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CANADIAN BANKERS ASSOCIATION

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Alberta Securities Commission
Saskatchewan Financial Services Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Nova Scotia Securities Commission
New Brunswick 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, Dept. of Justice, Govt. of the Northwest Territories
Registrar of Securities, Legal Registries Division, Dept. of Justice, Govt. of Nunavut

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and

John Stevenson, Secretary
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Email: jstevenson@osc.gov.on.ca

Dear Sirs and Mesdames:

Re: CSA's Proposed Revised Corporate Governance Instruments and Policies

The Canadian Bankers Association ("**CBA**") works on behalf of 50 domestic chartered banks, foreign bank subsidiaries and foreign bank branches operating in Canada and their 257,000 employees to advocate for efficient and effective public policies governing banks and to promote an understanding of the banking industry and its importance to Canadians and the Canadian economy.

The CBA welcomes the opportunity to provide the Canadian Securities Administrators ("**CSA**") with our comments on the proposed revised National Policy 58-201 *Corporate Governance Principles*, National Instrument 58-101 *Disclosure of Corporate Governance Practices*, National Instrument 52-110 *Audit Committees* and its related Companion Policy that were published for comment on December 19, 2008 (the "**Proposed Rules**").

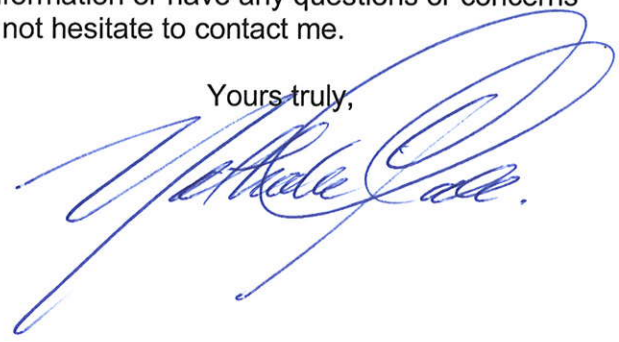
The Proposed Rules generally contemplate an expansive overhaul of the existing governance regime. It is our understanding that the CSA has proposed revising the governance regime in part to address concerns of closely held issuers and venture issuers, and we acknowledge the importance of responding to the concerns of these issuers. However, we are concerned that the expansive approach proposed would undermine the effect of positive developments that have occurred in Canadian corporate governance practices to date due to regulatory initiatives and voluntary adoption by Canadian companies of best practices. Further, we do not believe that the value added by the Proposed Rules for investors or shareholders is sufficient to justify the increase in compliance costs, as well as possible uncertainty and confusion in the marketplace, that may result from moving to a new governance regime. Accordingly we recommend that the CSA retain the existing rules, or refine them to address concerns particular to closely held issuers directly.

If implemented, the Proposed Rules would require significant amounts of due diligence, including high levels of engagement by boards of directors. We note that the CSA has indicated that they recognize issuers will need a reasonable amount of time to familiarize themselves with the new corporate governance and audit committee regimes, and has indicated its intention to provide at least six months advance notice of the implementation of the new regimes. In the current economic context, both issuers' staff and boards have significant responsibilities that are both time and resource-consuming, and we submit that the Proposed Rules should not detract from issuers' business initiatives during the economic downturn. As such, we recommend that should they be implemented, the effective date be set at one fiscal year after issuers' first year-end following release of the final version of the Proposed Rules.

While our view is that the sweeping changes contemplated by the Proposed Rules are not necessary, our detailed comments on the Proposed Rules are outlined in the attached Appendix A for your consideration in the event that the CSA chooses to proceed with the changes.

We have appreciated the opportunity to express our members' key concerns regarding the Proposed Rules. Should you require any further information or have any questions or concerns regarding the foregoing or the attached, please do not hesitate to contact me.

Yours truly,



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APPENDIX A

Our specific concerns are set out below with the paragraph headings corresponding to the respective principles outlined in the proposed Form 58-101F1 *Corporate Governance Statement* ("**Form 58-101F1**") and, where relevant, the principles in the proposed National Policy 58-201 *Corporate Governance Principles* ("**NP 58-201**") and the proposed National Instrument 52-110 *Audit Committees* ("**NI 51-110**"), (together, the "**Proposed Rules**"). Generally speaking, our comments focus on requirements in the Proposed Rules that we believe to be overly prescriptive or duplicative of existing requirements under securities and corporate law.

