FAIR | Canadian Foundation *for* Advancement *of* Investor Rights

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

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RE: Venture Issuer Disclosure - CSA Notice and Request for Comment Proposed Amendments to NI 51-102 *Continuous Disclosure Obligations*, NI 41-101 *General Prospectus Requirements* and NI 52-110 *Audit Committees*

FAIR Canada is pleased to offer comments on proposed amendments to National Instrument 51-102 *Continuous Disclosure Obligations* ("**NI 51-102**"), National Instrument 41-101 *General Prospectus Requirements* ("**NI 41-101**"), and National Instrument 52-110 *Audit Committees* ("**NI 52-110**") along with proposed changes to Companion Policy 51-102CP to NI 51-102 and Companion Policy 41-101CP to NI 41-101 (the "**Proposed Amendments**"). The Proposed

Amendments are intended to streamline and tailor disclosure by venture issuers and carry forward some of the previous proposals contained in requests for comments issued by the CSA in July 2011 and September 2012.

FAIR Canada is a national, charitable organization dedicated to putting investors first. As a voice of Canadian investors, FAIR Canada is committed to advocating for stronger investor protections in securities regulation. Visit www.faircanada.ca for more information.

FAIR Canada Comments and Recommendations – Executive Summary:

General Comments:

1. FAIR Canada is supportive of the objective of tailoring and streamlining disclosure and governance requirements for venture issuers and increasing guidance to simplify compliance and reduce costs to venture issuers. FAIR Canada also supports efforts to improve disclosure to reflect the needs and expectations of venture issuer investors. However, we continue to be of the view reducing the disclosure and governance standards applicable to venture issuers is not an appropriate method to achieve the stated goals.

2. In addition, FAIR Canada does not understand how the Proposed Amendments, which are purportedly aimed at improving investor usefulness and reflective of the needs of venture issuer investors, can be introduced in the absence of retail investor consultation. The Proposed Amendments refer to a venture issuer investor survey conducted in 2011. However, that survey was limited to consultation with nine investors consisting of three portfolio managers, two investment advisors, and one each of an institutional advisor, underwriter/dealer, research analyst and investment banker.[1] Whilst these individuals can be considered investors, FAIR Canada believes that a survey conducted with a representative sample of investors is necessary in order to obtain information about their needs and expectations. Significant changes to disclosure requirements should not be introduced prior to such retail investor consultation.

3. A reduction of the existing level of disclosure would result in informational gaps for investors and would increase the risks of investing in an already risky venture market. This is not a responsible course of action for regulators who have a mandate to protect investors nor would it improve confidence in the venture capital market. Regulators and the exchange have worked hard to improve the reputation of the venture exchange since the days of the Vancouver stock exchange.

4. FAIR Canada suggests that there are other alternatives available which would reduce compliance costs while at the same time clarifying obligations and thereby increase

[1] See description of investor survey at (2012) 35 OSCB (supp-4) at 234.

compliance with the existing rules. These alternatives should be explored in lieu of the Proposed Amendments. Alternatives are suggested at paragraphs 1.4 and 2.16 below.

5. Moreover, resources should be focused on measures to improve compliance with existing continuous disclosure requirements of reporting issuers. CSA Staff Notice 51-341 *Continuous Disclosure Review Program Activities for the fiscal year ended March 31, 2014* found that 76% of those subject to a full review or an issue-oriented review were deficient and required improvements to their disclosure (or resulted in the issuer being referred to enforcement, ceased traded or placed on the default list) [2]. Education and guidance (among other measures) to improve required disclosure would clearly be of benefit to investors and issuers. This should be the immediate priority.

6. FAIR Canada is of the view that benchmarking the type and level of disclosure provided in other jurisdictions would be worthwhile. We disagree with the position taken by the CSA that benchmarking to other jurisdictions such as Australia, the United Kingdom, Hong Kong or the United States is not appropriate. We urge the CSA to explain its statement that "The venture market in Canada is unique and is not directly comparable to most other markets."[3] FAIR Canada believes that benchmarking to other jurisdictions is an appropriate part of the policy-making process and should be undertaken for this initiative. Any significant differences warranting a different approach can be noted in the exercise.

