

Canadian Coalition for  
**GOOD GOVERNANCE**

THE VOICE OF THE SHAREHOLDER

October 27, 2011

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  
Prince Edward Island Securities Office  
Office of the Superintendent of Securities, Government of Newfoundland and Labrador  
Department of Community Services, Government of Yukon  
Office of the Superintendent of Securities, Government of the Northwest Territories  
Legal Registries Division, Department of Justice, Government of Nunavut

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Dear Sir/Madame:

**Re: Proposed National Instrument 51-103 *Ongoing Governance and Disclosure Requirements for Venture Issuers***

We have reviewed Proposed National Instrument 51-103 *Ongoing Governance and Disclosure Requirements for Venture Issuers* (the "Proposal") and thank you for the opportunity to provide you with our comments.

Representing the interests of institutional shareholders, CCGG promotes good governance practices in Canadian public companies to best align the interests of boards and management with those of their shareholders. We also seek to improve Canada's regulatory framework to strengthen the efficiency and effectiveness of the Canadian capital markets. CCGG has 48 members who collectively manage almost \$2 trillion of savings on behalf of most Canadians. A list of our members is attached to this submission.

## **Overview**

Our members regularly invest in issuers listed on the TSX-V. As we commented in response to CSA Multilateral Consultation Paper 51-403 *Tailoring Venture Issuer Regulation* (the "Initial Consultation") we support efforts to simplify compliance for venture issuers. We do not, however, support several of the reduced disclosure and governance standards currently found in the Proposal. We are pleased that the Proposal has been scaled back from the Initial Consultation, but we remain concerned that the proposed reduced standards will result in less protection for investors and have the potential to adversely affect the reputation of the Canadian marketplace. Our specific concerns are set out below.

## **Reducing Complexity for Venture Issuers**

To the extent that the Proposal is responding to a need for simpler rules or increased guidance for venture issuers, there are other ways to achieve both of those aims without simultaneously sacrificing investor protection. When presenting the Initial Consultation, staff of the participating securities regulators confirmed that the basis for the Proposal is "anecdotal" and no studies were undertaken to determine the extent to which venture issuers find the current rules to be confusing or cumbersome. We note that when the executive compensation disclosure rules were recently amended, no venture issuers commented that compliance with the current rules was too onerous. We think that prior to proposing an entirely different regime for venture issuers, some market data is required to properly quantify the problems that the Proposal is designed to address.

In this regard, we think it is noteworthy that even if the Proposal is implemented, venture issuers will still have to reference numerous other securities law instruments and the various provincial securities acts to understand the law that applies to them, including:

- NI 43-101 *Standards of Disclosure for Mineral Projects*
- NI 51-101 *Standards of Disclosure for Oil and Gas Activities*
- NI 52-107 *Acceptable Accounting Principles, Auditing Standards and Reporting Currency*
- NI 52-108 *Auditor Oversight*
- NI 54-101 *Communication with Beneficial Owners of Securities of a Reporting Issuer*
- All of the general securities law provisions found in the provincial securities acts, including the insider trading and secondary market liability provisions.

Since venture issuers must operate within the existing securities law framework, the Proposal will not create a "stand-alone" regime for them. As a result, we question the extent to which the Proposal will achieve its goal of simplifying and streamlining the rules applicable to venture issuers.

Finally, we think it is important to consider the impact the Proposal will have on the complexity of the overall securities regulatory regime. The Proposal will introduce a new definition of venture issuer, which will exclude debt-only issuers, preferred share-only issuers and issuers of securitized products. Those excluded issuers will be known as “senior unlisted issuers” and the current venture issuer rules will continue to apply to them. The new definition of venture issuer also will exclude any issuer that is subject to B.C. Instrument 51-509 *Issuers Quoted in the U.S. Over-the-Counter Markets* or that would be subject to Proposed Multilateral Instrument 51-105 *Issuers Quoted in the U.S. Over-the-Counter Markets* if it becomes effective.<sup>1</sup> As a result, there will effectively be three regimes in place for public companies in Canada: i) the rules applicable to non-venture issuers, ii) the Proposal applicable to the venture issuers, as newly defined and iii) the current venture issuers rules applicable to senior unlisted issuers or other companies excluded from the new definition of venture issuer. To the extent that the Proposal does reduce some complexity for venture issuers, we question whether that benefit is sufficient to justify the increased complexity in the overall regulatory structure.

### ***The Annual Report***

The idea of issuers filing a single Annual Report, combining elements currently found in the AIF and MD&A and containing the annual financial statements, is a good one (and not just for venture issuers). Our support for the idea, however, is contingent on the contents of an Annual Report reflecting current disclosure requirements, not the reduced requirements contemplated by the Proposal.

We are concerned by the proposed elimination of quarterly financial statements and MD&A. It is important for investors to be able to assess the financial position of venture issuers regularly, before potential problems get to the point where they could affect the entire enterprise and put investors’ capital at risk. CCGG believes that allowing an entire year to pass before audited financial statements are prepared (even if mid-year interim financial statements are provided) would increase the risk to investors considerably.