Principle 1 – Create a framework for oversight and accountability

Principle 1 of Form 58-101F1 would require increased disclosure regarding the reporting issuers' governance framework, particularly the roles and responsibilities of the board and committees and the terms of their mandate or charter. While this information is fundamental to understanding the corporate governance of an issuer, it can be voluminous especially if the issuer has developed formal mandates or charters and corporate governance guidelines, which many issuers have. It may be preferable for the CSA to allow issuers to provide such information on their websites with references to the web address and only a summary of the information in the disclosure document itself. We also recommend that the CSA add a provision similar to section 6.1 of Companion Policy 52-110CP (incorporation by reference) to clarify that any disclosure required by NI 58-101 may be incorporated by reference provided the procedures set out in National Instrument 51-102 *Continuous Disclosure Obligations* ("**NI 51-102**") are followed.

Subsection d(iii) under Principle 1 of Form 58-101F1 provides that the issuer must, for each standing committee of the board, describe the qualifications of its members. This is duplicative of item 7.1(d) of Form 51-102F2 (proxy disclosure of present and past occupation, business or employment of each director and proposed director). For audit committee members, it also duplicates the requirements of NI 52-110 (audit committee members must be financially literate and issuers must provide disclosure of members' relevant education and experience). Furthermore, principles 2, 3 and 4 of Form 58-101F1, as proposed, already require certain disclosure (e.g. value-added board, effective directors, and continuous improvement of board performance) which will provide readers with a great deal of relevant information, including expectations for directors and on-going education. Accordingly, our members recommend deleting subsection d(iii) under Principle 1 of Form 58-101F1.

In addition to being duplicative, there are other concerns with requiring issuers to pinpoint what makes an individual "qualified" to sit on a particular committee:

- It is best practice to focus on the composition of the board as a whole to ensure it has the right mix of skills and competencies.
- In contrast to audit committees, there is not necessarily a consensus on what would make a director "qualified" to sit on a nominating committee or a compensation committee, for example, aside from established qualities such as independence, willingness and capacity to serve, and so on.

We also note that the possibility that such disclosure could increase the chances that a director will be singled out in civil litigation by virtue of having certain "qualifications"; similar concerns led the Securities and Exchange Commission of the United States (the "**SEC**") to create a "safe harbour" for directors identified in disclosure and audit committee financial experts.

The Commentary to Principle 1 in NP 58-201 states that "in general, the board is responsible for setting the overall vision and long-term direction of the issuer, including risk and return expectations and non-financial goals". We suggest "non-financial goals" should be made less pointed; for example, it could be changed to "performance goals". The reference to "non-financial goals" suggests an obligation on the board that is potentially in conflict with, and may lead to confusion with, the board's obligations under corporate law regarding the business and affairs of the company. In addition, we respectfully submit that disclosure regarding an issuer's non-financial goals is already covered by other reporting obligations, such as the disclosure regarding the general development and description of the business which is required under Items 4 and 5 of Form 51-102F2 *Annual Information Form*.

Lastly, we recommend that the references to "executive officer[s]" in Form 58-101F1 and NP 58-201 be replaced with "management". "Executive officer" is a defined term under NI 51-102 that is used by issuers to identify a specific group of individual officers for the purposes of that instrument. This group may be too narrow or overbroad, depending on the issuer, for the various contexts "executive officer[s]" is used in Form 58-101F1 and NP 58-201. On the other hand, the term "management" – which has a well-understood meaning in corporate law ("directors... shall manage or supervise the management of the business and affairs") – provides issuers with needed flexibility in interpreting the Proposed Rules and would still capture the relevant individual or group for the purposes of Form 58-101F1 and NP 58-201. For example, the Commentary to Principle 2 in NP 58-201 states that "the board's role is to provide strategic leadership to the issuer and *to supervise the performance of executive officers*" (italics added). We recommend that the italicized part of the sentence be changed to state the following: "the board's role is to provide strategic leadership to the issuer and *oversight of the performance of management*". It seems to us that the term "management" would better capture the CSA's intent in the context of this principle. We note that this comment applies to wherever the term "executive officer" is used in the Proposed Rules.

