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

December 12, 2012

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Nova Scotia Securities Commission
New Brunswick Securities Commission
Prince Edward Island Securities Office
Office of the Superintendent of Securities, Government of Newfoundland and Labrador
Department of Community Services, Government of Yukon
Office of the Superintendent of Securities, Government of the Northwest Territories
Legal Registries Division, Department of Justice, Government of Nunavut

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RE: Proposed National Instrument 51-103 *Ongoing Governance and Disclosure Requirements for Venture Issuers* and Related Amendments

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FAIR Canada is pleased to offer comments on the Republication and Request for Comment (the "**Republication**") by the Canadian Securities Administrators ("**CSA**") regarding amendments proposing a new tailored regulatory regime for venture issuers contained in the CSA Notice of Republication and Request for Comment dated September 13, 2012 (the "**Notice**").

FAIR Canada is a national, non-profit 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:

1. Regulators should be careful not to reduce governance standards to a level that would undermine the TSX-V's reputation, reduce confidence or reduce the ability for venture issuers to raise capital.

2. FAIR Canada supports the objective of tailoring and streamlining the disclosure and governance requirements for venture issuers and increasing guidance for venture issuers so that compliance can be simplified and costs to venture issuers can be reduced. FAIR Canada also supports efforts to improve disclosure to reflect the needs and expectations of venture issuer investors. However, we do not agree that reducing the disclosure and governance standards applicable to venture issuers is an appropriate manner to achieve the stated goals.

3. FAIR Canada believes that empirical evidence should demonstrate that the current rules are confusing or costly to comply with and that new rules will be less confusing and costly before a proposed instrument is introduced.

4. FAIR Canada questions why a proposed instrument, purportedly aimed at improving investor usefulness, has been introduced prior to any consultation with investors. This would suggest a less than optimal process for an investor-focused initiative.

5. 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 prospective venture market. This would not be a responsible course of action for regulators whose mandate is to protect investors nor would it improve confidence in the venture capital market.

6. It would arguably be more efficient and less resource-intensive to assemble all current regulatory requirements for venture issuers into a manual for venture issuers rather than incur the cost of the rule-making process. The Proposed Instrument does not create a single instrument where all of the rules applicable to venture issuers can be found.

7. FAIR Canada believes that benchmarking to the requirements of acceptable jurisdictions, particularly in respect of executive compensation, corporate governance, and the significance test for financial disclosure, is an essential element of robust and informed policy development.

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

9. FAIR Canada provides its comments on specific aspects of the proposals in sections 3 through 11 below:

   Section 3: Interim Reports and MD&A: FAIR Canada supports the proposal to require interim financial reports for venture issuers for each of the 3, 6 and 9 month interim periods. FAIR Canada recommends that MD&A be required for the interim financial reports.

   Section 4: Major Acquisitions: FAIR Canada disagrees that 100% or more of the market capitalization of the venture issuer is the correct threshold indicative of a transformational transaction for venture issuers. We recommend reducing the threshold from 40% to 25%.

   Section 5: Requiring BARs: FAIR Canada does not support the elimination of the requirement to file Business Acquisition Reports (BARs) because we see value to investors in the filing of these reports and do not support their replacement with other disclosure documents.

   Section 6: Pro-Forma Financial Statements: FAIR Canada believes that the pro forma financial statement requirement should be retained but the exchange should have the ability to waive the requirement if the information is not material or is unduly costly to produce.

   Section 7: Use of Proceeds Disclosure: FAIR Canada supports enhanced requirements for disclosure in the short form prospectus about use of proceeds. We agree that it is particularly relevant disclosure for venture issuers.

   Section 8: Executive Compensation Disclosure: FAIR Canada is 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.

   Section 9: Reduced Governance Disclosure: Venture issuers are already subject to reduced corporate governance requirements and FAIR Canada is opposed to any further reduction of such standards.

   Section 10: Audit Committees: FAIR Canada supports enhanced requirements for impartiality by venture issuer audit committees.

   Section 11: Jurisdiction of Incorporation and Corporate Legislation: 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

1. General Comments

1.1. The Vancouver Stock Exchange had a terrible reputation (whether deserved or not) which undermined Canadian and international confidence in the Canadian capital markets. The TMX

Group and regulators have generally done a good job (aside from certain China listings) of erasing the memories of the old reputation and TSX-V has a much better reputation which adds to investor confidence and the ability of issuers to raise capital. Regulators should be careful not to reduce governance standards to a level that would undermine the TSX-V's reputation, reduce confidence or reduce the ability for venture issuers to raise capital.

