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VIA E-MAIL

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

Dear Sirs/Mesdames:

I am providing this letter in response to the Notice and Request for Comment of the Canadian Securities Administrators (the "**CSA**") on proposed National Instrument 51-103 – *Ongoing Governance and Disclosure Requirements for Venture Issuers* ("**Proposed NI 51-103**"), published on July 29, 2011. Thank you for the opportunity to comment on Proposed NI 51-103. The views expressed in this letter are my own and not necessarily those of any other member of my Firm.

Section 1 – Definition of "Material Contract"

The definition of "material contract" in Proposed NI 51-103, and related concepts, differ somewhat from the equivalent provisions in National Instrument 51-102 – *Continuous Disclosure Obligations* ("**NI 51-102**"). In particular, part (b) of the definition of material contract in Proposed NI 51-103 enumerates particular types of contracts (such as contracts with directors or executive officers and licences to use patents or trade names) that will be considered material, whether or not they are entered into in the ordinary course. However, in Proposed NI 51-103, part (b) of the definition (the enumerated items) does not have the element of the contract being material to the venture issuer. As currently drafted, it would seem to catch any contract of the enumerated types, whether

it is material to the venture issuer or not, which presumably is not the intention. In contrast, under NI 51-102 "material contract" is defined simply as a contract that is material to the issuer. In NI 51-102, the equivalent concept to part (b) of the definition in Proposed NI 51-103 is instead drafted as a requirement to file the enumerated types of *material contract*, even if they are entered into in the ordinary course of business – but they must first be material. I suggest that the definitions and concepts in Proposed NI 51-103 relating to filing of "material contracts" should be conformed to those in NI 51-102.

Section 3 - Application of Proposed NI 51-103

In Section 3 of Proposed NI 51-103, the approach to application of the Instrument is to make it apply to all reporting issuers other than four categories of specifically excluded reporting issuers, namely (a) investment funds, (b) issuers with securities listed or quoted on specified (senior) exchanges, (c) over-the-counter issuers subject to BC Instrument 51-509, and (d) senior unlisted issuers (as defined in proposed amendments to NI 51-102). This approach may inadvertently move some reporting issuers into the venture issuer disclosure regime under Proposed NI 51-103 when they ought to remain subject to NI 51-102. For example, an unlisted issuer can become a reporting issuer as a result of a plan of arrangement, amalgamation or other reorganization transaction, or by filing a non-offering prospectus. In addition, an unlisted issuer can be deemed to be a reporting issuer for specific purposes, including to be subject to senior issuer continuous disclosure obligations as a credit supporter or otherwise. The exclusion for a "senior unlisted issuer" may not apply in these circumstances, since the definition of "senior unlisted issuer" in the proposed amendments to NI 51-102 contemplates that such an issuer does not have any securities listed on the senior exchanges referred to in paragraph 3(1)(b) of Proposed NI 51-103, and that it has distributed debt, preferred shares or securitized products under a prospectus. If an unlisted issuer has not issued debt, preferred shares or securitized products under a prospectus, it appears that such an issuer would not be a "senior unlisted issuer" and therefore would become subject to Proposed NI 51-103, rather than NI 51-102, even if it would be more appropriate for that issuer to remain subject to NI 51-102.

To address this issue, I suggest that the definition of "senior unlisted issuer" be amended to include the types of reporting issuer referred to above. As a second alternative, the approach to the application of Proposed NI 51-103 and NI 51-102 could be reversed; that is, NI 51-102 could be made applicable to all reporting issuers other than venture issuers, and a definition of venture issuer could be drafted that captures the concept of the issuer having securities that are listed or quoted on a 'junior' exchange or marketplace. This could be done by listing applicable junior exchanges in the definition of venture issuer (the approach initially proposed in CSA Multilateral Consultation Paper 51-403 – *Tailoring Venture Issuer Regulation*), or by referring to the issuer being listed on an exchange or marketplace other than the specified senior markets (essentially, the analog of the concept found in current paragraph 3(1)(b) of Proposed NI 51-103). A third alternative would be for the CSA to introduce an "opt-out" provision that would allow issuers who would otherwise be subject to Proposed NI 51-103 to opt out of that regime, in appropriate circumstances and in whole or in part, and choose to continue being subject to the senior issuer disclosure regime of NI 51-102 and related instruments.

In addition, there seems to be an error in the cross-reference in subsection 3(3) – it appears that the reference to paragraph 35(1)(d) should instead be a reference to paragraph 33(1)(d).

Section 4 – Conflicts of Interest and Material Related Entity Transactions

Recognizing that not all reporting issuers are corporations, or are incorporated under Canadian federal or provincial business corporations statutes, I question whether the proposed requirements relating to conflicts of interest and material related entity transactions are necessary or appropriate. Most corporate laws include some kind of conflict of interest protection, and market practice generally leads to similar provisions being applied to non-corporate issuers (such as REITs and income trusts). Investors are further protected in relation to significant

related party transactions by the application of the minority securityholder protections in Multilateral Instrument 61-101. Furthermore, the formulation of this obligation may cause difficulty if it is not consistent with an issuer's constating documents or incorporating statute – for example, if the issuer's directors are required by applicable laws to act in the best interests of shareholders or others, in addition to or even instead of the issuer.

If Section 4 of Proposed NI 51-103 is retained in some form, I suggest that paragraph (a) be amended to introduce a materiality standard. As currently drafted, Proposed NI 51-103 would require the board of a venture issuer to discuss and consider every conflict of interest involving a director or executive officer, regardless of materiality. Canadian business corporations statutes generally include a materiality element in their conflict of interest provisions. I also suggest that Section 4 be revised to include language to ensure it is subject to, and not inconsistent with, the governing laws of the issuer.

Section 6 – Trading Policies

I suggest that the requirement in Section 6 of Proposed NI 51-103 for a venture issuer to take steps "to become aware of and to deter or prevent each person or company that is in a special relationship" from insider trading and tipping is too broad. Practically, issuers can put in place policies and procedures to cover their own directors, officers and employees, and perhaps consultants. However, I question whether issuers can realistically take these kinds of steps with respect to persons in a special relationship that are more removed from the issuer's control, and whether they should be required to do so. Such persons could include significant shareholders, persons proposing to make a take-over bid and anyone engaging in business or professional activity with or on behalf of a reporting issuer, and it should not be up to the issuer to monitor their activities or their compliance with securities laws. I suggest removing this provision or, if it is retained, that it be narrowed to apply only to an issuer's directors, officers and employees, and perhaps consultants. This would align with the focus of the guidance provided in part (1) immediately following Section 6 of Proposed NI 51-103.

Form 51-103F1 – Annual and Mid-Year Reports – Part 1, Section 2

Section 2 of Part 1 of Form 51-103F1, entitled "Focus on Material Information", begins by directing issuers: "In preparing a report, focus the disclosure on information that is material." However, Section 2 does not contain the sentence: "You do not need to disclose information that is not material", which is included in the equivalent section of Form 51-102F2 – *Annual Information Form*. I suggest including that sentence in Form 51-103F1, to avoid differences in the two instruments and confusion about the appropriate level of disclosure.

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Once again, thank you for the opportunity to comment on Proposed NI 51-103. Please contact me (at 416.863.5273) if you would like to discuss these comments.

Yours very truly,

(Signed) "Brendan Reay"

Brendan Reay