Principle 2 – Structure the board to add value

It is important that governance disclosure requirements not act as deterrents to recruiting good candidates. We believe that the disclosure required by subsection (d) under Principle 2 of Form 58-101FI could make it more difficult for issuers to recruit suitable candidates for board membership. The relatively small pool of Canadian director candidates with the necessary business competencies necessarily increases the likelihood that candidates may have relationships with various issuers and each other. For example, in the case of a major Canadian bank, it is quite likely that a candidate, either personally or through an associate or affiliate, has a banking relationship with the bank. The need to disclose personal or sensitive information to explain why the candidate is independent, even where the relationship is immaterial, could act as a disincentive for the candidate to stand for election.

Our specific concerns and suggestions regarding subsection (d) are as follows:

- The requirement in clause (i) to disclose "a description of any relationship with the issuer or any of its executive officers that the board considered in determining the director's independence" is out of step with similar disclosure requirements in the U.S. that require disclosure by category or type of relationship. If retained, this clause should be changed to require disclosure of the general nature, by category or type, of relationships the individual directors have with the issuer without requiring the provision of specific information about individual relationships. In addition, issuers should be permitted to disclose categorical standards for what would or would not constitute a material relationship between the issuer and an independent director and whether each of the independent directors meets those standards. If he or she does, the basis for the board's determination would not have to be disclosed; but if the director did not, the basis for the board's

determination of independence, notwithstanding the categorical standards, would have to be disclosed and explained. The model for this alternative is section 303A.02 of the New York Stock Exchange ("**NYSE**") Corporate Governance Standards.

- Section 3.1 of the proposed revised Companion Policy 52-110CP lists relationships between an issuer and its directors that could affect a director's independence. The Alberta Securities Commission (ASC) has commented that these proposed disclosure requirements may have a detrimental effect on an issuer's ability to attract and retain the best possible directors. We concur with the ASC's view and also note that providing such disclosure could conflict with duties of confidentiality owed to our members' clients. Further, describing such relationships might support a view that perfectly normal business relationships should create an onus on directors to defend their independence and on issuers to defend the independence of their boards. Issuers would effectively have to "rebut" this by providing a detailed explanation of the relationship. If this section is retained, we recommend that the CSA provide further guidance on materiality standards so it is clear that not every relationship of these types could affect a director's independence. We provide additional commentary on this point under the heading "Comments Regarding the Definition of Independence" below.
- We also believe that requiring issuers to disclose inter-connections between directors under subsection (f) under Principle 3 of Form 58-101F1 will create the incorrect impression that such connections inherently negatively influence the directors' decision-making and independence. Securities law already requires the disclosure of other board memberships in the proxy circular, in effect providing shareholders with information on common board memberships. Accordingly, we recommend this section be deleted from the disclosure requirements under Principle 2 of Form 58-101F1. Again, our concern is with creating disclosure obligations that may have unintended consequences for Canadian issuers' ability to recruit qualified independent directors.

For these reasons, we recommend that the CSA maintain the current level of disclosure with respect to independence of board members.

We recommend that the CSA consider removing subsection (c) from Principle 2 or refining its content. Subsection (c) asks the issuer to describe the relevant competencies and other attributes that each director brings to the board. What is germane to shareholders in this regard already appears in the proxy circular and is provided in the biographies of board nominees. As discussed above under Principle 1, it is the educational, professional and other relevant achievements of a director that make an individual, if elected by shareholders, qualified to be a director. The selection of nominees for board membership for reporting issuers is not a "tick-the-box" exercise where the individual's competencies are matched up to those required by the board in order to fulfill its functions. It is a qualitative exercise that incorporates numerous considerations, not all of which can be described and summarized succinctly in disclosure provided under subsection (c).

Lastly, the Commentary to Principle 2 in NP 58-201 suggests, as a general practice, "encouraging directors to limit other commitments, including to other corporate or non-profit boards...". We believe an issuer's board is in the best position to assess a director's commitment and thus we caution against the setting of arbitrary limits on the number of boards on which a director is permitted to sit. We recommend that this commentary be modified to suggest, as a general practice, "encouraging an issuer's board to assess a director nominee's ability to devote the time and commitment required to serve effectively on the issuer's board".

