April 20, 2009

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British Columbia Securities Commission
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, Department of Justice, Government of the Northwest Territories
Registrar of Securities, Legal Registries Division, Department of Justice, Government of Nunavut

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Dear Members of the Canadian Securities Administrators:

Re: Notice and 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*

TMX Group Inc. welcomes the opportunity to comment on behalf of both Toronto Stock Exchange ("**TSX**") and TSX Venture Exchange ("**TSX Venture**") (collectively, the "**Exchanges**") on the proposed repeal and replacement of National Policy 58-201 *Corporate Governance Guidelines* ("**NP 58-201**"), National Instrument 58-101 *Disclosure of Corporate Governance Practices* ("**NI 58-101**"), and National Instrument 52-110 *Audit Committees* and Companion Policy 52-110CP *Audit*

Committees (**"NI 52-110"**), as published by the Canadian Securities Administrators (the **"CSA"**) on December 19, 2008 (the "Request for Comments").

All capitalized terms have the same meanings as defined in the Request for Comments or NP 58-201, NI 58-101 and NI 52-110, unless otherwise defined in this letter.

To assist us with developing our comments, the Exchanges held beneficial discussions about corporate governance with various stakeholders, including consulting with our respective Listing Advisory Committees. In addition, the Exchanges studied the corporate governance disclosure regimes of the jurisdictions examined by the CSA.

Both Exchanges are active participants in corporate governance. TSX continues to conduct an annual review of a sample of listed issuers' corporate governance disclosure and follows up with issuers to improve deficient disclosure. In addition, TSX developed a successful corporate governance disclosure workshop which has been presented across Canada for the past four years, alongside CSA members, to educate TSX listed issuers about corporate governance disclosure requirements. TSX Venture also conducts regular reviews of issuers' corporate governance disclosure and follows up with issuers that have deficient disclosure. TSX Venture policies provide additional guidance and, in some instances, impose additional requirements with respect to corporate governance practices, including in the areas of directorships, compensation, conflicts of interest, disclosure practices and insider trading obligations. TSX Venture has also organized and developed several workshops dealing with corporate governance and internal control matters which it has presented across Canada, to help educate TSX Venture listed issuers regarding appropriate corporate governance practices and disclosure.

The Exchanges have drawn upon these extensive experiences in formulating our comments.

The proposals by the CSA have therefore been a useful point of reflection on corporate governance in Canada.

Proposed Audit Committee Materials

The Exchanges support the CSA's proposal to adopt a more principles based definition of independence, by removing the current bright-line tests and instead providing guidance for boards of directors to assess independence. We do not believe that removing the bright-line independence tests requires the adoption of a broader, subjective test based on perception. Rather, we support maintaining the current test based on expectation that allows the board, with its fulsome knowledge of a particular director, to determine independence. We believe that the board should ultimately be accountable for deciding which board members are independent. We also support the disclosure of material relationships that exist between board members and the listed issuer or its senior management, to give investors the requisite information to make their own assessment of independence should they wish to do so.

Proposed Governance Materials

While the Exchanges acknowledge that the proposed nine principles represent sound corporate governance objectives, we are not of the view that the principles based disclosure approach as proposed is appropriate or beneficial, for TSX issuers, investors or corporate governance in Canada.

The Exchanges are concerned that abandoning the "comply or explain" model of disclosure for TSX issuers, as proposed by the CSA, could lower governance standards and the quality of

corporate governance disclosure in Canada. Without disclosure against minimum standards or best practices, there are no benchmarks to serve as a point of comparison for investors or to provide rigour to TSX issuers' disclosure, which may weaken confidence in the Canadian capital markets.

The "comply or explain" model has, in the view of the Exchanges, operated successfully for TSX issuers since TSX adopted the Dey Committee's recommended disclosure requirements in 1995. It provides a flexible approach for TSX issuers to explain their corporate governance practices, and a foundation for investors to easily understand and compare them. This model was adopted on the recommendations formulated by a respected group of seasoned stakeholders (the Dey Committee) which identified reasonable practices for issuers, in particular for large widely held issuers.

