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April 20, 2009

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

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Re: Request For Comment - Proposed Repeal and Replacement of National Policy 58-201 *Corporate Governance Guidelines*, National Instrument 58-101 *Disclosure of Governance Practices* and National Instrument 52-110 and Companion Policy 52-110CP *Audit Committees*

Dear Sirs/Mesdames:

This comment letter is provided to you by Macleod Dixon LLP in response to the above Request for Comment dated December 19, 2008.

We will first offer some general comments followed by responses to the specific questions noted in the request for comment.

General Comments

If we were starting with a blank page and had no existing policies governing corporate governance and corporate governance reporting, we may slightly favor certain aspects of the approach taken the Proposed Materials. However, the fact is that we are not starting with a blank page and we have a current governance regime that has been in force for less than 4 years. This regime, which consists of the Current Materials supplemented by governance policies and practices recommended by institutional investors, is highly regarded on a world wide basis. Issuers have borne the cost of adapting to the current regime and there is no evidence that the existing regime is not producing a satisfactory level of corporate governance or that flaws exist which require implementation of a new regime. The Proposed Materials involve a regime that is different but not clearly better.

We suggest that imposing a new governance regime at this time when many issuers are struggling with costs of complying with the new executive compensation rules and conversion to IFRS while in many cases, struggling for their very survival, is unwarranted and unnecessary. Improved governance is great and a laudable goal or objective for all issuers, but is only of value if there is a business left to govern. In the current environment, management's time can more beneficially be spent on dealing with the major business and financial issues facing the issuers. It is our perception that, in the current environment, governance reform is not high on the radar screen of significant issues either for issuers or investors.

We concur with the view expressed by the Alberta Securities Commission that the Proposed Materials do not substantially improve on the Current Materials and that the anticipated potential benefits are outweighed by the costs to issuers of compliance.

Accordingly, we submit that the proposals be withdrawn and not proceeded with until a need for change has been exhibited and the market has returned to a degree of normalcy such that issuers can bear both the time and cost of restructuring their governance systems.

Responses to Specific Requests for Comment:

1. Do Principles 6,7 and 9 Provide Useful and Appropriate Guidance?

As a general comment, we find the principles to be so general in nature as to provide no real guidance. In respect of Principles 6, 7 and 9 it is our view that, while they may place additional emphasis on their respective subject matters, they do not introduce new concepts as they are inherent in the existing version of NI 58-201 - Principle 6 is addressed in 3.8(a), Principle 7 in 3.4(c) and Principle 9 in 3.4(i) of NI 58-201. In our experience, these are matters which boards are well aware of and responding to and accordingly it is our view that these principles do not in the end result add anything that is new or particularly useful or of such a level of importance as to justify a complete new set of governance policies.

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2. Level Of Detail in Commentaries and Examples of Practices

Given the broad and general nature of the Principles, some guidance is necessary for issuers and in that respect the commentaries and examples of practices are helpful and necessary. We note that the examples of practices in the Proposed Materials include many of the items set out in the Current Materials and accordingly the end result is more of a re-packaging of existing concepts than creation of new ideas. We expect that many issuers will take the path of least resistance and construe the examples as "safe harbours" and as such best practices, even though the Proposed Materials make it clear that this is not the case.

3. Relative Merits of Principles Based Approach

If we were starting with a blank sheet, we may favor a principles based approach rather than a comply or explain model as it is a more neutral basis of presentation - ie. issuers are explaining rather than defending their governance systems. Theoretically, a principles based approach provides more flexibility to issuers, however this may be more illusory than real as issuers are under a certain degree of pressure to comply with best practices established by institutional investors who take a more detailed approach. In addition, some cross border issuers will continue to be bound by the more prescriptive U.S. rules. One of the advantages of the comply or explain model is that it provides a degree of uniformity in presentation by issuers that facilitates comparison of issuers. We anticipate that the principles based approach will produce disclosure that may be less comparable for investors. We also note that certain aspects of the Proposed Materials (eg the provisions with respect to disclosure of independence determinations) is more consistent with a comply or explain approach than a principles based approach.