Principle 3 – Attract and retain effective directors

Our members respectfully submit that the disclosure requirement under subsection (a) of Principle 3 to describe the practices used to "to select and nominate, and attract and retain" directors should be modified to require only a description of the practices used "to select and nominate" directors. It is not clear what practices to "attract" and "retain" directors would mean, given that boards typically have a nomination process for selecting candidates and those candidates must be elected by the shareholders for a predetermined term. We believe the disclosure requirement in subsection (a) should focus on this nomination and shareholder election process. Together with other disclosure in the proxy circular under Form 58-101F1, such as disclosure concerning performance evaluation, this focus will result in a fullsome discussion of the relevant information about how individuals are selected to stand for election and re-election.

With respect to subsection (b) of Principle 3, we have no concern with disclosing whether a consultant or advisor assisted in the nomination process. However, our members are concerned about the level of detail required by clauses (i) to (iii). We believe the use of consultants in the nomination process is an ordinary course activity and not controversial in the investment community; it is also not subject to the same inherent possibilities of conflicts of interest that may exist between the issuer and external auditors or compensation consultants. To provide the details called for by clauses (i) to (iii) would give undue emphasis to this activity and not necessarily provide information of much use to investors.

Principle 4 – Continuously strive to improve the board's performance

Subsection (a)(iii) under Principle 4 requires disclosure of "the assessment process and outcomes, if a performance assessment of the board, any board committee or individual directors was conducted during the most recently completed financial year". Our members agree that appropriate disclosure should include a description of the assessment processes, including a description of the board's processes for responding to the results of an assessment. While our members can provide clarity regarding outcomes generally, providing disclosure regarding specific outcomes of assessment processes raises concerns. The outcome of a director's performance assessment is a discussion of his or her strengths and areas for development. If specific outcomes or results of individual assessments are made public, it may negatively affect the candour of the assessment process. In addition, it is possible that the prospect of disclosure of details about individual performance assessments might dissuade individuals from agreeing to serve as directors in the first place. Thus, we recommend that subsection (a)(iii) be modified to provide disclosure solely in respect of the assessment processes for the board, a board committee and individual directors.

Principle 5 – Promote integrity

We respectfully submit that the requirement in subsection (b) "to provide a summary" of any ethical standards and codes is duplicative and should be eliminated. We believe that the disclosure called for by subsection (a) of Principle 5 will necessarily require issuers to provide a description of the relevant ethical standards of the issuer when discussing the issuer's practices to promote ethical and responsible behaviour and decision-making. Shareholders would be better served by the current requirement of issuers filing their code on SEDAR and then being able to incorporate it by reference in the proxy circular pursuant to Part 1(c) of Form 51-102F5. We also believe that providing a summary under subsection (b) would duplicate the disclosure by many issuers of the full text of their code because of disclosure requirements imposed by the SEC on inter-listed issuers. Accordingly, we submit that if an issuer has adopted and filed a formal code, it should not have to provide a summary of the code as well, especially considering

the disclosure that will be provided under subsection (a) of Principle 5 as noted above and the disclosure provided under Principle 6 (recognize and manage conflicts of interest). For these reasons, we believe that the proposed subsection (b) should be removed from the Proposed Rules or, alternatively, its scope should be refined to limit duplication and provide an exemption for issuers that file their code on SEDAR or for inter-listed issuers that already provide more expansive disclosure on their publicly accessible websites.

Principle 6 – Recognize and manage conflicts of interest

Our members are concerned about the disclosure required by subsections (b) and (c) of Principle 6 of Form 58-101F1 as the required disclosure, if made prematurely, could give rise to issues with respect to privacy, confidentiality and/or maintaining privilege and, therefore, could unduly undermine the reputation of the issuer and its directors, officers and certain shareholders. The awareness of these risks could result in boards hesitating to form *ad hoc* committees or engage consultants and advisors as part of dealing with significant conflicts of interest because these actions would automatically trigger public disclosure. These concerns are expanded upon below. To address these concerns, we recommend that the CSA clarify that this disclosure is not required until:

- The process of investigating, reviewing and assessing a potential conflict of interest has been completed;
- A significant conflict of interest has been found to exist; and
- The board or committee has determined and carried out a course of action to manage or resolve the significant conflict of interest.

