Canadian Coalition for
GOOD GOVERNANCE
THE VOICE OF THE SHAREHOLDER

August 16, 2010

Alberta Securities Commission
British Columbia Securities Commission
Manitoba Securities Commission
Nova Scotia Securities Commission
New Brunswick Securities Commission
Saskatchewan Financial Services Commission

C/O: Ms. Denise Weeres
Alberta Securities Commission
400, 300 – 5th Avenue S.W.
Calgary, AB
T3B 2A6

Dear Sir/Madame:

Re: CSA Multilateral Consultation Paper 51-403

We have reviewed CSA Multilateral Consultation Paper 51-403 (the "Proposal") and thank you for the opportunity to participate in the consultation session held in Toronto and to provide you with our comments.

Representing the interests of institutional shareholders, CCGG promotes good governance practices in Canadian public companies and the improvement of the regulatory environment to best align the interests of boards and management with those of their shareholders, and to promote the efficiency and effectiveness of the Canadian capital markets. CCGG has 41 full members who collectively manage in excess of $1.4 trillion of savings on behalf of most Canadians. A list of our members is attached to this submission.

Overview

For the reasons that are set out below, we urge the CSA not to proceed with the Proposal. We are concerned by the reduced disclosure and governance standards found throughout the Proposal which will result in less protection for investors and have the potential to adversely affect the reputation of the Canadian marketplace.

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. Moreover, at the Toronto consultations Staff 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 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.

The following discussion details our concerns with the main provisions of the Proposal.

Reduced Material Change Reporting

The Proposal introduces the concept of "disclosable events" to the existing material change disclosure regime. To the extent that the list of "disclosable events" is intended to provide venture issuers with examples of events that would ordinarily be considered material changes, it might provide helpful guidance to venture issuers. The Proposal should make it clear, however, that the list of disclosable events is not exhaustive and for example only. Venture issuers must still be obligated, along with all issuers, to assess each material event (whether or not it is found within the list of "disclosable events") to determine whether it amounts to a material change that must be disclosed.

The Proposal would allow venture issuers not to disclose a material change if doing so would be "unduly detrimental to the legitimate interests of the venture issuer," provided senior management has no reason to believe that anyone has "made use of" the undisclosed information to buy or sell securities. It would also eliminate the need to file confidential material change reports. We oppose these changes to the current disclosure regime. Many negative material changes could be characterized as "detrimental to an issuer's legitimate interests". Such broad language could lead to venture issuers only disclosing positive material changes. The current confidential material change report process allows issuers to protect their legitimate business interests, while allowing for regulatory oversight of decisions not to disclose material changes, and should be maintained.

We also note that the test for insider trading in this section is much narrower than currently exists in securities law. As currently worded, a board could decide not to disclose material information, even if an executive traded while in possession of it (which currently would be illegal insider trading) as long as senior management is satisfied that the executive did not "make use of" the information when trading. We understand from the Toronto consultations that the insertion of the "makes use of" caveat may have been in error and we encourage you to remove it.

We also oppose eliminating the requirement to file material contracts and allowing venture issuers to only disclose "significant particulars" of them. If material contracts are not filed, there will be no way for investors or regulators to determine whether the company's summary is accurate or complete. Moreover, preparing a summary of the particulars of a material contract is more work than simply filing the contract, so it is unclear how this rule will be less onerous for venture issuers.

Reduced Compensation Disclosure

We do not agree with the Proposal's reduced disclosure of executive and director compensation. Allowing all executive and director compensation other than CEO or CFO to be aggregated makes it very difficult for investors to assess a venture issuer's compensation policies and impossible to assess individual compensation decisions beyond the CEO and CFO. This is a particular concern for venture issuers who are more likely to have related parties in executive and director roles.

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We also object to the elimination of the CD&A. Detailed disclosure of a company's compensation policies and decisions provide investors with important insight into how the board is incenting management to achieve the company's strategy and whether management's compensation is properly linked to performance. Allowing venture issuers to withhold this information will make it difficult for investors to monitor the effectiveness of management and the extent to which the board is fulfilling its oversight role.

Reduced Governance Standards and Directors' Duties

We are opposed to reducing venture issuers' disclosure of their governance practices. The Proposal would allow venture issuers not to disclose how the board facilitates independent judgment, what steps the board has taken to encourage a culture of ethical conduct and the results of any board assessments. In our view, these are precisely the areas where inexperienced boards of small companies should be focusing their attention 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 and any future investment.

Moreover, we are perplexed by the Proposal's rationale for reducing the governance standards. The Proposal suggests that since there are fewer institutional investors in the venture market and smaller investors are less likely to be effective in pressuring issuers to comply with governance standards, the standards themselves are less effective. In our view, the fact that smaller investors have less power to require issuers to comply with governance standards is no reason to reduce the standards. To the contrary, a smaller and less powerful investor base speaks to the need for high standards and greater regulatory oversight to ensure compliance.