4. Appropriateness of Level of Disclosure to Issuers and Investors

While the required disclosure may be for the most part appropriate, we believe that it goes too far in certain respects including the following:

(a) Principle 2(d) requires the disclosure of "any relationship" the board considered in making a determination of independence as well as a discussion of why the director is considered independent having regard to that relationship. This should be restricted by a materiality condition as otherwise it could require excessive and irrelevant disclosure such as disclosure of the fact that a director goes to the same church, plays on the same hockey team, etc. The board should be trusted to consider the right factors and make a decision which is in the best interests of the issuer.

(b) Principle 4(a)(iii) requires the disclosure of the assessment process and <u>outcomes</u> of performance assessments of the board, any committee and individual directors. While disclosure of the process is appropriate, the disclosure of outcomes goes

too far as it could require disclosure of information that is confidential and embarrassing to the corporation and individual directors. Requiring disclosure of outcomes could negatively impact the assessment process as it may result in a tempering of comments by directors. What is important is that the board has responded to any issues raised by the assessments.

(c) Principle 6(c) requires disclosure of details of every consultant or advisor retained to assist the board with respect to every significant conflict of interest as well as the mandate given to such consultant. This could require the disclosure of confidential information that is harmful to the issuer, its staff and its shareholders. If the significant conflict relates to senior management or directors there may be justification for the disclosure, however beyond those persons it is suggested that the disclosure may not provide any information of value to the shareholders.

5. **Disclosure by Venture Issuers**

Proportionate regulation is, or should be, a guiding principle for securities regulators. Venture issuers are for very good reason subject to reduced governance disclosure requirements under the Existing Materials. Requiring venture issuers to make the same governance disclosure as larger issuers is a significant step in the wrong direction. The additional management time and expense involved in compliance with the Proposed Materials could produce more value and benefit for the issuer and its shareholders if it was spent on the business of the issuer.

6. **Definition of Independence**

If we were starting with a clean page, we may favor the approach of indicia rather than bright line tests. However, we have an existing set of independence requirements that are reasonably aligned with the comparable U.S. standards and are readily understood by both Canadian and U.S. investors. Having regard to this, changing the approach to a principle based systems is not appropriate or advisable.

Basing an independence determination on the basis of "perceptions" rather than expectations is imprudent and could have detrimental effects for both issuers and investors. A perception is not reality even if it is a reasonable perception. Everyone generally considers their perceptions to be reasonable and as a result the test is too subjective. The result of this approach is that it creates uncertainty for both issuers and investors. The inclusion of indicia (which replicate many of the existing bright line tests) only heightens the problem for a board as the indicia will inevitably be treated as giving rise to a lack of independence unless rebutted - which leaves boards in the difficult position of proving a negative. As noted above, requiring disclosure of reasons is more consistent with a comply or explain approach than a principles based approach. Accordingly, the concept of reasonable perception leaves boards open for too much second guessing of their determinations of independence. We concur with the concern

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expressed by the Alberta Securities Commission in Appendix A that under the proposed definition, a reasonable but less informed and less experienced person's perception could be the determining factor of independence. If a change to a principles based approach is taken, we favor the approach contained in item 1 of Appendix A - namely allowing the board to subjectively determine independence and require that the board's decision be reasonable. We also think it is preferable to require the issuer to disclose the relationships considered without requiring a justification as referenced in item 3(c) and (d) of Appendix A.

7. **Reasonably Perceived Approach**

See response to 6 above.

8. **Guidance in Audit Committee Policy**

See response to item 6 above. The guidance in the policy is helpful but the detailed list of inclusion of factors or relationships (which replicate many of the factors or bright line tests of the current policy) coupled with the reasonable perception test leaves boards in an uncertain position where the conclusions reached can be easily second guessed and questioned with no real resulting benefit to the issuers or investors.

9. **Independence From the Issuer and Management**

No comment.

10. **Director Independence Disclosure**

See 6 above. We favor the approach referenced in item 3(c) and (d) of Appendix A which recommends disclosure of the relationships considered without requiring a justification.

Thank you for the opportunity to comment on the Proposed Materials.

Yours truly,

Macleod Dixon LLP