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May 6, 2009

VIA EMAIL 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

John Stevenson, Secretary
Ontario Securities Commission
20 Queen Street West
Suite 1900, Box 55
Toronto, Ontario M5H 3S8

Dear Sirs/Mesdames:

Re: Request for Comment – 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 ("NI 52-110") and Companion Policy 52-110CP ("CP 52-110") *Audit Committees* (the "Proposed Instruments")

We write further to your request for comments in respect of the Proposed Instruments.

General Comments

We would like to thank the Canadian Securities Administrators (the "CSA") for their time and efforts spent on preparing the Proposed Instruments, which have focused the attention of issuers

and their advisors on the Canadian corporate governance regime. We believe that such an analysis and discussion is essential to ensuring that Canada's corporate governance regime remains respected by and meaningful to investors, while not imposing unnecessary costs and obligations on issuers.

The Proposed Instruments, if adopted in their entirety, would dramatically change the corporate governance obligations of venture issuers, and although we realize the need for the Canadian corporate governance regime to evolve with the regulatory landscape, we are not certain that the benefits to investors of the proposed changes would outweigh the time and resources required to implement them, especially in the absence of any identified problems with the current corporate governance regime. In addition, we do not believe that Canadian investors are best served by the replacement of the current American-inspired corporate governance regime with a principles-based approach modelled on regimes in Europe, especially given the unique characteristics of Canada's capital markets, including the large number of issuers inter-listed in the United States or having U.S. shareholders. We are concerned that any movement away from an American-style regulatory regime will make comparisons between American and Canadian companies more difficult and will harm Canadian issuers as they compete for capital in world markets. Therefore, we do not recommend that the CSA proceed with the Proposed Instruments as currently drafted, and that any future changes to the Canadian corporate governance regime be preceded by a more inclusive consultation process that includes issuers and their shareholders.

Specific Comments

We respond to your specific request for comments as follows:

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 governance principles set out in Principles 6, 7 and 9 are relevant and should be made a part of the Canadian corporate governance regime. However, the required disclosure and related commentary should be re-drafted to ensure consistency with other regulatory instruments and existing Canadian corporate law, after consultation with issuers. In particular, we note that the requirement that a board identify the name and mandate of any consultant or advisor retained to assist the board in carrying out its responsibilities in relation to a significant conflict of interest appears to be a breach of the board's confidentiality privilege, which we feel is an unnecessary restriction on a board's right to manage and supervise the affairs of a company.

The requirements and commentary to Principle 7 consist of broad generalities that are not sufficiently informative to assist issuers in their disclosure in respect of this Principle. By way of comparison, the disclosure required under Item 11 *Quantitative and Qualitative Disclosures about Market Risk* of Form 20-F adopted under the United States *Securities Exchange Act of 1934* should be considered.

In the commentary to Principle 8 we do not feel that it is appropriate for the CSA to imply that "a balanced pursuit of the issuer's short term and long term objectives" is a best practice, as this exceeds the duties and obligations of directors recognized by Canadian courts. Furthermore, Principle 8 requires issuers to disclose the aggregate fees billed by advisors in respect of professional services related to executive compensation. The CSA should review this

requirement to ensure that issuers will not be required to disclose fees paid to solicitors in breach of their solicitor-client privilege.

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"?

By the very fact that the Proposed Instruments are published by the CSA, a securities regulatory authority with the power to regulate and enforce securities regulations, we believe it is inevitable that the disclosure requirements and commentary thereto in respect of the governance principles will become best practices and will be adopted by persons who advise institutional investors on governance policies and the voting of proxies. We believe that best practices are good baseline guides for issuers and should not be abandoned by the CSA, as they will be established by practice, if not by the CSA.

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

The current comply or explain model provides minimum standards of governance that have been accepted and adopted by most Canadian issuers and which allow issuers the flexibility to not adopt a particular practice if inappropriate for an issuer's circumstances by providing an explanation of why a particular practice has not been adopted. While we recognize that the comply or explain model is prescriptive in nature and may lead to a formalistic approach to corporate governance disclosure, we nonetheless believe that it is important for the CSA's corporate governance policies to match those adopted by the SEC for the reasons set out above.

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? Specially, do you think the disclosure in respect of Principles 6, 7 and 9 provides useful information to investors?