The Exchanges also monitor the evolution of corporate governance practices and disclosure models domestically and internationally, and support this continuous review. The Exchanges are not of the view, however, that the Proposed Materials are reflective of current international governance practices and disclosure models. The departure from the "comply or explain" model will make Canada unique from the other jurisdictions cited, with less clearly defined disclosure requirements. We are concerned that this proposed approach may weaken Canada's reputation internationally.

TSX suggests that the CSA consider whether this change in approach to corporate governance is needed. The Request for Comments does not identify any major deficiencies or shortcomings of the current corporate governance model. It is therefore difficult to determine whether the Proposed Materials will improve corporate governance practices or lead to more meaningful disclosure. TSX supports an approach which incorporates the principles based regime into a "comply or explain" model, like the ASX and the UK Combined Code. We submit, however, that the CSA can accomplish its stated objectives without adopting a whole new corporate governance regime.

We understand that smaller issuers may want greater flexibility in adopting suitable corporate governance practices. To achieve this objective, NI 58-101 could perhaps be more clearly worded as a "comply or explain" model in order to clarify that the intention is not to impose mandatory practices which may not suit all issuers. The current drafting of NI 58-101 may be perceived as requiring that issuers adopt governance practices to support each principle, rather than accepting that issuers may decide to do nothing to support the principle. The Exchanges are concerned that the goal of flexibility under the Proposed Materials may permit issuers not to adopt practices to address a principle without then being required to explain that decision.

If the CSA determines to proceed with the proposed principles based model of disclosure, the Exchanges would encourage the CSA to conduct a cost benefit analysis on the impact on issuer's of complying with the new regime, and to delay adoption until the economic conditions in Canada have improved and issuers have transitioned to IFRS. The Exchanges believe these current pressing matters are stretching issuer resources. In addition, there may be important lessons relating to corporate governance resulting from the current economic cycle which will make such a review of corporate governance more beneficial at a later time.

Based on our current views, if the CSA moves forward with the Proposed Materials, TSX will consider adopting minimum "comply or explain" corporate governance disclosure requirements for its issuers. Such a "comply or explain" model would supplement the CSA's disclosure requirements. In addition, TSX Venture may further supplement the corporate governance

requirements currently contained in its listing policies, to provide any necessary guidance and to ensure that issuers adhere to specified minimum standards.

Application to TSX Venture Issuers

The Exchanges are of the view that the proposed disclosure approach is too onerous for TSX Venture issuers as compared to the current disclosure requirement in NI 58-101 and is also unlikely to meet the CSA's stated objectives. The Exchanges note that the CSA has differentiated its issuer requirements in the past based on the market on which an issuer is listed, but there is no rationale provided for why the CSA has chosen to depart from this practice in the current proposal. In particular during these difficult economic times, smaller issuers are struggling and will be stretched to devote resources to a new corporate governance regime. So while it may be TSX Venture issuers or smaller issuers in general which have expressed concerns with the current regime, it is not apparent that the Proposed Materials will benefit these issuers.

Proposed Governance Policy

We appreciate that the CSA seeks to address the needs of smaller listed issuers which may feel pressured to adopt unsuitable practices under the current corporate governance regime. We note that the Proposed Materials include many examples of practices to assist issuers in developing or adopting suitable practices. However, we are concerned that such guidance from the CSA may be viewed by issuers as expected practices and as de facto requirements to adopt those practices. If this is the case, the Proposed Materials may create a more onerous and restrictive regime for smaller issuers.

The other jurisdictions reviewed by the CSA have adopted corporate governance practices developed by a broad group of industry stakeholders. Much of Canada's success in developing corporate governance practices and disclosure may be attributed to industry involvement in their development. We respectfully submit that the CSA's policy would benefit from engaging a group, like the Dey Committee and the Saucier Committee, with a mandate to examine the current corporate governance regime in Canada and recommend improvements. The Exchanges would be pleased to be involved with such an initiative in keeping with our leadership role in corporate governance in Canada.

