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April 20, 2009

Via E-Mail

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, 22^{e} étage
C.P. 246, Tour de la Bourse
Montréal, Québec H4Z 1G3
By Email: consultation-en-cours@lautorite.qc.ca

and

John Stevenson, Secretary
Ontario Securities Commission
20 Queen Street West
Suite 1900, Box 55
Toronto, Ontario M5H 3S8
By Email: jstevenson@osc.gov.on.ca

Dear Madame Beaudoin and Mr. Stevenson,

Re: 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*

Nexen Inc. is an independent, Canadian-based global energy company, listed on the Toronto and New York stock exchanges under the symbol NXY. We voluntarily file our annual report on Form 10-K in the U.S. and Canada. We believe that strong and transparent governance practices result in better decision-making and corporate performance. We strive to continuously improve our governance standards and practices and welcome the opportunity to comment on the Proposed Materials.

To preface our responses to the specific requests for comment, we would like to express support for the current governance regime in Canada. It provides a sound basis upon which compliance can be determined and improvement readily quantified. We also support the inclusion of current best practices, some of which form the Proposed Materials, which have evolved in Canada in response to developments in U.S. securities regulation and the encouragement of various corporate governance and shareholder interest groups.

We also feel it important to comment generally on the use of principles-based regulation, as contemplated by the Proposed Materials. As you are no doubt aware, the use of principles-based regulation has recently gained popularity in many jurisdictions in the world, including the UK and Australia, as a means to set the standards by which companies do business by de-emphasizing processes, rules and prescriptive detail. The experience of the UK Financial Services Authority with principles-based regulation suggests that this approach to regulation is difficult and easily misunderstood, and can only be successful if the vacuum of detailed rule and process is filled with some fixed points of reference in which an issuer can find safe harbour – perhaps a rationalized set of rules and detailed regulatory objectives – in addition to a degree of certainty in the scope and enforcement of the principles. In this regard, we consider the Proposed Materials incomplete. Without additional detail on the objectives and enforcement practices required to administer these principles we are unable to fully assess the implications of these changes to our governance practices and disclosure and comment accordingly.

1. Do you think Principles 6, 7 and 9 provide useful and appropriate guidance? Does this guidance appropriately supplement other corporate law and securities law (including legislation and decisions of Canadian courts) relating to these areas?

Principle 6 – Recognize and manage conflicts of interest

We are in full support of the establishment of a formal system of oversight and management of actual and potential conflicts of interest. A conflict of interest policy and related party transaction policy are expected to address this requirement.

Principle 7 – Recognize and manage risk

We do not object to this principle *per se*, but we question whether this principle is appropriately raised in the context of NP 58-201 Corporate Governance Guidelines. The subject strikes us as one of business judgment and which is addressed thoroughly by financial reporting standards, disclosure regulation such as NI 51-102 and common law. At the very least, the principle requires additional guidance which contemplates recent jurisprudence on the subject from the courts of both Canada and the United States.

Principle 9 – Engage effectively with shareholders

Effective engagement with shareholders is a critical component of good governance and we support the inclusion of this principle, though we are uncertain as to how far this principle is intended to apply beyond the requirements of Canadian corporate law and a pragmatic use of company resources. Smaller issuers, or issuers with large retail holdings, will need to have different engagement practices than a large issuer with institutional shareholders.

2. Does the level of detail in the commentary and examples of practices successfully provide guidance to issuers and assistance to investors without appearing to establish "best practices"?

It is clear that the Proposed Materials are not aiming to create obligatory practices or minimum requirements; however, we refer to our previous comments on the desirability of limited rule-based guidance and enforcement certainty in a principles-based approach to regulation. We are concerned that without a baseline level of comfort the marketplace risks a reduction in the quality of governance practice and standard of disclosure across the country through an overly cautious approach to governance disclosure and reluctance to innovate. In our opinion, issuers and interested stakeholders have responded positively to the current structure of "comply or explain", adapting and extending where valuable and appropriate. A foundational structure of governance guidelines serves issuers and the market in which they participate. Stability, consistency and the ability to make comparisons is paramount in today's marketplace. Stakeholders want to see that issuers are meeting a standard, and if not, why not. The current guidelines have been carefully considered, critically assessed and support best practices within the global arena. The move towards a permissive principles-based structure could threaten the governance leadership Canada has demonstrated by incorporating the ability to disregard governance principles in part, or in whole.

