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Me Anne-Marie Beaudoin, Corporate Secretary
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John Stevenson, Secretary
Ontario Securities Commission
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Request for Comments - Proposed Repeal and Replacement of National Policy 58-201 *Corporate Governance Guidelines*, National Instrument 58-101 *Disclosure of Corporate Governance Practices,* and National Instrument 52-110 *Audit Committees* and Companion Policy 52-110CP *Audit Committees*

Dear Me. Beaudoin and Mr. Stevenson:

The Canadian Society of Corporate Secretaries (CSCS) appreciates the opportunity to provide the following perspectives on the Canadian Securities Administrators' (CSA) proposed new corporate governance principles and practices for Canadian issuers.

CSCS represents more than 600 professionals across Canada whose primary accountabilities include corporate governance, investor relations and communications. Formed in 1994, CSCS represents many of Canada's largest and most respected public issuers. Our primary role is to help members in corporate secretarial practice, securities compliance and provision of governance services.

As part of this response to the proposed new CSA corporate governance rules, the CSCS recently held a series of consultations with our members across the country. Meetings were held in Vancouver, Calgary, Edmonton, Toronto and Montreal for the express purpose of discussing the proposed new rules and soliciting our members' comments. There were approximately 200 participants and, depending on the location, representatives from the AMF, the OSC, the ASC, and the BCSC were present to provide detailed presentations on the proposed new regime.

In light of those consultations, we are pleased to submit our observations and comments for your consideration.

A) High-level concerns

From a high level perspective, we have three key concerns:

1) *The proposed timing for the implementation of a substantially new governance regime*

Canadian issuers' plates are very full at the present time. In the current economic climate issuers are focused on business sustainability and success while corporate resources have been pared to the bone. Our members are hard at work on the implementation challenges of the International Financial Reporting Standards ('IFRS') and the recent Compensation Discussion and Analysis ('CD&A') rules. The implementation of IFRS is a major concern as issuers expect to face on-going challenges in explaining the impact of IFRS to their shareholders and other stakeholders while maintaining their ratings from ratings agencies.

As this particular CSA initiative stems from a scheduled review of the corporate governance rules, it does not have associated with it the urgency that might be justified in responding to a threat to the integrity of the capital markets.

As the proposed changes seek to place the Canadian regulatory approach to corporate governance on a whole new footing, it makes sense to allow more time for all stakeholders to consider the initiative and respond to it with the benefit of sound reflection and debate.

CSCS therefore recommends that implementation of the proposed changes, as they are presently conceived, ought to be substantially deferred and that a vigorous and open debate be encouraged on the subject of the proposed reforms.

2) *We are concerned about the value of moving from the current 'comply and explain' model to one that provides less well-defined expectations*

The CSA's objective for the new proposals is to provide Canadian issuers with a more flexible approach to corporate governance that is easier to tailor to individual requirements, removing the perception that all issuers are expected to adopt a one-size-fits-all model of governance. The current 'comply or explain' approach already provides that flexibility for issuers who feel that their business needs require a fresh or different approach to governance. To the extent that the CSA feels that the current rules are perceived as too constrictive, it should actively promote open discussion and debate among all stakeholders, seek out the views of those who feel the constraints most acutely, and suggest avenues within the existing framework that those issuers might explore.

Replacing the existing paradigm with an entirely new one may encourage freedom and experimentation, but an evolutionary and incremental approach, that does not impair comparability, would be much preferable.

Based on the results of our public sessions, there is a real and pervasive lack of support for a framework that lacks specificity. There is genuine concern among our members that the new rules will move Canada from an environment where there are tangible and well-understood governance benchmarks to one where expectations are unclear.

Another consistent and firm message that came from the cross-country meetings was that our members have difficulty understanding the benefits that the proposed reforms offer, while both the hard and soft costs of completely revising issuers' disclosure processes to respond to the new governance regulation are very well understood. For example, some of our issuer representatives indicated that external legal costs would inevitably increase under the proposed new regime as they would be forced to obtain independent legal confirmation of interpretations and disclosures in order to provide their Boards with comfort in this area.

3. *The proposed changes may make comparisons between countries and capital markets and between issuers in the Canadian market, more difficult*

We share the concern expressed by other seasoned observers that the new approach to corporate governance regulation may make the comparison of the Canadian corporate governance framework to the rules that apply in the US and UK markets more difficult.

Canada has rightly earned an enviable reputation for the quality of its regulation. That reputation is further enhanced by the performance of our financial institutions in the current recession and financial crisis. However, Canada is a relatively small market and Canadian issuers must compete for capital in world markets. Accordingly, providing a regulatory framework that facilitates comparisons must remain a policy objective for Canadian regulators.

B) Specific concerns

In addition to the high-level concerns expressed above, CSCS has the following more specific observations:

1) The proposed new independence rule

We welcome the move to a more principles-based independence rule that does away with the bright-line tests that, in some cases, acted to arbitrarily exclude a finding of independence that might not have been justified. The new approach also makes sense to the extent that it allows the nominee directors of controlling shareholders to participate on audit and other standing board committees from which they are currently excluded.

