January 22, 2018

BY EMAIL

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, Corporate Secretary
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The Secretary
Ontario Securities Commission
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Dear Sirs/Mesdames:

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

The Canadian Advocacy Council[1] for Canadian CFA Institute[2] Societies (the CAC) appreciates the opportunity to comment on the Consultation Paper.

The CAC is supportive of measures designed to increase accountability, integrity and transparency in the capital markets. We do not favour either an exclusively principles-based nor exclusively rules-based approach to corporate governance. The position of CFA Institute is that company boards should consist of a majority of

[1]The CAC represents more than 15,000 Canadian members of CFA Institute and its 12 Member Societies across Canada. The CAC membership includes portfolio managers, analysts and other investment professionals in Canada who review regulatory, legislative, and standard setting developments affecting investors, investment professionals, and the capital markets in Canada. See the CAC's website at http://www.cfasociety.org/cac. Our Code of Ethics and Standards of Professional Conduct can be found at http://www.cfainstitute.org/ethics/codes/ethics/Pages/index.aspx.

[2] CFA Institute is the global association of investment professionals that sets the standard for professional excellence and credentials. The organization is a champion for ethical behavior in investment markets and a respected source of knowledge in the global financial community. The end goal: to create an environment where investors' interests come first, markets function at their best, and economies grow. CFA Institute has more than 155,000 members in 165 countries, including more than 148,900 CFA charterholders and 149 member societies. For more information, visit www.cfainstitute.org.

independent directors. A board composed of a majority of independent directors is more likely to have independent decision making, fewer conflicts and more likely to first consider the best interests of shareholders.

We wish to make the following comments on the questions set out in the Consultation Paper.

1. *Our approach to determining director and audit committee member independence is described in section 3.2 of this Consultation Paper.*

   a. Do you consider our approach appropriate for all issuers in the Canadian market? Please explain why or why not.

   We do consider the CSA's approach appropriate for all issuers in the Canadian market. The bright-line tests that are in place offer certainty and transparency to both investors and board nominating committees. In addition, more stringent requirements for governance are on the whole beneficial to the capital markets in that they strengthen investor confidence. In addition to independence requirements, we would encourage the CSA to review the matter of board composition more holistically, and, for example, continue its review of women on boards and in executive officer positions. A board should be comprised of individuals with varied backgrounds, perspective and expertise.

   b. *In your view, what are the benefits or limitations of our approach to determining independence? Please explain.*

   The use of bright-line tests would appear to represent a higher governance standard and reinforce the principles of consistent application, transparency and trust that are critical to a high quality corporate governance regime.

   In addition, when investors (including institutional investors) are performing corporate governance assessments and making proxy voting determinations, the current tests assist in quickly evaluating the level of independence on a board.

   c. *Do you believe that our approach strikes an appropriate balance in terms of:*
   i. the restrictions it imposes on issuers' boards in exercising their discretion in making independence determinations, and
   ii. the certainty it provides boards in making those determinations and the consistency and predictability it provides other stakeholders in evaluating the independence of an issuer's directors or audit committee members?

   Yes, we believe the current approach strikes an appropriate balance. If an issuer's board were given additional latitude to subjectively determine independence in all circumstances, we are concerned it would lead to additional conflicts of interest. Please see our response to #1(a) above.

d. *Do you have any other comments regarding our approach*?

We are not aware of any evidence, statistical or otherwise, to justify a statement that there is an insufficient supply of highly qualified candidates for independent directors in the Canadian marketplace. It would be helpful to have additional data, to the extent it exists, in support of this claim prior to making any wholesale changes to the current regulatory approach that could have the effect of reversing gains made in the quality of corporate governance and potentially erode investor confidence.

We note as well the existing differentiated rules applicable to venture issuers with respect to both disclosure of their governance regime, as well as permitting non-independent directors to sit on the audit committee, which allows additional flexibility for these types of issuers. The availability of these different and more flexible rules for this subset of issuers may not be fully appreciated within the non-reporting issuer community, and could be an opportunity for additional education and outreach.