Comments on the Proposed Amendments:

7. Quarterly Interim Management's Discussion and Analysis ("**MD&A**"): FAIR Canada recommends that MD&A be required for the interim financial reports. Reducing the level of disclosure by replacing MD&A with quarterly highlights will result in a gap in continuous disclosure information, making it more difficult for investors to determine whether to invest in or sell shares of a particular venture issuer. It would also allow too much time to lapse between regulators' receipt of such information for purposes of review and investigation of possible issues. The proposed amendment to replace MD&A with quarterly highlights is not in the interest of venture issuers or venture issuer investors as it will lead to reduced confidence in Canadian venture markets and will reduce the level of investor protection.

8. Business Acquisition Reports ("**BARs**"): FAIR Canada does not support the proposed changes to the requirement to disclose BARs. Investors should receive financial statements regarding business acquisition transactions when proceeds are being used to finance a proposed acquisition that is significant in the 40% to 100% range. If any amendment to BARs is made, the significance level should be lowered rather than raised. Investors should not be provided with less information regarding a venture issuer's business acquisition activities than they are currently.

[2] (2014), 37 OSCB 6661 at 6662, available online at <http://www.osc.gov.on.ca/documents/en/Securities-Category5/csa_20140717_51-341_cdr-activities-fiscal-end.pdf>.
[3] CSA Republication and Request for Comment, September 13, 2012, (2012) OSCB (Supp-4) at page 24..

9. Audit Committees: FAIR Canada supports the proposed enhanced requirements for impartiality by venture issuer audit committees which would result in a rule similar to that already required of TSXV listed issuers. We also recommend that audit committee members be required to be financially literate (as required of non-venture issuer audit committee members) and that the CSA consider requiring that the majority of audit committee members also be "independent" as defined by NI 52-110 or some other suitable definition. Such reforms would increase governance standards.

10. Executive Compensation Disclosure: FAIR Canada continues to disagree with the proposal to reduce the level of disclosure provided regarding executive compensation. Less executive compensation disclosure will weaken corporate governance of venture issuers. We fail to see how reducing the level of disclosure provided to investors will improve the usefulness of such information as is stated in the Proposed Amendments.[4] FAIR Canada recommends that the format and/or manner in which information is disclosed be reconsidered and tested on retail investors before lessoning the amount of disclosure in an attempt to improve its usefulness.

Other Comments

11. FAIR Canada recommends that TSX and TSX-V listing requirements and a national instrument require that all listed issuers, including venture issuers, be incorporated in a jurisdiction with corporate legislation that meets minimum corporate governance standards, including directors' duties to act honestly and in good faith and to exercise care, skill and diligence.

12. FAIR Canada continues to strongly recommend that the CSA address the conflict of interest between the listing regulatory responsibilities and listing commercial operations of the TSX and TSXV.

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1. General Comments

1.1. FAIR Canada supports the objective of tailoring and streamlining the disclosure and governance requirements for venture issuers and increasing guidance to simplify compliance and reduce costs to venture issuers. FAIR Canada also supports efforts to improve disclosure to reflect the needs and expectations of venture issuer investors. However, we continue to be of the view that reducing the disclosure and governance standards applicable to venture issuers is not an appropriate method to achieve the stated goals.

1.2. FAIR Canada also questions why a proposed instrument, purportedly aimed at improving investor usefulness, has been introduced in the absence of any consultation with retail investors. This would suggest a less-than-optimal process for an investor-focused initiative.

[4] (2014), 37 OSCB 5145.

The Proposed Amendments refer to a venture issuer investor survey conducted in 2011. However, that survey was limited to consultation with nine investors consisting of three portfolio managers, two investment advisors, and one each of an institutional advisor, underwriter/dealer, research analyst and investment banker.[5] Whilst these individuals can be considered investors, FAIR Canada believes that a survey conducted with a representative sample of investors is necessary in order to obtain information about their needs and expectations. Eliminating important information from disclosure requirements should not proceed until such consultation with retail investors has been conducted and analyzed.

1.3. A reduction of the existing level of disclosure would result in informational gaps for investors and would increase the risks of investing in an already risky venture market. This would not be a responsible course of action for regulators who have a mandate to protect investors nor would it improve confidence in the venture capital market. Regulators and the exchange have worked hard to improve the reputation of the venture exchange since the days of the Vancouver stock exchange. Our specific concerns are set out below.