3. In your view, what are the relative merits of a principles-based approach for disclosure, compared to a "comply or explain" model?

We understand the appeal of principles-based regulation is that principles apply broadly across a diverse range of circumstances which permit an issuer to adapt to meet rapidly changing conditions without becoming trapped by outdated rules and processes which might prevent the desired outcome. However, the movement away from a "comply or explain" model towards a permissive, principles-based approach may come at a cost to: (i) continuing with the establishment of minimum governance standards, with which all issuers are free to comply (or not, with explanation); (ii) the certainty of compliance with specific guidelines and other "bright-line" tests; and (iii) enabling comparability across issuers and over time.

It is possible to draft fulsome guidance to support broad-based principles, within a "comply or explain" framework and incorporate diverse company sizes and circumstances. See the "Preamble," "Main Principles," "Supporting Principles" and "Code Provisions" within The Combined Code on Corporate Governance, Financial Reporting Council ("FRC"), June 2008 ("Code") and Guidance on Audit Committees, FRC, October 2008. This Code at the outset reads that the "comply or explain" approach has been in operation in the United Kingdom since 1992, offers flexibility, and "[s]maller companies, in particular those new to listing, may judge that some of the provisions are disproportionate or less relevant in their case." In addition, the Code reads that "where a company has taken additional actions to apply the principles or otherwise improve its governance, it would be helpful to shareholders to describe these in the annual report" (page 1) and "Companies and shareholders have a shared responsibility for ensuring that "comply or explain" remains an effective alternative to a rules-based system." (page 2). In other words, compliance with the Code should not be "evaluated in a mechanistic way and departures from the Code should not be automatically treated as breaches."

We are concerned that the nine principles, together with commentary and "examples of practices" upon which issuers may wish to report, are sufficiently ambiguous making way

for compliance uncertainty, variability, confusion and lack of comparability to be introduced into the marketplace and investor community. We submit that the presence of the guidelines within NP 58-201 has augmented corporate governance practices for Canadian issuers, as the guidelines were fully intended to do. It has been Nexen's experience that the presence of tangible guidelines, against which reporting must occur, provides a foundation and framework for effective corporate governance practices. Issuers are free to choose which standards to extend in tailoring the guidelines to suit specific business needs and philosophies. A number of our practices have been recognized in this regard for being innovative.

We are in favour of continuing with the "comply or explain" approach of the sixteen guidelines within NP 58-201, with guidelines modified, added or subtracted as necessary and appropriate.

4. Is the level of disclosure required under each of the principles appropriate both from an issuer's and an investor's point of view? Specifically, do you think the disclosure in respect of Principles 6, 7 and 9 provided useful information to investors?

We submit that the addition of two of the three new principles, namely conflicts of interest and shareholder engagement, is useful (as mentioned, we feel risk management is adequately addressed in other areas of securities and financial regulation), but more so under the current regime of "comply or explain". As discussed previously, we are concerned with the departure from established governance standards that require explanation in the case of non-compliance, the certainty of compliance with specific guidelines, and the comparability of practice and disclosure for issuers.

5. Should venture issuers be subject to the same disclosure requirements concerning their corporate governance practices as non-venture issuers?

It is important that the market reflects the same standard of governance practices with consistent disclosure though we recognize that as a question of size and resources that several standards of reporting amongst different classes of issuers currently exist. We question whether venture issuers will have, or can afford, the resources and expertise required to interpret the principles and related guidance. The "comply or explain" approach may be preferable to these issuers for that reason.

6. In your view, what are the relative merits of the proposed approach to independence compared to the current approach?

We believe that the current definition of independence, based on reasonable expectation and bright-line tests, is preferable to the proposed definition, based on the perception of a "reasonable person" and the guiding of a board of directors through indicia. In that regard, we support the comments of the Alberta Securities Commission on this subject.

