Blakes

Blake, Cassels & Graydon LLP
Barristers & Solicitors
Patent & Trade-mark Agents
199 Bay Street
Suite 2800, Commerce Court West
Toronto ON M5L 1A9 Canada
Tel: 416-863-2400 Fax: 416-863-2653

April 20, 2009

John M. Tuzyk
Dir: 416-863-2918
john.tuzyk@blakes.com

VIA E-MAIL AND COURIER

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
New Brunswick Securities Commission
Nova Scotia Securities Commission
Office of the Attorney General, Prince Edward Island
Securities Commission of Newfoundland and Labrador
Registrar of Securities, Government of Yukon
Registrar of Securities, Department of Justice, Government of the Northwest Territories
Registrar of Securities, Legal Registries Division, Department of Justice, Government of Nunavut

Me Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
800, square Victoria, 22e étage
C.P. 246, tour de la Bourse
Montréal, Québec
H4Z 1G3
E-mail: consultation-en-cours@lautorite.qc.ca

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

Re: Proposed Replacement of National Instruments 58-101 *Disclosure of Corporate Governance Practices* and 52-110 *Audit Committees* and National Policy 58-201 *Corporate Governance Guidelines*

Dear Sirs/Mesdames:

I am providing comments on the foregoing proposed instruments, based on my experience in advising issuer clients as to the application of the existing corporate governance disclosure requirements, and the experience of my partners who practice in this area. I respond to your specific request for comments below:

Item 3. In my view, a principles-based approach for disclosure, compared to a "comply or explain", model is much preferable.

A major purpose of securities legislation is to provide for timely, accurate and efficient disclosure of information. The "comply or explain" model puts securities administrators in a position of indirectly regulating matters of directors' legal governance duties by establishing a certain normative model against which disclosure is to be made. This is properly the subject matter of corporate law. This unhelpfully blurs the distinction between securities law (relating to disclosure) and corporate law (relating to directors' legal governance duties), and creates ambiguity. Securities requirements should focus on disclosure as to how a corporation is governed, not on indirectly attempting to, in effect, prescribe what directors should do or not do with respect to governance through a "comply or explain" model.

Item 6. My view is that the "perception" test for determining independence will, in practice, be extremely difficult for issuers to apply, and for legal advisors to provide advice to issuers as how to comply. It is, in effect, asking the board to make their judgment of somebody else's judgment, or "perception", instead of their own. This dichotomy becomes all the more apparent if a board's judgment was that a director was independent within the current basic test but that this judgment was different than their judgment as to how someone else would "perceive" it. The current "basic" test for independence, relating to relationships which could in the view of the issuer's board of directors be reasonably expected to interfere with the exercise of a member's independent judgment, has now been applied for issuers for some time, and directors, shareholders, the market and legal advisors are familiar with it. I submit that there is no pressing need to change it. One can also contemplate that, if the new proposed "perception" test is adopted, some issuers will, in addition, continue to disclose the board's view of independence based on the current basic test.

The "deeming rules" in the current NI 52-110 are inconsistent and confusing, and, in a number of cases, lead to misleading results and disclosure. For this reason, among others, I suggest that they be deleted. By way of example:

- There are differing definitions of independence for the audit committee on the one hand, and for the board and all of the other committees, on the other hand. It is not at all clear why an audit committee member must be "more" independent than a member of the board generally or a member of the compensation committee.

This distinction produces anomalous results and, arguably, misleading disclosure. For example, a partner from a law firm whose firm has a significant relationship with the issuer is deemed non-independent under section 1.5 for audit committee purposes, but is not deemed non-independent for the board itself or other committees, because the lawyer himself did not receive amounts in direct compensation from the issuer. Although arguably he or she could still be found to be non-independent by virtue of the basic test, given that there are deeming provisions which specifically address the issue it would be reasonable for a board to conclude that, as the individual is specifically caught by one deeming test and not the other, that he is independent under the other test. As well, they may determine he is independent under the basic test. Accordingly, the issuer discloses the lawyer is independent, whereas, if the lawyer was on the audit committee, disclosure would be required that he was not independent.

- The "deemed" treatment of individuals "affiliated" with affiliated companies is inconsistent and highly artificial:
  - Employees from a parent company are deemed to be not independent, but directors from a parent company and its subsidiaries are not so deemed.
  - Individuals from sister companies are not deemed to be not independent, while individuals from the parent company are.
  - The definition of issuer including a "parent company" is a trap for the unwary, as one's normal reading of "issuer" would not naturally lead one to conclude that it included other companies.
- The term "parent company" itself is not defined. Does it mean the immediate holding company, only the ultimate parent company, or every company in between?

I have seen numerous examples of where issuers have misinterpreted and misapplied the deeming provisions in this context, both in deeming individuals as not independent when the deeming rules in fact did not apply and the converse.

The deeming rules also deem people to be non-independent, who in fact, under the basic test, are independent. As well, if an individual is caught, or not caught, by the technical deemed non-independence tests, the board and the issuer are, practically to some degree, relieved of their responsibility to determine independence in fact.

(They would follow the logic that if the regulators intended that a person who received a smaller amount of compensation than the deeming rules thresholds would be regarded as not independent, the regulators would have set the threshold limits in the deeming rules lower.)

On the specific principles in the proposed National Policy and Form 58-101F1, I comment as follows:

Principle 1

National Policy

The reference to the board developing the issuer's approach to corporate governance should refer to the development of such an approach in the context of applicable law. The board is not free to alter directors' duties and obligations nor change shareholder rights in relation to corporate governance.

