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INTERNATIONAL

April 20, 2009

Me. Anne-Marie Beaudoin, Corporate Secretary
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Montréal, QC H4Z 1G3

John Stevenson, Secretary
Ontario Securities Commission
20 Queen Street West
Suite 1900, Box 55
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Dear Me. Beaudoin and Mr. Stevenson,

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*

The Institute of Chartered Secretaries and Administrators in Canada (ICSA Canada) is an international organization that promotes the highest standards in corporate secretaryship and corporate governance. We currently have over 1,000 members in Canada, who are proud to be part of the over 36,000 worldwide members of the international Institute. We, as an organization, are committed to strengthening and advancing good governance procedures and the efficient administration of every type of organization in business and government.

ICSA Canada is pleased to provide comments on the proposed material changes regarding National Policy 58-201 (NP 58-201), National Instrument 58-101 (NI 58-101), and National Instrument 52-110 (NI 52-110) and its companion policy (NI 52-110CP).

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?**

From a corporate secretarial/general counsel perspective, the guidance provided for Principles 6, 7 and 9 opens up significant gray areas and leaves key issues open to interpretation. This is somewhat counter-intuitive for us as, by our nature, we tend to prefer stricter definitions rather than loose ones. We have a comfort level with the current Guidelines that is not present with the less defined Principles.

While the guidance may provide some amplification of current legislation, we find that it does not clarify or supplement some judicial decisions. A particular instance is the recent BCE case decided by the Supreme Court of Canada. The guidance under

Principle 6 does nothing to assist Directors in better defining their duty of care and is not particularly useful in creating a framework within which corporate secretaries/general counsel can provide meaningful advice. We also feel that decisions by Canadian courts should more properly be influenced by the guidance instead of having the guidance opening up interpretations of judicial rulings. Without conducting an exhaustive review, we are concerned that there may be no correlation between the guidance and the decisions made by the courts in many instances. We feel there is a greater likelihood of correspondence between legislation and the guidance proposed but, given multiple securities jurisdictions, this is not certain.

Recommendation: we believe the guidance provided could be re-written to yield a greater level of precision (perhaps by making greater use of examples) without violating the concept behind a shift to principles as opposed to guidelines.

We also recommend a closer review of existing legislation and significant court decisions be undertaken to ensure (a) concordance between them and the guidance, and (b) an appropriate and consistent elaboration of the law and the decisions.

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"?

For the most part, we find the commentaries and examples do not establish best practices, although to the casual reader, they may appear to do so. They identify areas for which issuers may develop their own practices. They also provide guidance to allow issuers to identify questions useful in their processes. We believe that, for many issuers, thoughtful review will lead to greater transparency.

We see two potential downsides to the approach taken. The first is that, as noted previously, corporate secretaries/general counsel tend to be comfortable with more precise guidelines and we have had indications from some of our members that they would not change their approach to governance or their disclosure practices. We feel this is more likely to happen with venture issuers, who have already developed "boilerplate" disclosures and are less likely to invest in new practices.

Second, we believe the Principles, commentaries and examples will generate more communication between issuers and regulators. Again, this is not necessarily a bad thing, although our members have indicated their questions would be more focused on determining what practices regulators expect or prefer. We are concerned that the various regulatory bodies, particularly in smaller jurisdictions, may not have sufficient resources to manage these exchanges.

Recommendation: we do not immediately endorse the approach taken for the reasons outlined above. However, we feel there is some value in having issuers and regulators engage in dialogue and that adapting to the proposed approach will lead to more transparency and, in some instances changes in organizational culture towards better governance practices.

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

The main values to a "comply or explain" regime are that (a) it provides a means for investors directly to compare two different issuers' disclosures; (b) it provides a

template for issuers; and (c) it does identify "best practices", which we feel are often more comfortable for investors and issuers alike. Against this, the "simple disclosure" model may lead to fuller disclosure and, thus, greater transparency.

Our primary concern is that principles-based disclosure will lead to investor and issuer confusion. From an investor perspective, issuers will no longer be preparing disclosure documents that are directly comparable. Such documents may well be complex, difficult to understand, and potentially unclear. Investors who are used to evaluating disclosure documents based on identified best practices will not be helped by the principles-based approach, which is not aimed at such practices.

Issuers will similarly have difficulty in determining the appropriate degree of disclosure, and each such firm will have to develop new disclosure templates. We feel the burden will be greatest for venture issuers, who may have fewer resources for, and greater resistance to, the new processes required.

