



January 25, 2018

VIA E-MAIL

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
The Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission of New Brunswick
Superintendent of Securities, Prince Edward Island
Nova Scotia Securities Commission
Superintendent of Securities, Newfoundland and Labrador
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Nunavut

Me Anne-Marie Beaudoin
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Dear Sirs/Mesdames:

Re: CSA Consultation Paper 52-404 *Approach to Director and Audit Committee Member Independence*

TSX Inc. and TSX Venture Exchange Inc. (collectively, the “**Exchanges**” or “**we**”) welcome the opportunity to provide comments on the Canadian Securities Administrators’ (the “**CSA**”) Consultation Paper 52-404 *Approach to Director and Audit Committee Member Independence* (the “**Consultation Paper**”). The Exchanges believe that director and audit committee independence is of significant importance and is an integral part of corporate governance and maintaining market integrity, and is an issue which affects numerous stakeholders. The Exchanges generally support the CSA’s current approach to determining director and audit committee member independence, which includes a combination of a principles-based definition combined with bright line disqualification categories, as prescribed by National Instrument 52-110 Audit Committees (“**NI 52-110**”). However, we believe that the specific criteria included in the “bright line test” of the current independence definition should be revisited and reassessed by the CSA, and that the CSA should consider adopting a “best practices” model to the independence definition in addition to the current CSA approach.



The Exchanges

The Exchanges are part of TMX Group Limited, a company that is strongly focused on supporting and promoting good governance, innovation, capital formation and financial markets in Canada and globally through its world class exchanges, including the Toronto Stock Exchange (“**TSX**”) and TSX Venture Exchange (“**TSXV**”) for equities, and the Montreal Exchange for financial derivatives. TSX is a globally recognized, robust stock exchange that lists growth-oriented companies with strong performance track records and is a top-ranked destination for global capital. TSXV is Canada’s leading global capital formation platform for growth stage companies looking to access public venture capital to facilitate their growth, and is an important part of Canada’s vibrant and unique capital markets continuum.

Approach to Director and Audit Committee Independence

Bright Line Test

Under the current CSA approach of director independence, certain relationships are deemed to be material (i.e. the “bright line test”) and automatically result in a director being considered non-independent by the CSA, even where an issuer’s board has factually determined otherwise. The Exchanges believe that the use of a bright line test with respect to determining the independence of directors and audit committee members continues to be appropriate for issuers in the Canadian market. While we understand some of the concerns expressed by certain stakeholders in the Consultation Paper regarding the use of the bright line test (i.e. that such test may be at times inflexible and restrictive, and may unduly restrict the pool of potential directors by presumptively precluding individuals with the requisite experience and sound judgement from being eligible to be independent members of the board or audit committee), the Exchanges feel that the bright line test provides a level of certainty and predictability for stakeholders in evaluating the independence of an issuer’s directors or audit committee members. Accordingly, the Exchanges believe that the use of a bright line test continues to be appropriate for issuers and we do not support the elimination of the bright line disqualification categories in favour of a purely principles-based approach.

While the Exchanges support the use of a bright line test, given the passage of time since the adoption of the independence definition by the CSA in 2004, we believe that the specific independence criteria prescribed in subsection 1.4(3) to subsection 1.4(7) of NI 52-110 should be revisited and “refreshed” by the CSA as the criteria included may be too broad and no longer appropriate. The Exchanges urge the CSA to assess whether each criteria is still relevant to issuers and that it accurately captures those individuals whose independence may actually be impaired because of a conflict of interest, rather than capturing those individuals who are not independent by virtue of meeting the criteria set out in the independence definition. For example, pursuant to subsection 1.4(3)(e) of NI 52-110, an individual is deemed to have a material relationship with the issuer (and therefore, is not considered independent) if he or she is, or has been within the last three years, in receipt of more than \$75,000 in direct compensation from the issuer during any 12 month period. The Exchanges question the appropriateness and relevance of this dollar amount and whether it continues to be meaningful or appropriate. We are of the view that receiving compensation of \$75,000 by an issuer may not be a significant factor that would impair an individual’s independent judgement. In the Exchanges’ view, there may be other

