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

September 17, 2010

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

Attn: Denise Weeres, Alberta Securities Commission
400, 300-5th Avenue S.W.
Calgary, AB T3B 2A6
Denise.weeres@asc.ca

Re: Comments on Proposed CSA Multilateral Consultation Paper 51-403 *Tailoring Venture Issuer Regulation* ("51-403")

Dear Ms. Weeres:

1.1. FAIR Canada recognizes the importance of the venture market in Canada and is pleased to participate in the consultation process on 51-403, as initiated by the securities commissions of Alberta, British Columbia, Manitoba, Nova Scotia, New Brunswick and Saskatchewan.

1.2. FAIR Canada is a non-profit, independent national organization founded in 2008 to represent the interests of Canadian investors in securities regulation. Additional information about FAIR Canada, our governance, and our priorities is available on our website at www.faircanada.ca.

1.3. While FAIR Canada is supportive of the CSA's efforts to tailor regulatory requirements for the venture issuer market, we believe the CSA's current regulatory regime already does so sufficiently. As such, we do not see the need to undertake a major overhaul of the existing "lighter touch regime", with further reductions in compliance obligations and shareholder protections. In addition, 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 all

current regulatory requirements into one policy (to be updated on an annual basis) rather than incurring the cost (both in terms of time and resources on the part of both regulators and stakeholders) of the rule-making process.

Recommendation 1: FAIR Canada recommends that serious consideration be given to assembling all current regulatory requirements relevant to venture issuers into one policy.

Summary of Comments

2.1. The current regulatory regime in Canada already provides venture issuers with tailored, less-onerous requirements for certification, governance and continuous disclosure, by considering their often smaller size, as well as capital and resource restrictions, as compared with non-venture issuers. To introduce a regime with reduced requirements for venture issuers could add confusion, particularly for investors, and send a negative message to foreign investors about the strength of Canada's regulatory environment. This would be further complicated if the proposed were adopted by some, but not all, CSA members.

2.2. The Canadian capital markets have developed a strong regulatory environment for venture issuers, particularly for mineral and resource issuers who make up a large part of the market. Canada experienced a period during which its venture market was viewed unfavourably, particularly the former Vancouver Stock Exchange (whether justified or not). This led to the need for robust, yet customized, regulation through which Canada was able to restore confidence in its venture market. Any further reduction in disclosure requirements could undermine the considerable progress that has been made to date.

2.3. From an investor perspective, the current customized disclosure requirements based on size and compliance costs may be appropriate for venture issuers. But any further reduction of disclosure would result in information gaps for investors, who have limited additional sources of information about the risky, prospective venture market. FAIR Canada believes that a better approach would be for the CSA to incorporate comments received through the consultation process to further tailor the current system, as our comments below suggest.

Comments about Specific Proposals in the Proposed Initiative

3.1. ***Proposal to remove quarterly financial statements and MD&A***: Quarterly financial statements are required for public issuers in Canada and the U.S. Other jurisdictions, such as the U.K. and Australia, do not require three- and nine-month interim statements. Unless a wholesale change were undertaken for all Canadian public issuers, eliminating the quarterly

requirement solely for venture issuers would fundamentally change the financial reporting regime in Canada. Investors have come to rely on such disclosure since analyst coverage of venture issuers is minimal. The extended deadlines for venture issuer quarterly filings have already been tailored to assist these issuers. If additional tailoring is required, the alternative of a reduced MD&A requirement in National Instrument 51-102 *Continuous Disclosure Obligations* ("NI 51-102") could be introduced for certain venture issuers. Quarterly MD&A may not be as relevant for smaller issuers who are in the exploration stage and not yet producing revenues, so a reduction in the MD&A requirements in quarterly statements should not be harmful to investors.

Recommendation 2: FAIR Canada recommends that the requirement for the filing of quarterly financial statements be retained for venture issuers. With respect to quarterly MD&A, FAIR Canada recommends that consideration be given, within NI 51-102, to a reduced MD&A requirement for venture issuers. However, this reduced disclosure should only be permitted in limited circumstances and should not, for example, be available for issuers that meet TSX listing requirements.

3.2. ***Annual report proposal***: The annual report (and accompanying mid-year report) proposal introduces new documents to which secondary market civil liability must attach. This would require concurrent changes to the provincial securities legislation in the jurisdictions that choose to adopt a rule based on this proposal, particularly if they are to be relied upon for public offerings. In addition, the annual report would require different disclosure from that currently required in an AIF, it would encourage the use of non-GAAP financial measures, and would place an emphasis on prospective rather than historical disclosure. While information provided in the new documents may be helpful to investors, particularly for issuers not yet producing revenues, it should be supplemental disclosure (due to issues with measurement controls and comparisons), and not a replacement of the standards currently found in AIF disclosure.

Recommendation 3: FAIR Canada recommends that, if the annual report proposal is adopted, it should be supplemental disclosure rather than a replacement of the standards currently found in AIF disclosure.