We are also concerned with the Proposal's reduced standard of care for directors of a venture issuer as one requiring only the care, diligence and skill "expected of a reasonably prudent person acting for a venture issuer". The Proposal explains that it is trying to distinguish between the standard of care expected of a venture issuer board and that of a senior, more experienced board. In our view, the fact that the board of a venture issuer may be less experienced is no reason to lower the standard of conduct expected of them.

In any event, it is doubtful that securities regulators have the authority to lower the standard of care for directors of a venture issuer. Provincial and federal business corporation acts, together with the common law that has developed under them, have established the accepted standard of care as that "of a reasonably prudent person" which has a well understood and accepted legal meaning. Every director of a corporation is required to meet that standard.

We understand from Staff at the Toronto consultations that the intended benefit of importing a new standard of care for directors into securities law is to apply it to directors of companies that are not organized as corporations and allow securities regulators to enforce it. On the first point, the number of companies that are not corporations would be such a small segment of the market that importing a new standard would not be worth the uncertainty it would create. On the second point, we note that securities regulators have always been reluctant to delve into areas that are traditionally considered matters of corporate law. We think it very unlikely that enforcement actions would be brought against directors for breach of their duty (even assuming securities regulators have the authority to do so) and given the lower standard being proposed, such actions would be of questionable value.

Reduced Financial Reporting

The idea of requiring issuers to file 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 therefore put investors' capital at risk. 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.

Duplication of Existing Legal Requirements

We are concerned that the Proposal purports to introduce new legal obligations to further investor protection when in fact, all of the requirements found in the Proposal already exist in other areas of law (explicitly or implicitly). For example:

- The Proposal indicates that it is creating two new governance obligations: the requirement to create policies and procedures to address conflicts of interest and to avoid illegal insider trading. Practically, these obligations already exist in law, although they might not be contained in a securities law instrument.
- The Proposal provides that a majority of the audit committee cannot be officers or employees of an issuer or its affiliates. Although securities law 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.
- The Proposal would implement "notice and access" for proxy materials, but the CSA has already proposed proxy access as an option for all issuers.

Staff at the Toronto consultations confirmed that the Proposal does not contain any new legal requirements but does bring some existing corporate or common law requirements into securities law. As noted above, we think this approach will create confusion and is of questionable benefit, particularly since matters of corporate law are unlikely to be pursued by securities regulators.

Unintended Market Impacts

We are also 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 so dramatically will undoubtedly 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 who would otherwise 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.

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In addition, we are not aware of any jurisdiction where the disclosure requirements for the junior market are so much lower than those for the senior market, as contemplated by the Proposal. Since TSX-V issuers are 62% of all publically listed issuers in Canada, we are concerned that this may create the perception among international investors that the Canadian market as a whole has lax governance and disclosure standards.

Non-Participation across CSA

We note that Ontario and Quebec are not participating in the consultation process. In addition to the points we have raised above, we would be concerned if some CSA jurisdictions chose to proceed with the Proposal without the support of Ontario and Quebec. The CSA has made important progress towards harmonizing securities laws across Canada. Proceeding with the Proposal without the support of all jurisdictions would create unnecessary confusion and complexity and would be a step backwards for the CSA.

Preferable Alternatives

At the Toronto consultations, Staff suggested that one of the main purposes of the Proposal is to provide venture issuers with a single instrument that contains all of the rules that apply to them. In our view, this could be achieved by creating a guide for venture issuers that includes, for ease of reference, all of the current "carve-outs" pertaining to venture issuers. Such a guide would provide the desired single point of reference for venture issuers without simultaneously lowering the substantive requirements.

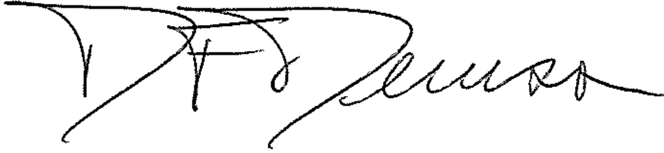
In this regard, however, it is important to note that even if the Proposal is implemented, venture issuers will still have to look to many other instruments to understand the law that applies to them including:

- 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*
- All of the general securities law provisions, including the insider trading and secondary market liability provisions.

Since venture issuers must operate within the existing securities law framework, the Proposal would not create a "stand-alone" regime for them. Although reducing complexity for venture issuers is a laudable goal, this would be best achieved by creating a guide that would 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 Griggs, at 418.868.3585 or sgriggs@ccgg.ca.

Yours very truly,



David Denison
Chair of the Board
Canadian Coalition for Good Governance

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