However, we understand that other jurisdictions, such as Australia, have developed an alternative financial reporting regime for certain mining exploration stage companies. Financial disclosure for those companies is focused on operational expenditures, cash flows, liquidity and related party transactions. We acknowledge that there might be merit in more focused quarterly financial reporting for small, exploration stage companies in certain industry sectors. In CCGG’s view, any more focused quarterly financial reporting should still be certified by management. We would be pleased to provide further comments if the CSA develops specific proposals in that regard.

The Proposal also contemplates that the executive compensation and governance disclosure will be contained in the Annual Report, with the information circular delivered in advance of an annual general meeting (“AGM”) simply incorporating the Annual Report by reference. We agree that incorporation by reference would be sufficient, provided that the Annual Report is available for shareholders as far in advance of an AGM as the information circular is currently required so that

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<sup>1</sup> Ontario is not participating in MI 51-105, so even if it becomes effective it will not apply in Ontario.

shareholders have all executive compensation and governance disclosure before they are required to vote their shares. If the Proposal contemplates that an Annual Report would not be available as far in advance of an AGM as the information circular is currently required, then CCGG believes that a company should be required to include the executive compensation and governance disclosure in the information circular.

CCGG does not object to a long form prospectus requiring only two years of audited financial statements instead of three years as currently required. We do not object to replacing Business Acquisition Reports with a Report of Material Change, Material Related Entity Transaction or Major Acquisition, and eliminating the requirement for pro forma financial statements. However, we believe that requiring financial statements only for reverse take-overs and acquisitions that are 100% significant to the venture issuer is too high a threshold. These financial statements provide useful information for investors and should be provided if the transaction meets the current 40% threshold.

### ***Reduced Compensation Disclosure***

While CCGG is pleased that the Proposal does not reduce executive compensation disclosure as dramatically as the Initial Consultation, we maintain that all companies should be providing the same executive compensation disclosure. As noted above, when the executive compensation rules were recently amended, no venture issuers commented that those rules were too complicated or onerous.

In particular, CCGG does not agree with allowing venture issuers to provide only two years of compensation information instead of three. We also believe that allowing venture issuers to combine NEO and director compensation into one table will make disclosure less clear for shareholders and will not reduce the burden on venture issuers in a meaningful way.

CCGG supports the proposed amendment to allow stock options or other securities-based compensation to be disclosed at fair market value at the time options are exercised. However, CCGG believes that requirement should be in addition to the current requirement to disclose the grant date fair value of stock options. CCGG believes that the grant date fair value provides important information to investors since it shows what the board intended to pay an executive at the time the award was made. An additional requirement to disclose the amount realized by an executive at the time a securities-based award is exercised would allow shareholders to compare how the actual return to an executive compares to what the board intended. It will also allow for a comparison between the return to the executive and the return to shareholders during the same time period.

### ***Reduced Governance Disclosure***

We note that venture issuers already are subject to reduced corporate governance disclosure requirements. In CCGG's view, the existing requirements remain appropriate for venture issuers and we are opposed to reducing them further. In our view, members of the boards of small companies, who may be inexperienced, should be focusing their attention on their corporate governance practices in order to ensure that the company is well-governed and built on an ethical

foundation. Investors need information about a company's governance practices in order to assess the risk of their current investment and any potential future investment.

We are pleased to see that the Proposal has retained the requirement for venture issuers to disclose i) the steps the board takes to promote a culture of ethical business conduct, ii) how the board facilitates its exercise of independent supervision over management and iii) the steps the board takes to satisfy itself that the board, its committees and its individual directors are performing effectively. However, we are opposed to the removal of the following existing requirements for venture issuers:

- the requirement to disclose and identify the independent and non-independent directors and the basis for that determination<sup>2</sup>,
- the requirement to disclose the steps the board uses to identify new candidates for board nominations, including who identifies new candidates and the process used to identify new candidates, and
- if any of the directors are members of another public company board, the requirement to name each director and identify the other board(s) of which they are a member.

CCGG maintains that these disclosure requirements are appropriate for venture issuers and should not be eliminated.

#### ***Duplication of Existing Legal Requirements***

We are puzzled by the proposed requirement for venture issuers to disclose whether their directors and officers are subject to any statutory or contractual obligations that require them, in performing their services as directors and officers of a venture issuer, to act honestly and in good faith and to exercise care, skill or diligence and if so, to describe those duties. Since these obligations already exist in corporate statutes and the common law, we do not think describing them in a disclosure document provides any additional information to investors.

As detailed in our response to the Initial Consultation, we do not object to the new requirement for venture issuers to create and disclose policies and procedures to address conflicts of interest and to avoid illegal insider trading. We note, however, that practically, these obligations already exist in law and in the TSX-V listing requirements, so we do not think that these provisions are adding any additional protection for investors.

Similarly, the Proposal provides that a majority of the audit committee cannot be officers or employees of an issuer or its affiliates. Although NI 52-110 does not currently impose a minimum level of independence for audit committees of venture issuers, corporate statutes such as the CBCA and OBCA already contain the same requirement, as do the TSX-V listing requirements. As a result, we do not believe that this requirement is adding any additional investor protection.