We also do not feel that principles-based disclosure will do anything to improve shareholder engagement. We considered the potential for greater shareholder activism (leading, for example, to better corporate social responsibility policies) and found that such would not be the case – the complexity of disclosure documents, combined with the lack of identifiable best practices, would mitigate against this.

Finally, we are concerned that, over time, best practices would be replaced by a "lowest common denominator" for disclosure, resulting in a weakening of the quality of disclosure in Canada

Recommendation: we recognize the importance of greater disclosure and transparency, but not at the price of the relative comprehensibility of disclosure documents. We recommend that consideration be given to development of a disclosure template and feel this is not incompatible with principles-based disclosure. Identification of individual dimensions of each principle to be disclosed will at least ensure some level of compatibility between issuers, and will smooth the process for those issuers to some extent.

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 provides useful information to investors?

The level of disclosure indicated in the proposed NI 58-101F1 varies considerably, from very generic (Principle 7's disclosure falls far short of the guidance contained in the proposed NP 58-201) to extremely – perhaps even overly – detailed (some of the disclosure required in Principle 2 is extremely useful, while other points provide much more depth of information than all but the most sophisticated investor would be able to use). Some of the disclosure requirements follow the guidance relatively closely, while others merely gloss over it. In addition, the use of the verb "describe" allows great variance in the level of detail that issuers provide.

We found the disclosure required for Principle 6 fails to answer a key question – how successful are the practices at recognizing and/or managing conflict of interest situations? There is no context provided, through the requirement, which would allow investors to evaluate the efficacy of an issuer's practices. In addition, where a

board appoints a standing committee on conflicts (as discussed in the guidance), it has no disclosure requirement to parallel that for ad hoc committees.

The disclosure requirement for Principle 7 falls far short of the type of useful information that could be provided if the guidance were to be used as a template and, again, does not provide any contextual information that would allow an investor to evaluate the policies.

The disclosure required for Principle 9 reflects the guidance faithfully, but, like the guidance, does not address the larger issues of shareholder engagement.

From an issuer perspective, we recognize that the disclosure requirements could offer an opportunity to evaluate the success or efficacy of the different policies or practices discussed in proposed NP 58-201. However, the actual requirements in proposed NI 58-101F1 do not do so. Thoughtful issuers will conduct their own evaluation, but others will miss that opportunity. As corporate secretaries/general counsel, we find the disclosure requirements to be inconsistent and therefore not likely to be easily or clearly complied with.

Recommendation: the proposed NI 58-101F1 disclosure requirements should be consistent, should reflect the guidance from proposed NP 58-201 better, and should go further to specify the level of required disclosure than vague terms such as "describe". We also recommend that, where appropriate, information that would allow investors to evaluate the success or efficacy of the policies and practices should also be disclosed.

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

Disclosure has three potential benefits: (a) it allows investors to become better informed of an issuer's governance practices; (b) it provides an opportunity for an issuer to "pause for breath" and evaluate its policies and practices; and (c) ideally, it also provides information to allow both investors and issuers to benchmark a specific issuer's policies and practices against those of both competitors and other well-governed companies.

Against that, of course, there are costs to be incurred by an issuer in meeting its compliance obligations. These are resource issues – the presence of available and skilled staff and the financial cost associated with meeting the specific requirements. We recognize these may be more onerous for venture issuers than for non-venture issuers.

Recommendation: on the whole, we believe both the investing public and the venture issuers will be better served by having those issuers meet the same disclosure requirements as non-venture issuers.

6. In you view, what are the relative merits of the proposed approach to independence compared to the current approach? In particular:
   (a) basing the determination of independence on perception rather than expectation; and
   (b) guiding the board through indicia rather than imposing bright line tests?

We believe that the shift away from bright line tests is a positive move, as it will hopefully encourage Boards to consider fully their processes in the nomination of independent Directors. We are supportive of the more thoughtful process involved with a review of indicia. However, as advisors to Boards, we are concerned that using perception as the yardstick for independence is not only difficult as a concept on which to advise, but also potentially much more exclusionary of otherwise well-qualified Directors than is expectation. It is our position that perception, whether theoretically "reasonable" or not, is too subjective a criterion on which to base a definition of independence. We feel that this criterion moves a Board from thoughtful review to second-guessing their judgment.