Nexen has developed and disclosed comprehensive categorical independence standards for determining director independence that are based on a foundation of explicit, bright-line tests, supplemented by other best practices; and the subjective and reasonable affirmation of independence by Nexen's board of directors. The movement away from bright-line tests to indicia; and away from the informed business judgment of a board towards a third party and less experienced standard, could incorrectly result in an accusation of conflicted judgment. This shift threatens the well-established deference to the business judgment of a board of directors. The ability to exercise independent

judgment within the boardroom cannot be better evaluated by anyone but the board of directors. Bright-line tests are a tangible means to support the subjective decisions regarding independence that are made by the board.

The proposed definition creates sufficient ambiguity and potential conflict between the subjective and reasonable view of a board of directors and the views of broad constituencies possessing divergent, specific or vested interests. A director may lack definitional independence but possess independence of mind, character and integrity within a boardroom, as well as other competencies and attributes that may make him or her very effective as a director. Effective directors may be dissuaded from board participation by the implication that they lack the capability to exercise independent judgment.

In our view, the independence of a director —and in particular, the director's displayed ability to think and act independently from management within the boardroom context— should be (i) seen as a necessary but not sufficient condition for director and board effectiveness; and (ii) determined, documented and disclosed by formal bright line tests of materiality and the collective experience and informed, well-reasoned subjective judgment of a board of directors. The proposed approach may unnecessarily curtail the already shrinking pool of skilled directors.

We also point out that any changes to the independence standards must permit inter-listed issuers to meet the requirements of other jurisdictions and stock exchanges.

7. Is it sufficiently clear that the phrase "reasonably perceived" applies a reasonable person standard?

It is not clear that the phrase "reasonably perceived" applies a reasonable person standard. A plain language meaning could be that a "reasonable perception" is a broader and vague concept which does not achieve an objective standard. When comparing "reasonably perceived" to reasonable person, there is lack of clarity regarding the point of view or frame of reference.

The reasonable person standard is well established at common law. Any variation from that standard will add ambiguity to application of the principle. Moreover, it is not clear to us that the reasonable person standard is the most appropriate standard to be applied to the complexities of determining director independence.

8. Is the guidance in the Proposed Audit Committee Policy sufficient to assist the board in making appropriate determinations of independence?

As stated in item 6, we favour the application of bright-line tests, rather than a non-exhaustive list of relationships that *may* affect a director's independence.

9. The proposed definition provides that independence is independence from the issuer and its management, and not from a control person or significant shareholder. Given this definition:

- **a) Should a relationship with a control person or significant shareholder be specified in section 3.1 of the Proposed Audit Committee Policy as a relationship that could affect independence?**
- **b) Should such a relationship be solely addressed through Principle 6 – Recognize and manage conflicts of interest as proposed?**

c) Is it appropriate to include as an example of a corporate governance practice that an appropriate number of independent directors on a board of directors and audit committee be unrelated to a control person or significant shareholder?

We do not view a control person or entity as independent and suggest that the current application of bright-line testing is appropriate for the determination of independence in this context.

10. Does the required disclosure on director independence provide useful and appropriate information to investors?

Please see response in item 6 above. The creation of negative presumption is harmful as it improperly assumes that a particular relationship will impede the exercise of independent judgment unless proven otherwise. The collective experience and knowledge of the board of directors, who may subjectively and reasonably come to a different conclusion, is secondary where we feel it should be primary.

11. Do you think our proposal regarding the effective date adequately addresses the needs of both venture and non-venture issuers?

If reporting issuers determine to take the examples of practice and further develop their corporate governance practices and disclosure, the undertaking will require significant effort. Six months is not a reasonable time frame for issuers who do not currently have formal processes or frameworks for managing conflicts of interests and risk oversight.

Yours truly,

/s/ Rick C. Beingessner

Rick C. Beingessner
Vice President, General Counsel, Corporate

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