3.3. ***Director and officer duties***: We see limited value in adding a securities law standard of director and officer liability specific to venture issuers. Corporate statutes and common law deal with this standard sufficiently and can be applied to venture-specific circumstances for a board member. A wealth of common law already exists in this area, and potentially subjecting directors and officers to securities law enforcement in this way would not necessarily add

greater protections for investors. It is not clear from the proposal how and to what extent securities regulators would exercise this new enforcement power in an area that has traditionally fallen within the realm of corporate rather than securities law.

Recommendation 4: We see limited value in adding a securities law standard of director and officer liability specific to venture issuers, given the wealth of common law that already exists in this area. It has also not been made clear to us how subjecting directors and officers to securities law enforcement in this way could add greater protections for investors.

3.4. ***Reduced compensation disclosure***: Replacing the compensation discussion and analysis with minimal peer group and performance criteria disclosure does not take into account the fact that venture issuer compensation can be very complicated to calculate. Venture issuer compensation is often laden with options and warrants tied to various milestones, agreements, transactions, and the like. As such, disclosure of compensation policies beyond that proposed in the consultation paper is necessary. Aggregating the compensation disclosure beyond CEO and CFO is also troublesome for the same reasons, and would likely not be an onerous requirement for most venture issuers since they tend to have fewer officers than larger issuers.

Recommendation 5: We recommend that the current compensation discussion and analysis be retained, and that there be no aggregation of compensation disclosure beyond that of the CEO and CFO.

3.5. ***Conflict of interest requirements***: We do not agree with the less onerous conflict of interest requirements outlined in the proposal. Given the prevalence of related party transactions in the venture market, we would instead recommend heightened conflict of interest requirements. The 25 percent threshold exemption from most shareholder protection requirements for related party transactions (including disinterested shareholder approval and valuation) is a major flaw in Canadian securities regulation and falls below the level of international best practice. We recommend that regulators strengthen shareholder protections in related party transactions in general and suggest that the 25 percent threshold be reduced to 10 percent.

Recommendation 6: We do not support the less onerous conflict of interest requirements. We would encourage strengthened requirements in this regard, given the prevalence of related party transactions in the venture market.

3.6. ***Elimination of the requirement to file confidential material change reports and business acquisition reports***: The rationale provided for the elimination of filing confidential material change reports implies that venture issuers have been unduly relying on the filing of confidential reports as a defence to secondary market liability. It would be helpful to know whether this has been an issue with venture issuers, and with non-venture issuers. We see value in the filing of confidential material change reports, and would like further clarification on the rationale for this proposed change.

3.7. With respect to business acquisition reports, we do not agree with the proposal to eliminate the filing requirement, as we see value to investors in the filing of these reports. In addition, we do not support the 20 percent level proposed for "Disclosable Events". If adopted, we would recommend that the threshold for "Disclosable Events" be lowered to 5 or 10 percent.

Recommendation 7: We do not support the elimination of the requirement to file confidential material change reports and business acquisition reports. With respect to the proposed "Disclosable Events" concept, if it were adopted, we recommend that the threshold be lowered to 5 or 10 percent

3.8. ***Elimination of the requirement to file material contracts***: While providing summaries of material contracts to investors may be helpful, the material contracts should still be filed publicly, since summaries often do not cover all sections of a contract that are relevant to an investor. In addition, the cost to issuers of filing material contracts is minimal. Unless regulators are in a position to review the contract summaries for accuracy, the contracts need to be available to investors.

Recommendation 8: Material contracts should continue to be filed publicly unless regulators are in a position to review the summaries for accuracy.

3.9. ***Reduced governance disclosure:*** Boards of all sizes are expected to disclose how they facilitate independent judgment, take steps to encourage a culture of ethical conduct, and assess results. These expectations also apply regardless of whether the companies themselves are profit or non-profit. The rationale provided in the proposal that these practices are already required or not applicable to venture boards dismisses the importance and universality of these practices. Disclosure assures investors that these practices are being adopted. We see no reason for a reduction in the current disclosure requirements.

3.10. To reduce printing and mailing costs, regulators may wish to consider having a brief summary of governance requirements and other attachments to information circulars (such as stock option plans), with a web link to the full document on the listed company's website. This change alone would reduce the size of many information circulars by 50 percent or more.

Recommendation 9: We do not support reduced governance disclosure, particularly since such disclosure often assures investors that robust corporate governance practices are being adopted by issuers. Regulators may wish to consider reducing governance disclosure costs through other means.

We would be happy to speak to you further about these comments or to provide further information. Please do not hesitate to contact Ermanno Pascutto at 416-572-2282/ ermanno.pascutto@faircanada.ca or Ilana Singer at 416-572-2215/ ilana.singer@faircanada.ca.

Best regards,

Canadian Foundation for Advancement of Investor Rights