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Registrar of Securities, Legal Registries Division,
Department of Justice, Government of Nunavut
Saskatchewan Financial Services Commission
Securities Commission of Newfoundland and Labrador

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Dear Sirs/Mesdames:

Re: Proposed Repeal and Replacement of NP 58-201 *Corporate Governance Guidelines*, NI 58-101 *Disclosure of Corporate Governance Practices*, NI 52-110 *Audit Committees and Companion Policy 52-110CP Audit Committees*

This is our firm's response to your request for comment dated December 19, 2008 regarding the proposed repeal and replacement of National Policy 58-201 *Corporate Governance Guidelines*, NI 58-101 *Disclosure of Corporate Governance Practices*, National Instrument 52-110 *Audit Committees* and Companion Policy 52-110CP *Audit Committees*. Our comments relate to the following:

1. independence from management and freedom from conflict of interest are the fundamental criteria for effective board decision-making;
2. controlling shareholders should not automatically be disqualified from being considered independent;

3. providing lists of examples of corporate governance practices is generally at odds with a principles-based regime;
 4. principles 1 and 2 are interrelated and, along with being combined, should be accompanied by additional disclosure requirements; and
 5. principle 8 relating to executive compensation is unnecessary.
1. **Independence from management and freedom from conflict of interest are the fundamental criteria for effective board decision-making**

We support the proposed definition of independence to the extent it leaves the ultimate determination to the reasonable judgment of the board of directors. We believe that issuers and other market participants sometimes place undue reliance on the existing bright-line tests for independence at the expense of carefully assessing a board member's capacity to make effective decisions in the best interests of the issuer, independent of management and free of conflict of interest.

Because we view independence from management as a fundamental prerequisite for effective board decision-making, we agree with the proposal that section 3.1 of the audit committee policy include being actively involved in the management of the issuer, which may include a control person or a significant shareholder, as one of the relationships that could affect independence.

Because we view managing conflicts of interest as another fundamental criterion for effective board decision-making, we support the proposed disclosure requirements in relation to Principle 6 "Recognize and Manage Conflicts of Interest" as being both appropriate and complementary to existing securities and corporate law requirements governing related party transactions.

2. **Controlling shareholders should not automatically be disqualified from being considered independent**

We agree with the proposals that significant or even controlling shareholders should not be disqualified from being considered independent merely because of their shareholdings.¹ The interests of major shareholders are often aligned with those of other shareholders, and we believe that representatives of major shareholders can and do make a positive contribution to the overall quality of decision-making by boards and committees. We recommend that major shareholders be treated just like other board members, i.e., their independence should be assessed on the basis of their capacity for decision-making free of management influence and, where specific transactions or other corporate activities are being considered, they must be free of conflict of interest in those instances.

¹ This approach is consistent with the NYSE's independence standards. The commentary accompanying the NYSE's general independence test in Section 303A.02(a) of the listed company manual states that "as the concern is independence from management, the exchange does not view ownership of even a significant amount of stock, by itself, as a bar to an independence finding."

Accordingly, in response to your specific request for comment, we do not believe that a relationship with a control person or significant shareholder should be specified in the proposed audit committee policy as a relationship that could, on its own, affect independence. For the same reason, we recommend removing proposed section 2.4, which states that “an audit committee should be composed of an appropriate number of independent directors who are unrelated to any control person or significant shareholder.”

3. Providing lists of examples of corporate governance practices is generally at odds with a principles-based regime

We believe that providing examples—particularly such a large number of them and in such detail—is generally at odds with a principles-based regime for the following reasons:

- The examples are very likely to be treated by issuers as a checklist of *minimum acceptable* practices, effectively removing the flexibility the regime is supposed to provide issuers to tailor their governance practices to their circumstances.
- The examples may also be treated by issuers as a checklist of *maximum required* practices, removing one of the key potential advantages of a principles-based regime, namely, to provide better incentives than a rules-based regime for on-going improvement and innovation in corporate governance.
- The examples effectively provide a template for issuers’ disclosure and will therefore encourage the use of boilerplate.

4. Principles 1 and 2 are interrelated and, along with being combined, should be accompanied by additional disclosure requirements

We believe that the first two proposed principles (“Create a framework for oversight and accountability” and “Structure the board to add value”) are necessarily interrelated and should be combined into a single principle that clearly articulates the main purpose of any board of directors, which is to supervise the company’s management while providing strategic leadership. We therefore recommend that these two principles be combined and reformulated as follows:

“Structure the board so as to empower it to set the company’s overall strategic vision and long-term objectives and effectively supervise management’s implementation of that vision and those objectives.”

We strongly agree that certain of the enumerated governance practices under proposed principle 2—namely, having a majority of independent directors, separating the roles of chair and CEO, hosting regular meetings of only the independent directors, and empowering the independent directors to engage their own advisors—are crucial to the ability of any board of directors to make effective decisions in the best interests of the issuer. Accordingly, we recommend that explicit disclosure related to these practices be added to proposed Form 58-101F1 *Corporate Governance Statement* in the form of the following requirement:

“Describe what practices the issuer uses to ensure the board of directors and its committees are empowered to make decisions independent of management influence. This disclosure should, at a minimum, inform investors of the following:

- whether or not the roles of CEO and chair of the board are separate, and who has responsibility for setting the board's agenda,
- whether or not the independent directors, both at the board and committee levels, hold regularly scheduled meetings at which other directors and executive officers are not present, and
- whether or not the independent directors, both at the board and committee levels, have the authority to engage and compensate, at the issuer's expense, any internal or external advisors that they determine necessary to carry out their duties."

5. Principle 8 relating to executive compensation is unnecessary

The new executive compensation disclosure requirements that became effective at the beginning of this year address the concepts and ideals set forth in proposed principle 8 in a comprehensive and detailed manner. Therefore, we recommend removing principle 8 as duplicative and unnecessary.

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Thank you for the opportunity to comment on the proposed changes to the current corporate governance regime. Please contact me if you would like to discuss any of our firm's comments.

Yours sincerely,

Peter Jewett