factors that are more relevant in determining independence which are currently not included in the bright line test set out in NI 52-110 (for example, where an individual's shareholdings in an issuer is material). In addition, the CSA could provide flexibility or exceptions to certain criteria of the bright line test. For example, an individual who has acted as interim chief executive officer of a shell company (for example, a TSXV Capital Pool Company ("CPC")) would not be considered independent for the audit committee of the resulting issuer for a period of three years. Given the difficulty many TSXV issuers face in attracting quality directors, the CSA could consider providing flexibility around this to certain issuers (for example, by reducing the period of time in which an individual would not be considered independent under subsections 1.4(3) to 1.4(7) of NI 52-110 from three years to one for CPCs, or permitting certain exceptions. Accordingly, we recommend that the CSA re-examine each criteria set forth in the bright line test to determine the appropriateness and relevance of each, and provide more flexibility where appropriate.

Best Practices Model

The Exchanges are of the view that, in addition to the current bright line and subjective tests, the CSA should include a "best practices" component to its approach to determining director and audit committee independence. We recognize that the automatic deeming provisions included in the bright line test may result in an unintended one-size-fits-all approach that may not take into account the particular circumstances of an issuer. Accordingly, the Exchanges feel that the adoption of a "best practices" model in addition to the current tests (and not in lieu thereof) may help alleviate this concern, and the concern that the current bright line test is too restrictive and inflexible.

As part of the re-examination of the specific criteria included in the bright line test criteria mentioned above, the Exchanges believe that the CSA must assess whether it is appropriate to continue to classify each criteria as a "deeming provision", or whether any of the criteria is better suited for inclusion in a "best practices" model. In particular, where there is debate or controversy with respect to the relevance or importance of a specific item included in the bright line test regarding independence (such as being in receipt of \$75,000 in compensation as described above), such item should no longer be considered as an automatic disqualification category under the bright line test and instead, should be included as a factor in determining independence under a "best practices" model. Under this model, and similar to the "comply or explain" model under National Instrument 58-101 *Disclosure of Corporate Governance Practices*, the CSA would provide issuers with guidance as to "best practices" for determining director and audit committee independence. Such guidance may include criteria no longer included in the bright line test as a result of the reassessment, and may provide other guidance as to "best practices" in determining independence. Where an issuer deviates from the CSA's guidance, it would be required to make certain annual disclosures, including disclosing the fact that the guidance was not complied with, and explaining why and how a particular individual was determined to be independent by the board. Any criteria included in the bright line test would continue to be classified as an automatic disqualification category that must be complied with by issuers and would not be subject to the "comply or explain" model.



Subjective Test

While the use of the bright line test under NI 52-110 is important and useful for determining independence, the “subjective test” set forth in subsection 1.4(2), whereby the board of directors of the issuer must determine whether the material relationship could be reasonably expected to interfere with the individual’s independent judgment, is of equal importance and must be considered by issuers. The Exchanges believe that issuers may focus solely on the bright line test described above, which may not fairly and accurately capture all situations or circumstances whereby an individual would not be considered independent, and may fail to consider or apply the “material relationship” test. It is essential for issuers to consider and apply the subjective test to ensure that independence is properly assessed. Failing to consider the subjective test may result in a situation where an individual is considered to be independent solely because he or she does not meet any of the criteria included in the bright line test, but would not otherwise have been considered independent if the subjective test had been properly considered and applied. Accordingly, the Exchanges do not support eliminating this aspect of the independence definition from the CSA’s approach, and we urge the CSA to emphasize to issuers that both tests must be considered and applied when determining director or audit committee member independence.

The Exchanges appreciate the opportunity to provide comments with respect to the CSA’s definition of director and audit committee member independence and look forward to continuing an open dialogue with the CSA on this issue. We appreciate your consideration of our comments and suggestions and we would be happy to discuss these at greater length with the appropriate representatives. Please do not hesitate to contact us if you have any questions regarding our comments.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Loui A.', written in a cursive style.

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cc: Ungad Chadda, *SVP & Enterprise Head of Corporate Strategy, Development and External Affairs, TMX Group Limited*