If the matter is material, the issuer would have to publicly disclose in accordance with its timely disclosure obligations and, accordingly, this change would not disadvantage investors. If the matter pertains to corporate developments, such as a buyout of minority shareholders, it would also be subject to separate disclosure requirements.

We do not believe it is appropriate, as a matter of periodic disclosure, to require issuers to disclose whether an *ad hoc* committee has been appointed to address a significant conflict of interest (subsection (b)) or whether the board or a committee has retained a consultant or advisor to assist it in relation to a significant conflict of interest (subsection (c)). It would be harmful to provide this disclosure before the board or committee has completed the process of investigating, reviewing and assessing the potential conflict of interest and, if one is found to exist, determining a course of action to manage the conflict of interest. This process is alluded to in the description of "General practices" under Principle 6 of NI 58-101. However, because the CSA is proposing that this disclosure become part of an issuer's annual filing, the disclosure could be premature. In addition, premature disclosure could also entail the board or committee waiving privilege over legal advice (since independent advisors will most often be retained for that purpose) before it is appropriate to do so.

We also suggest a modification to clause (b) under the heading "Examples of practices – General practices" in Principle 6 in NP 58-101. This clause indicates that an issuer might establish a board committee "to carry out these practices". It would more correctly describe corporate governance practice to indicate that an issuer might establish a board committee "to carry out or oversee these practices".

Principle 7 – Recognize and manage risk

Disclosure regarding risk management systems and processes is currently required to be included in issuers' annual and quarterly Management's Discussion and Analysis ("**MD&A**") and annual information form ("**AIF**"). The MD&A must disclose material risks affecting the financial statements, risk trends, and credit, market, and liquidity risks generally and in specific contexts such as financial instruments and off-balance sheet arrangements. The AIF must provide a description of general risks inherent in the business. Many issuers, including our member banks, provide additional disclosure in the MD&A and/or AIF regarding the issuer's risk management and policies.

Given this is the case, we recommend continuing with the existing disclosure requirement under the current version of Form 58-101F1 to describe the board mandate, which includes the identification of the principle risks of the issuer's business, and ensuring the implementation of appropriate systems to manage these risks. We respectfully submit that this is the appropriate disclosure for corporate governance purposes regarding risk, and not a summary of the risk oversight and management policies as proposed for Form 58-101F1. If more specific disclosure concerning risk policies is sought, new disclosure requirements should be added to the existing MD&A or AIF forms. The CSA should also clarify that issuers are permitted to provide cross-references to, or incorporate by reference from, these disclosure documents into the corporate governance disclosure in the proxy circular to help ensure that readers are aware that important additional risk disclosures are provided in the MD&A and AIF.

Principle 8 – Compensate appropriately

Form 51-102F6 *Statement of Executive Compensation* ("**Form 51-102F6**") currently requires extensive disclosure regarding the compensation policies and practices of reporting issuers. The proposed disclosure requirement in clause (a) of Principle 8 is vague and would likely result in duplication of disclosure already provided under Form 51-102F6. We question whether it is necessary to require disclosure concerning compensation policies and practices in Form 58-101F1. If so, we recommend that the CSA refine the disclosure requirement so it is clear what is required that is not already contained in Form 51-102F6.

We also note that the Commentary to Principle 8 in NP 58-201 states that "compensation should be set and structured to attract and retain executive officers and directors and motivate them to act in the best interests of the issuer". This commentary could be understood to imply that compensation levels and structures are important to "attract and retain" directors, which, as indicated above in our comments under Principle 3, does not take into account the role of shareholders in the election of directors for a predetermined term. We recommend that the above-noted statement from the Commentary be modified to remove the reference to directors. This would result in a less prescriptive description of the principle of "compensating appropriately" and would recognize that there are different policies underlying the compensation of directors and executive officers.