1.4. As we commented in response to earlier proposals[6], if a principal goal of the initiative is to clarify current obligations for venture issuers, it would arguably be more efficient and less resource-intensive to assemble a manual covering all venture issuer regulatory requirements rather than incur the cost (both in terms of time and resources on the part of both regulators and stakeholders) of the rule-making process. The Proposed Amendments do not create a single instrument where all of the rules applicable to venture issuers can be found. Given that venture issuers will still have to comply with other national instruments and securities laws in the applicable provincial acts, we do not believe that the goal of clarifying obligations and thereby reducing compliance costs will be achieved through the CSA's current proposals. Providing a comprehensive manual which would explain all current requirements would be preferable.

1.5. In addition, further measures to improve compliance with existing continuous disclosure requirements of reporting issuers are clearly needed. CSA Staff Notice 51-341 *Continuous Disclosure Review Program Activities for the fiscal year ended March 31, 2014* found that 76% of those subject to a full review or an issue-oriented review were deficient and required improvements to their disclosure (or resulted in the issuer being referred to enforcement, ceased traded or placed on the default list).[7] Education and guidance (among other measures) to improve required disclosure would clearly be of benefit to investors and issuers.

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[5] See description of investor survey at (2012) 35 OSCB (supp-4) at 234.

[6] We made earlier submissions In 2010, 2011 and 2012. See our earlier submissions on our website at http://faircanada.ca/standing-committee-review-of-osc/submissions/.

[7] Supra, note 2..

2. Comments on the Proposed Amendments

3- and 9-month Interim Financial Reports and Management's Discussion and Analysis

2.1. FAIR Canada supports the proposal to require interim financial reports for venture issuers for each of the 3, 6 and 9 month interim periods. As we noted in our letter of December 12, 2012, FAIR Canada recommends that MD&A be required for the interim financial reports. Reducing the level of disclosure by replacing MD&A with quarterly highlights will result in a gap in continuous disclosure information, making it more difficult for investors to determine whether to invest in or sell shares of a particular venture issuer and allow too much time to lapse between regulators' receipt of such information for purposes of review and investigation of possible issues.

2.2. The proposal requires that those with "significant revenue" will be required to provide MD&A. However, those who determine they do not have "significant" revenue, will not be required to provide MD&A and will only provide quarterly highlights. As a result, such venture issuers will provide less information and investors may not obtain information about related party transactions, stock options and warrants, operating expenses or account payable information that would be relevant to their decision to sell or purchase securities. Such reduced disclosure would not be in the interests of investors or venture issuers since it will lead to reduced confidence and an increase in the cost of capital (at a minimum, in this subset of venture issuers). FAIR Canada is of the view that these negative consequences far outweigh the purported benefits to investors "...because less time would be required to read through the quarterly highlights to locate salient information about a venture issuer's operations" or through a reduction in the time and cost burden to venture issuers of producing interim MD&A.[8]

2.3. FAIR Canada believes that the existing requirements in section 5.3 of NI 51-102 and Item 1.15 of Form 51-102F1 which require a venture issuer that has not had significant revenue from operations in either of its last two financial years to disclose in its MD&A, on a comparative basis, a breakdown of material components of:

(a) Exploration and evaluation (E&E) assets
(b) Expensed research and development costs;
(c) Intangible assets arising from development;
(d) General and administration costs, and
(e) Any material costs.

allow an investor to understand where and how the money was spent and is important information for investors to receive.

[8] CSA Notice and Request for Comment, (2014), 37 OSCB 5105, at 5145.

Major Acquisitions: Reduction in the Instances when Business Acquisition Reports must be Filed

2.4. Under the Proposed Amendments, as with the September 2012 and July 2011 proposals, the significance test for financial statement disclosure would be lowered so that instead of requiring reporting of acquisitions that are 40 per cent significant, only acquisitions that are 100 per cent or more of the market capitalization of the venture issuer would be considered to be indicative of a transformational transaction and thus would trigger a report. FAIR Canada continues to disagree that 100% or more of the market capitalization of the venture issuer is the correct threshold indicative of a transformational transaction for venture issuers. If any amendment to BARs is made, the significance level should be lowered rather than raised.

