and self-examination on the part of some boards.

Usefulness of required disclosure on director independence

10. We are not sure that any great empirical research has been carried out to demonstrate the value of such disclosures for investors. Presumably most retail investors would rely on the media or other intermediaries for their insight into a particular board's strengths and weaknesses. It is particularly difficult to know how investors might weigh information on director independence relative to the hundreds of other components that explicitly or implicitly contribute to an investment decision, given that the correlation between independence (within the structure in the proposed materials) and effective board contribution would vary greatly from one individual to the next. Still, the proposed disclosures may have some minor incremental value.

Effective date

11. We think that at least six months' advance notice of the new regimes' implementation would likely be the minimum appropriate period.

Comments follow on the questions set out in appendix A to the CSA's request for comment.

Replacement of "reasonable person" test

1. As set out in our comments above, we agree with the ASC's concern that a test based on "reasonable perception" is not well suited for this purpose. We agree that it would be superior to allow the board to determine subjectively, based on a reasonable analysis, whether a director is independent.

Impact of current materials on controlled issuers

2. We think investors will generally expect that the financial statements reviewed by the audit committee represent the collective input and knowledge of management, as overseen and certified by the CEO and CFO. Investors expect the audit committee to engage knowledgeably with these financial statements, for example questioning management on the appropriateness of major assumptions and on any major points of judgment or uncertainty. In some cases, a committee member's active involvement in day to day management could be a net positive factor, by attuning that member to the key issues without diluting his or her ability to raise appropriate questions within the committee. In others though, it might (for example) increase the likelihood of the committee member's perception of certain issues being aligned with management's to the extent that the member would be unlikely to provide additional value from within the committee. Overall, we think it makes sense to cite involvement in the issuer's day to day management as a factor that *could* affect independence, while leaving the door open to conclude that it might not do so in particular circumstances. Possibly the discussion in the companion policy could be expanded to provide further guidance on this area. For example, the concern might be less where the committee member's involvement in management is confined to certain defined operating matters, with no input into the financial reporting function.

Best available directors

3. We agree with the implied concern that there is a very fine line between stating that a director's independence "could be affected by" certain relationships, and defining a rebuttable presumption that it *will* be affected by such relationships. This appears particularly problematic, as already argued, when the overall test is based on "reasonable perception." On the other hand, if an audit committee consisted entirely of individuals subject to one or more of the relationships set out in section 3.1 of the proposed policy, investors might legitimately question the entity's commitment to establishing a rigorous audit committee review process. We would not necessarily object to some middle ground that provides overall insight into the analysis underlying the audit committee's composition, but perhaps with less emphasis on the analysis applied to each individual member. Possibly some approach similar to that proposed in 3(c) of the ASC's specific requests for comment could be appropriate.

   We think in theory it should be possible for an organization to make it clear that the term "not independent" is used within a particular regulatory framework and does not constitute a broader comment on the individual's quality or contribution. However, as set out in 6 above, although we do not have any direct empirical information on this point, we do have some concerns about how the proposals might impact on venture issuers.