Attached as Schedule A to this letter are responses to certain of the specific questions set out in the Request for Comments.

Thank you for the opportunity to comment on the Proposed Materials. Should you wish to discuss any of the comments with us in more detail, we would be pleased to respond.

Yours truly,

Richard Nadeau
Senior Vice President
Toronto Stock Exchange

John McCoach
Senior Vice President
TSX Venture Exchange

APPENDIX A

Specific requests for comment:

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?

   The Exchanges believe that the guidance for establishing practices which support the principles is best developed by a group of seasoned experienced stakeholders such as the individuals who comprised the Dey Committee and Saucier Committee. Such a group experienced in corporate governance can identify the most useful and appropriate guidance for issuers, as well as provide credibility to Canada's corporate governance practices.

   Notwithstanding this broader viewpoint, we do not believe that the guidance in Principle 7 is sufficiently developed to have a useful impact on risk management by issuers. In addition, Principle 9 concerning the issuer's relationship with security holders appears strictly focused on shareholder voting. The Exchanges suggest that a robust investor relations program can provide the board with regular feedback about investor issues and concerns and should form part of the guidance. We also suggest that the approach in the UK Combined Code, which directly identifies investor responsibilities, is useful in recognizing that a sound corporate governance regime relies on different affected parties taking appropriate action.

   The Exchanges note that other disclosure documents also require details relating to these principles. We suggest that it may be most beneficial for investors if these disclosure requirements were consolidated in one document. This comment extends in particular to aspects of Principle 8 – Compensate Appropriately, which must be disclosed in the Information Circular, and Principle 6 – Recognize and Manage Conflicts of Interest, which must be disclosed in the Annual Information Form. Aspects of Principle 7 about risk are also covered in the Management's Discussion and Analysis.

   We believe it is more consistent with the stated goal of providing greater transparency to the marketplace that disclosure concerning a topic be contained all in one document. Further, this is consistent with the goal of investors receiving more comprehensive and meaningful information.

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"?

   We believe that the level of detail in the commentary and examples may not only have the effect of establishing "best practices", but may increase potential liability for issuers who do not follow these practices. The commentary is very detailed and contains suggested practices without reference to materiality thresholds.

   Further, since issuers need only explain how they accomplish the principles, without reference to, or explanation of, why they have chosen not to adopt certain governance practices, issuers may be permitted to avoid meeting reasonable standards. For

example, we note that the Proposed Materials provide an example of the practice of the separation of the roles of chairman of the board and the chief executive officer, or the appointment of an independent lead director, but no related disclosure is required. Such practice has been embraced by many Canadian issuers to ensure the board operated independently of management. It may be beneficial for issuers who choose not to adopt this practice to explain their decision.

It is also unclear whether the detailed commentary and examples of practices will be perceived and treated as non-mandatory obligations, or whether the guidance provided will result in a positive overall impact on issuers' corporate governance practices.

In addition, Principle 8 - Compensate Appropriately is of particular concern as the guidance provided is inconsistent with certain principles of executive compensation. For example, it provides that an "issuer" should ensure that compensation policies align with the best interests of the issuer, even though that responsibility should be with the board.

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

While a principles based approach may provide a flexible framework and be adaptable, the lack of a requirement to explain why certain practices are not adopted may result in a lowering of corporate governance standards. Issuers may be able to legitimately withhold disclosure of their corporate governance practices (or lack thereof).

TSX views the purpose of the corporate governance disclosure requirements as providing investors with information about the procedures and processes of the board and to help investors better understand how the business and affairs of the issuer are directed and managed. The goal of this disclosure is to permit investor to make more informed investment decisions. Without a "comply or explain" disclosure regime, it will be difficult for investors to compare corporate governance practices among issuers. In addition, the "comply or explain" model helps educate investors about corporate governance practices that have been validated as reasonable, at least for large widely held companies.

TSX supports an approach which incorporates the principles based regime into a "comply or explain" model, like the ASX and the UK Combined Code. We submit, however, that the CSA can accomplish its stated objectives without adopting a whole new corporate governance regime.