Principle 9 – Engage effectively with shareholders

Under the existing securities and corporate laws (including National Instrument 54-101 *Communications with Beneficial Owners of Securities of a Reporting Issuer*), there are extensive rules and requirements governing an issuer's communication with shareholders – both sending and receiving. Our members respectfully submit that the proposed Principle 9 would merely require description of legal requirements without adding meaningfully to corporate governance disclosure. For instance, section (a)(ii) under Principle 9 asks the issuer to describe any practices or policies that promote a voting process that facilitates the board obtaining meaningful information on shareholder views. Corporate law clearly delineates the mechanisms available to shareholders, such as shareholder proposals and nomination of directors, to make their views

known to the board and management of the issuer. Securities law and corporate law require proxy disclosure when these mechanisms are used.

Given the foregoing, we recommend that the CSA remove Principle 9 from the Proposed Rules. Alternatively, to reduce duplication with corporate law, we recommend that the commentary to Principle 9 in NP 58-201, with corresponding changes to the disclosure requirement in section (a)(ii), be modified to delete the comments regarding the board's obligation to promote a voting process that facilitates the board obtaining meaningful information on shareholder views.

Comments Regarding the Definition of Independence

The Proposed Rules set forth a new definition of independence in NI 52-110 and offer guidance for assessing independence in the Companion Policy 52-110CP. Generally, we agree with the view of the ASC, to the effect that the definition of independence in paragraph 1.4 of proposed NI 52-110 (which reads: "... a director is independent if he or she (a) is not an employee of executive officer of the issuers, and (b) does not have, or has not had, any relationship with the issuer, or an executive officer of the issuer, which could, in the view of the issuer's board of directors having regard to all relevant circumstances, be reasonably *perceived* to interfere with the exercise of his or her independent judgment") may have the unintended effect of impacting the discretion of the board, because the definition is susceptible to the interpretation that a "reasonable" but less informed and less experienced person's perception should be the standard. The proposed definition would also create enormous subjectivity in how issuers assess directors' independence. This subjectivity will result in determinations and disclosure that will be of less value to shareholders, as it will be more difficult to compare determinations of independence as "perceptions" of independence will vary with different vantage points. For this reason, we prefer the current definition and the inclusion of the bright-line tests.

In addition, our members feel that the removal of bright-line tests for assessing independence, and the new guidance for assessing independence as set out in the Companion Policy, would lead to less clarity under the Proposed Rules. First, the proposed withdrawal of the bright-line tests signals a departure from the U.S. approach under the NYSE Corporate Governance Standards and Rule 10A-3 of the Exchange Act (as it applies to audit committees). The practical result for inter-listed issuers is that different analyses would be required under the Canadian and U.S. rules, with the potential for different conclusions under Canadian and U.S. rules. Second, considerations in assessing independence as set out in subsection 3.1(e) of the Companion Policy 52-110CP add further confusion to the manner in which independence should be assessed, and include factors that arguably do not affect a director's ability to exercise independent judgment. For example, the Companion Policy indicates that a director's independence could be affected if the director has or had a significant contractual or other business relationship with the issuer, among other roles, or is a shareholder of an entity that has such a relationship. We believe that directors' shareholdings should not be presumed to impact the director's independence, nor is it apparent why this would impact the director's independence vis-à-vis a bank. For example, if a director held immaterial shareholdings in an entity that had a significant relationship with the bank, but was not otherwise a director or executive officer of such entity, it is unclear why this should affect the director's independence. The use of the term "significant" is also problematic – how are issuers to understand the meaning of that term and how does it interact with the "materiality thresholds" to which these relationships are subject for the purpose of determining a director's eligibility to be considered independent? Similarly, our members find that the reference to "close association" in subsection 3.1(c) is problematic – what constitutes a "close association" and under what circumstances does it trigger concerns about the director's independence? It remains unclear why these relationships should be presumed to interfere with a director's independence. Moreover, the use of such vague terms will require significant subjectivity in how independence is assessed, with the resulting determinations and disclosure thereby being of less use to investors and shareholders as it will be difficult to make comparisons among issuers and find uniformity in approach.

Comments Regarding Audit Committee Responsibilities

The CSA is proposing to delete the current subsection 2.3(5) of NI 52-110, which provides:

> "An audit committee must review the issuer's financial statements, MD&A and annual and interim earnings press releases before the issuer publicly discloses this information."

and replace it with a new provision that provides:

> "An issuer must not publicly disclosure information contained in or derived from its financial statements, MD&A or annual and interim earnings news releases, unless the document has been reviewed by its audit committee."