2. *Should we consider making any changes to our approach to determining independence as prescribed in NI 52-110, such as changes to:*

a. *the definition of independence;*

b. *the bright line tests for directors and audit committee members; or*

c. *the exemptions to the requirement that every audit committee member be independent? Are there other changes we should consider? Please explain.*

Rather than a wholesale review of the approach to the meaning of independence, there may be an opportunity to revisit some of the specific bright-line tests to better align the Canadian regime with those of the relevant listing venues used by many Canadian issuers in the United States. We recognize the differences and relative ease with which the rules of listing venues (as opposed to securities legislation) may be amended and implemented. Nevertheless, we note as an example, that certain thresholds in Canada could be modernized and better harmonized with those in the U.S. As noted in Annex D of the Consultation Paper, as a bright-line test, both the NYSE and Nasdaq disqualify certain persons as directors if they have received more than $120,000 USD compensation from the listed company within the specified period of time, compared to the Canadian threshold of $75,000.

As another example, the definition of "affiliate" in the existing governance regime could possibly be re-examined in light of the nature of complex organizations with multiple affiliates and subsidiaries across different geographies. In a large organization, there may be sufficient autonomy between certain affiliates/subsidiaries such that a person should not be automatically disqualified

from constituting an independent director of one entity as a result of employment or officer status within the last three years of another entity within the corporate group, but quite remote to the entity in question where they are seeking to serve as an independent director. There may be in some instances sufficient financial and operational independence between the entities in some such organizations to warrant a review of the definition for more discretion.

As an analogy, the CSA has recognized that in the investment fund context, it may be possible for certain individuals with a relationship to the manager of the fund to be independent for conflict of interest purposes. Under National Instrument 81-107 *Independent Review Committee for Investment Funds* ("**NI 81-107**"), public funds are required to have an independent review committee to consider certain conflict of interest matters. A member of the IRC is considered to be independent for these purposes if the member has no material relationship with the manager, the investment fund, or an entity related to the manager, meaning a relationship which could reasonably be perceived to interfere with the member's judgment regarding a conflict of interest matter. In the commentary to section 1.4 of NI 81-107 with respect to the definition of independence, it is noted that while it is unlikely that a person who has recently been an employee or executive officer of the manager of the fund would be independent, they are not automatically excluded from potentially serving as a member of the IRC.

Additional clarity could also be given to the meaning of the term "worked on the issuer's audit". A person who was, within the last three years, a partner or employee of a firm and who personally worked on the issuer's audit file as part of the firm within that time is not currently considered independent. Given the fact that a number of individuals may contribute to a limited portion of a public issuer's audit, even for a short period of time, and then move on to another position or assignment within an external auditor's organization, there may be room to clarify the type, substance or duration of work which would result in an automatic bright-line test disqualification.

We are of the view that the audit committee should consist of independent members in order to, among other things, prevent management from inadvertently impacting the work of the external auditors. We recognize that the pool for independent directors with the requisite technical expertise for audit committee work may be less than the overall independent candidate pool, but the benefits of independence in this area for an issuer's quality of corporate governance outweighs this potential difficulty.

3. *What are the advantages and disadvantages of maintaining our approach to determining independence versus replacing it with an alternative approach? Please explain.*

We do not see a compelling policy rationale for further disharmony of the Canadian corporate governance regime from comparable U.S. independence rules. There are

a number of practical considerations for those issuers that are or wish to cross-list their securities on Canadian and U.S. marketplaces. Given the interconnections between the Canadian and U.S. economies and securities markets, it would be beneficial to harmonize the independence requirements, to the extent possible, between the two countries as well as among other developed economies where high-quality corporate governance regimes exist and where economic and financial interconnections to Canada are material.

Concluding Remarks

We thank you for the opportunity to provide these comments. We would be happy to address any questions you may have and appreciate the time you are taking to consider our points of view. Please feel free to contact us at chair@cfaadvocacy.ca on this or any other issue in future.

(Signed) *The Canadian Advocacy Council for Canadian CFA Institute Societies*

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