Recommendation: we support the use of indicia rather than bright line tests, but recommend that the definition of "reasonable expectation" be retained as the criterion for independence. "Reasonable perception" is too subjective and not conductive to positive, thoughtful, Board action.

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

We agree that "reasonably perceived" implies a reasonable person standard. However, as noted above, we are not in favour of perception as a criterion for evaluating independence. We are also concerned that the reasonable person standard is a shifting line that, coupled with perception, may lead Boards to reject potential Directors who would otherwise be well-suited if the "reasonable expectation" test were to be used.

Recommendation: we recommend the test for reasonable expectation rather than reasonable perception be adopted.

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

Subject always to our previously stated concerns about "perception" as a criterion for evaluating independence, and our reservations concerning relationships with control persons and significant shareholders below, we believe the guidance in the policy is a useful tool to assist Boards in making determinations of independence.

Recommendation: we support the guidance, with the addition of a recommendation that relationships with significant shareholders and control persons be included as part of the evaluation, and that evaluation take place in context of a reasonable expectation of independent action.

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?

While, as noted, we are supportive of the move away from bright line tests, we nonetheless believe that relationships with significant shareholders and control persons have the potential to colour a Director's stance on issues and therefore those relationships should be considered when a Board reviews the independence of potential Directors. We also hold with the old maxim of "an ounce of prevention", particularly where conflict of interest is concerned. Identifying potentially problematic relationships when considering the independence of a proposed Director is preferable to leaving those relationships to be "managed" when a conflict arises, and is certainly more supportive of governance as a proactive activity. In keeping with our support for indicia rather than bright line tests, we do not believe it is appropriate to make a hard and fast judgment of a Director's ability to be independent based on such relationships.

Recommendation: we support the inclusion of relationships with control persons or significant shareholders as part of the specification in section 3.1 of the proposed Policy. They are important to consider as part of the overall question of Director independence, and most appropriately should be considered when potential Directors are being reviewed. Accordingly, we do not support leaving this issue solely in Principle 6; as stated, this set of relationships has the potential to affect a Directors' judgment and should therefore be considered during Director recruitment/nomination. Finally, we do not support a practice that effectively provides a bright line test of independence based on relationship to control persons or significant shareholders. Such relationships must be considered, that consideration should take place during recruitment/nomination, but we recognize it is possible that those relationships will not affect a fair-minded person, and that this is a reasonable expectation.

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

We agree that the required disclosure under Principle 2 provides useful and appropriate information to investors. We particularly applaud 2 (d)(ii), under which the Board explains its rationale for accepting a Director as independent notwithstanding a relationship with the issuer or any of its executive officers. However, as noted above, we believe a relationship with a control person or significant shareholder should be considered and, accordingly, disclosed as part of the discussion of Principle 2.

Recommendation: amend the list of relationships from 2 (d)(i) to include relationships with control persons or significant shareholders.

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

We believe that a period of longer than six months would be appropriate before implementation of the proposed materials. This is particularly so in the case of venture issuers, who may have significant resource and staffing issues to address.

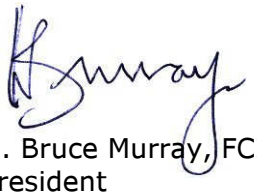
Recommendation: we believe the effective date should be extended to one year from the publication of the new materials, as they may have been modified as a

result of the comments received. This will allow both venture and non-venture issuers the opportunity to engage in dialogue with the various regulators, and will also allow venture issuers time to address their resource and staffing constraints, if such exist. We also believe that, introducing the new materials later will allow issuers to (hopefully) achieve some relief from the current adverse economic situation.

Conclusion

ICSA Canada appreciates the Canadian Securities Administrators' desire to ensure that Canadian governance practices are world leading. We believe the proposed materials are a step in the right direction. We do however, have concerns about the lack of consistency and specificity in disclosure requirements, and the application of what we believe to be a flawed criterion, "perception", to the evaluation of the independence of a potential Director. We believe these concerns can be addressed within the framework of principles rather than guidelines, and we hope this will happen.

Respectfully submitted,
Institute of Chartered Secretaries and
Administrators in Canada



H. Bruce Murray, FCIS
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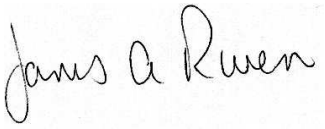

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