It is not clear that why the board would need to "at least annually" approve a strategic plan. By their nature, strategic plans may be multi-year. It may not be necessary for the board to approve a new strategic plan every year. Indeed, that may be inconsistent with the idea of a strategic plan.

A board should not be responsible for identifying the principal risks of the issuer's business; if included here at all it should be in the context that the board is responsible for a process being in place so that the principal risks of the issuer's business are identified. That is a subtle but important difference of the role of the board as opposed to management.

Form

As a practical matter, describing responsibilities delegated to officers of the issuer is not a practical exercise for many companies. Few companies specifically delegate certain identified tasks to management. Most public companies operate under the rubric of general corporate law, under which directors supervise management of the corporation and management manages, without a comprehensive list of all items delegated to management. This item is more usually addressed by a board mandate or other policies which reserve certain approvals to the board.

It seems redundant to describe both the roles and responsibilities of the board, and the terms of any written mandate or formal board charter. This might be rephrased to refer to a description of the roles and responsibilities of the board, including, as applicable, the terms of any written mandate or formal board charter.

Principle 2

National Policy

Phrasing the commentary in the principle simply as structuring the board to allow for directors to fully and effectively carry out their fiduciary duties ignores the important corporate law duties of directors to act with due care, which is at least as important and meaningful a duty in the context of director duties. It also ignores other duties under corporate law. This should simply say "their duties".

Form

While it is relevant for the proxy circular to provide disclosure regarding the background, experience and expertise of each director, I think it is unwise to prescribe or imply in a normative fashion by way of the Form required disclosure that the preferred method of board composition is to develop a list of specific required attributes and skills and then select directors who each fulfill a different one of them. This may be a method which is preferred by some boards, and the shareholders of their companies. However, this is not a method which should be, by implication, a normative process that each board, and its shareholders, should follow. Some boards, and their shareholders, may determine that it is more important to clearly have collective board, and equal individual, responsibility for all decisions. Some may adopt that view in light of a concern that, under applicable law, a particular director may have particular responsibility and liability for specific decisions by virtue of expertise. The same comment applies to the proposed National Policy.

Principle 4

Form

Most board process assessment processees are done in confidence to facilitate an effective process. It will be counterproductive for the outcomes of the assessment process to be publicly disclosed.

Principle 5

National Policy

The matter of the issuer's responsibilities to employees, those with whom it has a contractual relationship and the broader community is an important and evolving issue of corporate law in relation to the exercise of directors' duties. To suggest that a code of conduct should in a generic way address this matter may limit the scope of directors' abilities to deal with specific decisions, which may be to the detriment of the issuer's shareholders. The directors' abilities to consider such other interests may be constrained by applicable corporate law and competing

interests of shareholders, depending on the circumstances. It would not be prudent for most issuers, and the shareholders of most issuers, for a board to specify in a public code of conduct a list of responsibilities to employees, those with whom it has a contractual relationship and the broader community. I would not advise a board to state in a code of conduct anything other than to say it will discharge its duties, if any, to stakeholders other than shareholders in accordance with applicable law. Anything more than that may create expectations which run the risk of becoming binding in a legal sense. Insofar as issuers' responsibilities to securityholders are concerned, these are set out in applicable corporate and securities legislation.

Principle 6

Form

The disclosure in items (a) and (b) appears sufficient. The disclosure required in (c) is intrusive, and is of little value to investors or the marketplace, in comparison to the detriment to the issuer. As drafted, it requires disclosure of information which would otherwise in all respects be for the issuer's benefit privileged. Obviously, if a company wishes to disclose that information if it thought the benefit of doing so outweighed any prejudice, it could do so.

Principle 8

National Policy

I do not believe that it is appropriate for a securities regulator to be mandating or implying as a best practice that the compensation policies and practice are to "include a balanced pursuit of the issuer's short term and long term objectives". This is a decision for an issuer's board, elected by the shareholders, to determine, and in the context of their overall legal duties. An issuer may chose to only pursue short term, medium-term or long term objectives – this is for a board to determine subject to their corporate law duties and should not be subject to a mandated or recommended "balance".

In addition, with respect to design of compensation, the commentary suggests there be procedures to ensure that no individual is directly involved in deciding his own compensation. This should be rephrased to refer to no executive or employee being directly involved in determining the issuer's approach to determining his compensation. Employment arrangements, including compensation, are contractual relationships between the issuer on the one hand and executives on the other. To state that individuals are not involved in deciding his or own compensation is to suggest that issuers' boards can unilaterally determine compensation, ignoring the

bilateral contractual aspects of the arrangement. The individual is of course involved, as he decides whether to accept the employment terms or not.

Form

The proposed disclosure provision is drafted too broadly. It applies to privileged information arising out of legal advice. I expect this was not intended. The Form for this Principle should either explicitly exclude legal advice in connection with compensation matters or be more narrowly crafted to address compensation consultants in the intended sense, i.e. those who have provided advice with respect to the quantum of compensation received by executive officers and directors. Read literally, the required proposed disclosure would mean that legal advice regarding compliance with executive compensation disclosure requirements, or advice as to severance payments, or preparation of pension plans, or other legal advice related to executive compensation would require disclosure of the provision of such advice (which is privileged) and, in addition, all legal fees paid to law firms for work of any kind done for the issuer, which is of no relevance to the intended purpose of the disclosure, and which also impinges the issuer's privilege for legal advice.

Yours very truly,

John M. Tuzyk

JMT/mtp

12289642.1