2.5. The CSA should conduct a benchmarking exercise of requirements in other jurisdictions such as the US, UK, Australia and Hong Kong before it alters the requirement to file BARs. FAIR Canada continues to question the CSA's statement that "The venture market in Canada is unique and is not directly comparable to most other markets. We do not think that benchmarking to requirements in other jurisdictions is appropriate." [9] Benchmarking to other jurisdictions is an important part of the policy-making process. If Canadian venture issuers are subject to less disclosure than other jurisdictions, then those venture issuers seeking out lower standards may choose to list here or may end up listing here if unable to meet the higher standards elsewhere. Such an approach will not serve the interests of venture issuer investors, nor the long term interests of venture issuers themselves as it will reduce confidence in the Canadian venture issuer market.

2.6. FAIR Canada agrees with the CSA's comment that "The proposed 100% threshold test would mean that venture issuer investors would face reduced disclosures on transformational business acquisition transactions, which would then reduce their awareness of a venture issuer's business acquisition activities."[10] Accordingly FAIR Canada does not support reducing disclosures to investors on business acquisition activities. FAIR Canada believes that the current BARs requirements should be retained and BARs should be provided when the acquisition is significant.

2.7. FAIR Canada urges the CSA to undertake a consultation with retail investors before making any such change to the requirement for BARs. The CSA 2014 Consultation Document states that results from a 2011 CSA Venture issuer investor survey "...suggest that investors may not view this reduction in business acquisition disclosure as significant in their decision to invest in a venture issuer. When asked to rank the importance of certain forms of disclosure, in making an investment decision, BARs were considered an important but not essential source of information."[11]

[9] Supra, at Note 3.
[10] (2014) 37 OSCB 5144.
[11] (2014), 37 OSCB 5144-5145.

2.8. FAIR Canada's understanding is that the 2011 investor survey referred to was limited to consultation with nine investors consisting of three portfolio managers, two investment advisors, and one each of an institutional advisor, underwriter/dealer, research analyst and investment banker.[12] Whilst these individuals can be considered to be investors, FAIR Canada believes that a survey conducted with a representative sample of investors is necessary in order to obtain information about their needs and expectations. FAIR Canada believes that consultation with a broader sample of retail investors is necessary before any conclusions can be made about the likely impact on retail investor's decision-making. Significant changes to disclosure requirements should not be introduced prior to such retail investor consultation.

2.9. In FAIR Canada's view, benefits from the reduction in reporting time and cost do not outweigh the cost of reducing protections to investors and reducing confidence in the Canadian venture market. FAIR Canada agrees with the CSA when it states that "Changes to the existing reporting and disclosure requirements could be taken by venture issuer investors as an indicator of reduced market quality amongst venture issuers. It is possible that this perception could reduce confidence in the venture market..."[13] FAIR Canada does not agree, as the CSA suggests, that this would only result in a temporary effect until investors become more comfortable with the proposed reporting regime.[14] In FAIR Canada's view, such changes could have a long-term effect on investor confidence in the venture issuer market.

2.10. Questions in the Proposed Amendments document relating to BARs call into question the appropriateness of the significance level that the CSA has set for requiring BARs and suggests that benchmarking to other jurisdictions could be of real assistance to policy-makers in determining when a business acquisition is "significant" or "material" and therefore needs to be disclosed.

Audit Committees

2.11. FAIR Canada supports enhanced requirements for impartiality by venture audit committees. The Proposed Amendments would require venture issuers to have an audit committee consisting of at least three members, the majority of whom could not be executive officers, employees or control persons of the venture issuer or an affiliate of the venture. This rule would be similar to that already required of TSXV-listed issuers and would not necessitate any change for issuers listed on the TSXV.[15] FAIR Canada recommends that audit committee members be required to be financially literate (as required of non-venture issuer audit committee members) and that the CSA consider requiring that the majority of audit committee members also be "independent" as that is defined by NI 52-110 or another suitable definition. Such reforms would increase governance standards for venture issuers.

[12] See description of investor survey at (2012) 35 OSCB (supp-4) at 234.
[13] (2012) 35 OSCB (supp-4) at 235.
[14] (2102) 35 OSCB (supp-4) at 235.
[15] TSXV Policy 3.1, available online at http://www.tmx.com/en/pdf/Policy3-1.pdf.