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<sup>2</sup> Although we acknowledge that the Proposal would require venture issuers to disclose any relationship of a director that could affect the director's exercise of independent judgement in a particular circumstance, this is only part of the definition of "independence" currently found in s. 1.4 of NI 52-110. CCGG believes it is important for all public companies to be using the same definition of "independence" and disclosing whether their directors are independent according to that definition.

The CSA has asked whether control persons should be added to the above list to ensure that a majority of the audit committee is not comprised of control persons. We note that the TSX-V listing requirements already provide that a majority of the audit committee cannot be comprised of control persons. In CCGG's view, when considering the appropriate composition of an audit committee, it may be more important to consider the relationship between a director and management rather than the relationship between a director and a controlling shareholder. In that regard, please see Guideline #4 of our recently released *Governance Differences of Controlled Corporations*, a copy of which is enclosed.

Finally, we note that the Proposal would implement "notice and access" for proxy materials. However, in proposed amendments to NI 54-101 *Communication with Beneficial Owners of Securities of a Reporting Issuer* the CSA already has proposed a notice and access regime that would apply to all reporting issuers other than investment funds, including venture issuers. It is therefore unclear to us why the notice and access provisions in the Proposal are necessary.

### ***Unintended Market Impacts***

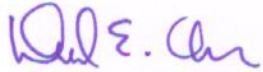
CCGG also is concerned that the Proposal may result in unintended market impacts. The Proposal indicates that 22% of current TSX listed companies started on the TSX-V. Reducing the disclosure obligations for TSX-V issuers will make the transition from the TSX-V to the TSX more difficult for issuers. Perhaps more troublesome, the Proposal could create an incentive for issuers which otherwise would list on the TSX (or graduate to it) to list on the TSX-V solely for the purpose of limiting their disclosure and governance requirements. Since TSX-V issuers represent 62% of all publically listed issuers in Canada, CCGG is concerned that the Proposal, if implemented as currently drafted, may create the perception among international investors that the Canadian market as a whole has lax governance and disclosure standards.

### ***Preferable Alternatives***

During the Initial Consultation, staff of the participating securities regulators suggested that one of the main goals of the Proposal is to provide venture issuers with a single instrument that contains all of the rules applicable to them. As noted above, since venture issuers will still be required to comply with other securities law instruments and the relevant securities acts, we do not think the Proposal will achieve that goal. CCGG believes that the goal would be best achieved by creating a comprehensive guide for venture issuers that describes all of the rules applicable to them. Such a guide would provide a single point of reference for venture issuers without simultaneously lowering the substantive requirements. (As noted above, however, we do agree with some of the proposed modifications to those requirements.) A single guide for venture issuers would better assist them in navigating and understanding the entire securities law regime and highlighting the exceptions that apply to them.

We thank you again for the opportunity to provide you with our comments. If you have any questions regarding the above, please feel free to contact our Executive Director, Stephen Erlichman, at 418.868.3585 or [serlichman@ccgg.ca](mailto:serlichman@ccgg.ca).

Yours very truly,

A handwritten signature in blue ink, appearing to read "D. E. Chornous".

Daniel E. Chornous, CFA  
Chair of the Board  
Canadian Coalition for Good Governance

## CCGG MEMBERS

Acuity Investment Management Inc.  
Alberta Investment Management Corporation (AIMCo)  
Alberta Teachers' Retirement Fund Board  
Aurion Capital Management Inc.  
BlackRock Asset Management Canada Limited  
BMO Harris Investment Management Inc.  
British Columbia Investment Management Corporation (bcIMC)  
Burgundy Asset Management Ltd.  
Canada Post Corporation Registered Pension Plan  
CIBC Global Asset Management  
Claymore Investments, Inc.  
Colleges of Applied Arts and Technology Pension Plan (CAAT)  
Connor, Clark & Lunn Investment Management  
CPP Investment Board  
Franklin Templeton Investments Corp.  
Genus Capital Management  
Greystone Managed Investments Inc.  
Hospitals of Ontario Pension Plan (HOOPP)  
Jarislowsky Fraser Limited  
Leith Wheeler Investment Counsel Ltd.  
Lincluden Investment Management  
Mackenzie Financial Corporation  
McGill University Pension Fund  
McLean Budden Limited  
MFC Global Investment Management  
NAV Canada  
New Brunswick Investment Management Corporation (NBIMC)  
NEI Investments  
Ontario Municipal Employees Retirement Board (OMERS)  
Ontario Pension Board  
Ontario Teachers' Pension Plan (Teachers')  
OPSEU Pension Trust  
Public Sector Pension Investment Board (PSP Investments)  
RBC Global Asset Management Inc.  
Régimes de retraite de la Société de transport de Montréal  
Russell Investments  
Scotia Asset Management  
SEAMARK Asset Management Ltd.  
Sionna Investment Managers Inc.  
Standard Life Investments Inc.  
State Street Global Advisors Ltd. (SSgA)  
TD Asset Management Inc.  
Teachers' Retirement Allowance Fund  
UBS Global Asset Management (Canada) Co.  
United Church of Canada  
University of Toronto Asset Management Corporation  
Workers' Compensation Board - Alberta  
York University Pension Plan