Section 2.3(6) would remain substantially as it is currently.

There are ambiguities in the drafting of new proposed subsection (5) and how it will work with the existing rule in subsection (6). First, it is unclear what is meant by "the document" (underlined above) in subsection (5). We believe this is intended to refer to the source document for the information to be publicly disclosed – that is, the financial statements, MD&A or earnings news releases – and not any "document" that contains the information derived from such sources. If this interpretation is correct, this would mean that issuers cannot publicly disclose information "contained in or derived from" the financial statements, MD&A or earnings news releases unless the source document itself has been reviewed by the audit committee. However, there are cases in which an issuer may publicly disclose information that will eventually be contained in the financial statements, MD&A or earnings news releases. We believe this disclosure should not be restricted by subsection (5). For example, many issuers have a practice of periodically releasing statistics (e.g., monthly volume of trades per day) that are also eventually contained in the MD&A. As another example, financial institutions provide monthly balance sheet information to the Office of the Superintendent of Financial Institutions ("OSFI") that OSFI posts to its website before the quarterly financial statements that include the relevant month are released by the institution. A further example is that an issuer might have a equity investee that publicly releases financial information before the issuer releases its own financial statements incorporating the equity investee's results; the issuer might wish to provide its own public comment on the expected contribution of the equity investee to the issuer's results for the upcoming quarter. It would be unduly burdensome and unnecessary to require audit committee review of these disclosures as a general rule.

Second, it is unclear what "public disclosure" is being made an exception to the application of subsection (6) and accordingly what residual "public disclosure" must be subject to the additional audit committee procedures described in subsection (6). We believe the exception in subsection (6) is simply meant to clarify that such procedures cannot be applied to the review of the financial statements, MD&A and earnings news releases themselves because these documents must be specifically reviewed by the audit committee. In other words, the CSA's intention is to avoid any understanding by issuers that the review of the financial statements, MD&A and earnings news releases can be delegated. By extension, however, our interpretation of subsection (6) is that it allows for disclosure, without audit committee review, of financial information extracted or derived from the financial statements, provided that procedures exist for the review of such extracted information and that such procedures have been assessed by the audit committee to be adequate for this purpose.

If we are not correct in this interpretation of subsections (5) and (6), and the CSA's intention is that any document containing information derived from the financial statements, MD&A or earnings news releases must be reviewed by the audit committee prior to public disclosure – in addition to audit committee review of the source document – this would be a very concerning change. Most issuers have implemented comprehensive disclosure policies and procedures to comply with the approval requirements in NI 52-110 and NI 51-102 and to meet general continuous disclosure obligations, while also providing for safeguards against, among other things, selective disclosure. It would be disruptive to issuers' existing disclosure practices and unduly onerous for issuers' audit committees to require a great deal of additional disclosure to be reviewed by the committee. Non-material financial disclosures in advance of or following the release of the earnings, financial statements and MD&A for the related period do not pose the same risks (for example, of a later restatement) that make audit committee review advisable as a rule. Rather, it should continue to be sufficient for the audit committee to approve procedures for management to follow when making such disclosures, as we believe is currently provided for in subsection 2.3(6), but not necessarily to have to approve the disclosures themselves.

If the CSA desires to clarify best practices, additional commentary could be added to Companion Policy 52-110CP. We agree that a failure to have a disclosure process that ensures the "quality, credibility and objectivity" of key disclosure documents and "a critical examination of all [related] issues" (as provided in section 6.1(1) of National Policy 51-201 Disclosure Policy) could be harmful at many levels. The audit committee of each issuer must determine what procedures are adequate to address these issues.

Other Comments

As a general point, where applicable within the Proposed Rules, we recommend that the descriptor of each Principle be changed to the italicized sentence that is below each Principle in NP 58-201. For instance, in Part 3 of NP 58-201, rather than titling the relevant section "Principle 1 – Create a framework for oversight and accountability", the suggested title would be "Principle 1 – An issuer should establish the respective roles and responsibilities of the board and executive officers." We believe that this change would make the import of each Principle clearer to the reader.