Executive Compensation Disclosure

2.12. FAIR Canada continues to be of the view that venture issuers should not provide less disclosure with respect to executive compensation as compared with senior unlisted issuers or other issuers. FAIR Canada does not agree that venture issuers should only have to provide two years' worth of information (rather than three); that the number of individuals for whom disclosure is required should be reduced from a maximum of five to a maximum of three; that the requirement for venture issuers to calculate and disclose the grant date fair value of stock options and other share-based awards in the compensation table should be eliminated; nor should the table combine named executive officers and director compensation rather than produce it in a separate format as is required for other issuers.

2.13. The current requirement of grant date fair value provides important information to investors as it discloses the amount the board intends to pay an executive at the time the award is made. Having this information along with disclosure of the amount realized by the executive at the time it is earned (or "exercised") would allow investors to compare the two amounts. It also allows directors to consider the amount of money transferred to its executives at the time such options are granted, thereby assisting directors in justifying such transfers of wealth to shareholders**.** The Canadian Council of Good Governance has taken the same position.[16]

2.14. FAIR Canada questions why venture issuers would not want to know the fair value of the stock options they provide to an executive at the time it is granted. This should be viewed as necessary information in order to justify to shareholders that the compensation granted to that individual is appropriate. Accordingly, eliminating this required disclosure may result in directors not having information that they need in order to fulfil their duties in a robust manner. Such a change should not be implemented solely to allow for the possibility of monetary savings from the elimination of the need to have a valuation undertaken for options awarded in order to comply with regulatory requirements.

2.15. FAIR Canada fails to see how reducing the level of disclosure provided to investors improves the usefulness of such information, as is stated in the Proposed Amendments.[17] FAIR Canada recommends that the format and/or manner in which information is disclosed be reconsidered and tested on retail investors (for both venture issuers and non-venture issuer investors) before taking the more drastic step of lessoning the amount of disclosure in order to improve its usefulness.

2.16. FAIR Canada supports efforts to reduce duplication of information and believes that a brief summary of governance requirements and other attachments to the information circular could be provided (rather than the full documents) with links to the full documents on the

[16] Letter from Canadian Council of Good Governance to CSA dated December 11, 2012 at page 3, available online at https://www.osc.gov.on.ca/documents/en/Securities-Category5-Comments/com_20121211_51-103_chornousd.pdf.

[17] (2014), 37 OSCB 5145.

listed issuer's website. Implementing such a change could reduce the size of many information circulars by 50 per cent or more.

3. Duties to Act Honestly and In Good Faith and to Exercise Care, Skill and Diligence

3.1. FAIR Canada recommends that TSX and TSXV listing requirements and a national instrument require that all listed issuers, including venture issuers, be incorporated in a jurisdiction with corporate legislation that meets minimum corporate governance standards, including directors' duties to act honestly and in good faith and to exercise care, skill and diligence. Issuers should be required to be incorporated in a jurisdiction with an acceptable standard of corporate governance (i.e. in a major developed jurisdiction).

3.2. Our understanding is that the TSXV does not require that listed issuers be incorporated in Canada or pursuant to the corporate laws of a Canadian province or territory, and simply requires that the applicant complete a reconciliation of its constating documents and the corporate law or equivalent legal regime of its home jurisdiction with that of the Canada Business Corporations Act where the applicant is not incorporated or created under the laws of Canada or any Canadian province.[18] It also imposes on directors and officers the requirements to act honestly and in good faith with a view to the best interests of the issuer and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. However, the latter requirements are contractual relationships between the TSXV and the issuer and would be difficult for a shareholder to enforce against an issuer incorporated in the British Virgin Islands or in China (for example).

4. Address Listings Conflict of Interest

4.1. FAIR Canada also continues to recommend that the CSA address the conflict of interest between the listing regulatory responsibilities and listing commercial operations of TSX and TSXV and bring them in line with international standards.

We thank you for the opportunity to provide our comments and views in this submission. We welcome its public posting and would be pleased to discuss this letter with you at your convenience. Feel free to contact Neil Gross at 416-21403497 (neil.gross@faircanada.ca) or Marian Passmore at 416-214-3441 (marian.passmore@faircanada.ca).

[18] See Part 1, section 1.18 of Policy 2.3 of the TSXV Corporate Finance Manual and see Part 5 of Policy 3.1 for the directors and officers duties.

Sincerely,

Canadian Foundation for Advancement of Investor Rights