Whether the level of disclosure in respect of Principles 6, 7 and 9 provides useful information to investors will depend on how a particular issuer interprets the Principles and it is possible that in the absence of baseline standards, disclosure by some issuers will be less informative to investors than it might otherwise be.

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

The existing regulatory regime contains numerous exemptions applicable to venture issuers, including those related to corporate governance practices. The CSA have not clearly explained why they feel it necessary to remove these corporate governance exemptions. While the corporate governance policies of an issuer are important to its investors, the boards of many venture issuers are of the opinion that the money and time spent on corporate governance matters would be better spent on profitable endeavours. By their very nature, investments in venture issuers are more risky than investments in non-venture issuers and this risk premium is reflected in the stock prices of venture issuers. It is therefore unnecessary for venture issuers to meet all of the same corporate governance requirements as non-venture issuers. We are of the view that the current model of corporate governance for venture issuers works well and without good reasons should not be changed.

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?

The current rules for determining director independence set out in National Instrument 52-110 are unclear and difficult to apply and we believe that the CSA are correct in attempting to clarify this definition. However, we have several concerns with the definition set out in the Proposed Instruments. First, we believe that the "reasonable perception" test for determining independence will be difficult for issuers to apply and for their lawyers to advise upon. Second, we believe that the reasonable perception test will require directors to base their judgment on a third party judgment instead of their own judgement, which is contrary to the mandate of directors to exercise good faith discretion in the performance of their duties, as provided by the business judgment rule. Third, we believe that the removal of bright line tests by the CSA will necessarily result in courts establishing new bright line tests after costly litigation. Bright line tests provide easily understood baseline requirements, the importance of which should not be underestimated for venture issuers with limited legal budgets.

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

If it is the CSA's intention that the phrase "reasonably perceived" infer a reasonable person standard, then the CSA should use clear language to express this intention. An example of this language would be: "be perceived by a reasonably prudent person".

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

The guidance for assessing independence is set out as Part 3 of the Proposed Audit Companion Policy. We believe that the discussion of independence and its importance to the integrity of the financial statement disclosure should be set out earlier in the Companion Policy.

9. The proposed definition provides that independence is independence from the issuer and its management, and not from a control person of significant shareholder. Given this definition:

(a) should a relationship with a control person or significant shareholder be specific 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 independence directors on a board of directors and audit committee be unrelated to a control person or significant shareholder?

We believe it is important that a single definition of independence be adopted by the CSA for the purposes of an issuer's corporate governance obligations. Regardless of whether it is ultimately determined by the CSA that shareholdings affect independence, such a definition should be applicable to all instances where director independence is required to be determined. In determining the definition of independence, we believe that the CSA should engage in further consultation with interested stakeholders and in light of the large number of Canadian issuers inter-listed in the United States, should pay particular attention to definitions provided under American securities laws.

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

We do not believe that the costs of the required disclosure on director independence outweigh its usefulness to investors. Particularly, we believe that obliging issuers to disclose any relationship between an issuer or its executive officers that the board considered in determining director independence and to describe why the board considers the director independent, in light of such a relationship, will have a chilling effect on the congeniality necessary for a board to operate effectively, as it could conceivably require the explanation and disclosure of insignificant relationships, including the sharing of a cabin, attending the same church or being a member of the same service club. Similarly, we believe that the requirement in Principle 4 that the board disclose the results of any assessment process will undermine the confidence and trust necessary for sensitive issues to be examined by boards.

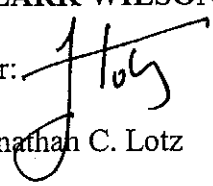
11. Do you think our proposal regarding the effective date adequately addresses the needs of both venture and non-venture issuers?

In light of the current economy climate, the recent changes to compensation discussion and analysis rules, the challenges facing issuers regarding the adoption of IFRS and the scope of the changes in the Proposed Instruments, we do not believe that six-months' advance notice of the effective date is adequate for venture and non-venture issuers and we suggest that the adoption of the Proposed Instruments be delayed to allow for further consultation with interested stakeholders.

We again thank the CSA for the opportunity to comment on the Proposed Instruments. If you have any questions or would like further clarifications, please do not hesitate to contact the undersigned.

Yours truly,

CLARK WILSON LLP

Per: 

Jonathan C. Lotz

JCL/jcl