Where we must express a dissenting view is with respect to the proposed 'reasonable perception' standard. We feel that this proposal injects a subjective element into the independence determination that may prove to be extremely difficult for boards and their nominating committees to come to terms with in practice.

The independence determination must remain an objective exercise. The board and its nominating committee must be in a position to determine, based on the specific circumstances, whether a candidate or incumbent director is independent or not.

The public's perception of issues is frequently based on only the information that can be found in the newspaper and, therefore, either oversimplified or incomplete. In complex situations, the independence determination requires sound judgment based on factors that will likely be beyond the public's level of knowledge to judge appropriately.

The 'reasonable perception' standard seems to imply, however, that the prism that the board and its nominating committee must use in making independence determinations is limited to that of public perception. If that is the case, we may expect to find more independence exclusions than would apply under the current rule.

In addition, some of our members are very concerned about the extent to which the new disclosure rules focus on business or other relationships among directors without providing any guidance as to the nature of the relationships required to be disclosed.

We therefore feel strongly that either: i) the current 'reasonable expectation' standard be maintained; or, ii) at a minimum, the proposal clarify, in terms that remove all doubt, that the only perception that matters under the independence rule is the perception of independence of the board or nominating committee making the determination and not that of the general public.

We also feel that more guidance should be provided concerning the disclosure of relationships among directors.

2) *Board evaluation outcomes*

There are arguably at least three types of outcomes from the board evaluation process: i) relatively routine or trivial issues in respect of which board practices might be improved (such as directors requesting that the font size and style on materials be consistent); ii) somewhat more substantial issues that are not important and may take time and patience to resolve (such as ensuring the appropriate level of detail of board materials to satisfy all directors); and, iii) issues that are so sensitive that directors barely dare to mention them out loud and which need to be appropriately dealt with in a confidential manner (such as concerns with a member of executive management).

It is the view of CSCS that the board evaluation process works best when there is a high degree of confidence that difficult or sensitive issues can be raised in a way that enhances the board's functioning. Bringing a disclosure obligation to bear on evaluation outcomes may lift the veil of intimacy that is essential to the candid and fulsome participation by directors and, ultimately, ensure that only the trivial concerns are raised so as to avoid potentially embarrassing or damaging disclosure.

It would be a shame that if by shining a bright light on such a sensitive area, the substantive benefits of candid board evaluations were lost. Accordingly, while disclosure of the use and format of a director, board or committee evaluation is appropriate, as is currently required, it is necessary in order to ensure the ongoing effectiveness of these processes that issuers determine whether and what disclosure of 'outcomes' are made.

3) *Individual director expertise*

The proposals require disclosure in relation to the expertise expected of each individual director, both in terms of their role as a director and standing committee member.

While some issuers voluntarily provide this type of disclosure, some of our members expressed the concern that there may be unintended consequences with respect to director liability. It was felt that this type of disclosure may encroach on the collegial nature of the board and set up classes of directors. One or two directors on a board could become targets for shareholder discontent and possibly actions for damages, if unfavourable consequences attach to a board decision that is within the scope of their disclosed expertise.

Corporate law does not empower individual directors; it empowers the board as a decision-making body. Accordingly, one alternative may be to require disclosure that the board, as a whole, has the appropriate skills and expertise to direct the issuer.

In the past, Canadian regulators have been rightly cautioned to avoid, to the extent possible, regulatory initiatives that might unduly chill the desire and willingness of

qualified directors to serve on corporate boards. We feel that this aspect of the proposed rule needs be re-evaluated from that perspective.

4) Formatting the disclosure of corporate governance practices

Since the introduction of the current rules on corporate governance disclosure, many issuers have adopted a format for the disclosure of their corporate governance practices that sets out the practices in a logical narrative that may make it easy for the reader to understand. Under the former TSX rules, however, most governance disclosure followed a tabular presentation.

Unless it is intended that the new rules require that issuers go back to the old tabular approach and explain what they do with respect to each of the nine principles, the CSA should clarify in the new rules that issuers are free to maintain narrative disclosure, to use tabular disclosure, or to adopt other formats best suited to the issuer's needs.

5) Structure of the rules

Disclosure requirements should be grouped in a logical fashion in the respective instruments. For instance, the disclosure required under Principle #6 seems to be redundant with item 13 of 51-102F2. The disclosure required under Principle #8 would make more sense if it were included among the compensation related disclosure in 51-102F6. The MD&A disclosure requirements buried in the CEO and CFO 52-109 certification forms would be better included in 51-102F1.

We thank the CSA for participating in our cross-country meetings and for this opportunity to share our observations and concerns on this most important initiative. Should you have any questions, I am available at your convenience to discuss these comments.

Sincerely,

Lynn Beauregard
President
Canadian Society of Corporate Secretaries