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?

From an issuer's perspective, the level of disclosure is extremely detailed and onerous. As noted above, we are concerned that there are no materiality thresholds set out in the Proposed Materials. This raises concerns for liability for issuers and may result in less meaningful disclosure for investors. Investors may not receive more meaningful information because of the abundance of detail without materiality thresholds. For example, we note that some of the disclosure requirements provide that an issuer disclose "any practices" or "any relationships". Without a materiality threshold, this information may not provide meaningful disclosure and may create liability risks for issuers.

In addition, in the absence of benchmarks or standards, only the most sophisticated investors may understand and fully appreciate an issuer's corporate governance practices and disclosure. There is concern about the lack of comparability and lack of opportunity for investor education.

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

The Exchanges observe that the CSA has proposed to adopt one standard for both TSX and TSX Venture issuers, but has not provided an explanation for this change. We do not believe that TSX Venture issuers should be subject to the same disclosure requirements as non-venture issuers. Venture issuers are at a different stage of corporate development. Neither venture issuers nor their security holders will benefit from requiring them to be held to the same disclosure requirements as senior listed issuers. While venture issuers might theoretically benefit from the flexibility offered by the principles based approach, the level of detail is onerous and may result in practices and disclosure which are not useful to issuers or investors.

6. In your 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 it is appropriate for the board to retain accountability for determining independence. Removal of the bright-line tests generally works in that context. We also agree with the ASC's concerns regarding basing the determination of independence on perception rather than expectation.

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

As stated above, we do not believe that "reasonably perceived" is the appropriate test for the board to measure an individual's independence.

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

Yes.

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?

   We believe that such a relationship should be included as a factor that may affect independence, to be considered by the board.

   (b) Should such a relationship be solely addressed through Principle 6 – *Recognize and manage conflicts of interest* as proposed?

   See (a).

   (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?

   Yes.

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

    Yes, we agree that the required disclosure generally provides useful and appropriate information to investors. However we note that the disclosure is very detailed and without reference to materiality thresholds.

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

    Subject to our overall view that the CSA should maintain the current regime, if the CSA proceeds with the current proposal, we do not believe that a six month transition period is sufficient for the majority of listed issuers. Given the current economic conditions and other matters before boards, the Exchanges suggest that issuers be given at least 12 months before the new requirements become effective.

12. Instead of the "reasonable person" test, do you think the definition of independence should:

    (a) allow the board to subjectively determine whether or not a director is independent; and

    (b) require that the board's subjective decision be reasonable (i.e., there is a line of analysis that could reasonably lead the board from the factors it considered to the conclusion it reached, even if it is one with which others may disagree)?

    We support the "reasonable person" test, on an expectations level.

13. Concerns have been expressed with respect to the effect that the Current Materials have on controlled issuers. Is it appropriate to include being actively involved in the management of the issuer, which may include a control person or a significant shareholder, as one of the relationships that could affect independence enumerated in section 3.1 of the Proposed Audit Committee Policy?

It is appropriate to include it as one of the factors that could affect independence, but not determinative. The determination should be made by the board, having evaluated all roles of an individual, as well as any other applicable factors and available information in assessing independence. The individual's shareholdings may also be another relevant aspect to consider.

14. Given that it is in all market participants' interest for issuers to have the best directors available:

(a) Is it appropriate to require that the board explain why a director was found to be independent?

We believe that the disclosure of material relationships that exist between the board member and the issuer or its senior management, and the board's final decision, is important information. We do not believe that it is necessary as baseline disclosure to require the board to explain how it arrived at its decision. The issuer may however choose to provide that information.

(b) Could requiring such an explanation create a presumption that each relationship enumerated in section 3.1 of the Proposed Audit Committee Policy affects the exercise of independent judgment unless the contrary is proven?

The Exchanges are of the view that most investors will not know the relationships enumerated in Section 3.1, and as such, will not have the predetermined mindset. Investors should be given information, including disclosure of existing material relationships, to make their own assessment of independence if they wish.