1.2. **FAIR Canada supports the objective of tailoring and streamlining the disclosure and governance requirements for venture issuers and increasing guidance for venture issuers so that compliance can be simplified and costs to venture issuers can be reduced. FAIR Canada also supports efforts to improve disclosure to reflect the needs and expectations of venture issuer investors. However, we do not agree that reducing the disclosure and governance standards applicable to venture issuers is an appropriate manner to achieve the stated goals.**

1.3. As noted in our earlier comment letter[1], FAIR Canada believes that empirical evidence should demonstrate that the current rules are confusing or costly to comply with and that new rules will be less confusing and costly (including transition costs) than the current rules before a proposed instrument is introduced.

1.4. FAIR Canada also questions why a proposed instrument, purportedly aimed at improving investor usefulness, has been introduced prior to any consultation with investors. This would suggest a less than optimal process for an investor-focused initiative.

1.5. 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 prospective venture market. This would not be a responsible course of action for regulators whose mandate is to protect investors nor would it improve confidence in the venture capital market. Our specific concerns are set out below.

1.6. As we commented in response to CSA Multilateral Consultation Paper 51-403 *Tailoring Venture Issuer Regulation* (the "**Initial Consultation**"), 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 for venture issuers into a manual for venture issuers 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 Republication does 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] FAIR Canada, RE: Proposed National Instrument 51-103 Ongoing Governance and Disclosure Requirements for Venture Issuers (October 27, 2011), online: <http://faircanada.ca/wp-content/uploads/2011/01/111027-FAIR-Canada-submission-re-Proposed-NI-51-103.pdf>.

Comment Weighting

1.7. FAIR Canada also notes that throughout the summary of key comments received by the CSA provided in the Republication, the number of comments in support or unsupportive of certain subjects were tallied by the number of comments received without any context for the source of the comments. For example, in response to question 7 (100% market capitalization threshold) of the CSA's original Notice and Request for Comment issued July 29, 2011 (the "**Original Notice**"), it is noted that "...thirty-eight commenters indicated 100% is the correct threshold..." while "...nine commenters indicated 100% is not the correct threshold..."[2] FAIR Canada, the Canadian Coalition for Good Governance and the Ontario Securities Commission's Investor Advisory Panel, all groups that advocate for investor protection, made up three of the nine submissions unsupportive of this proposed threshold. The vast majority of the letters in favour of a 100% threshold were submitted by venture issuers, who represented their interests with a standard form letter upon which they included their letterhead and signature. The majority view should have little or no weight in assessing the policy options given that most Canadians would have been completely unaware of the consultation and the vast majority of those who responded were those who stood to benefit.

1.8. Given that investors, particularly retail investors, are disproportionately under-represented in the policy-making process and submit far fewer comment letters on their own behalf, it is FAIR Canada's opinion that it would have been helpful for the summary of key comments to attribute comments to the interests they represent. We sincerely hope that the CSA considers the comments received in the context of the interests represented by the commenters and not on the volume of comments received for any given position.

Benchmarking

1.9. FAIR Canada believes that benchmarking to other jurisdictions is an important part of the policy-making process and questions 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."[3] FAIR Canada believes that benchmarking to the requirements of acceptable jurisdictions, particularly in respect of executive compensation, corporate governance, and the significance test for financial disclosure, is an essential element of robust and informed policy development.

[2] (2012) 35 OSCB (Supp-4) at 24-25.
[3] (2012) 35 OSCB (Supp-4) at 24.

2. Address Listings Regulation Conflict of Interest

2.1. FAIR Canada also continues to strongly recommend that the CSA address the conflict of interest between the listing regulatory responsibilities and listing commercial operations of TSX and TSX-V and bring them in line with international standards.[4]

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

3.1. FAIR Canada supports the proposal to require interim financial reports for venture issuers for each of the 3, 6 and 9 month interim periods. FAIR Canada recommends that MD&A be required for the interim financial reports. As noted in our October 27, 2011 comment letter[5], removing these filings would result in a gap in continuous disclosure, making it more difficult for investors to determine whether to invest or sell their 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.

4. Major Acquisitions

4.1. Under the Proposed Instrument, the significance test for financial statement disclosure would be lowered so that instead of requiring reporting of acquisitions that are 40% significant, only acquisitions that are 100% 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 disagrees that 100% or more of the market capitalization of the venture issuer is the correct threshold indicative of a transformational transaction for venture issuers. We recommend reducing the threshold from 40% to 25% as set out in our earlier comment letter.

5. Replacement of Business Acquisition Reports with Reports of Material Change, Material Related Entity Transactions or Major Acquisitions

5.1. FAIR Canada does not support the elimination of the requirement to file Business Acquisition Reports ("**BARs**") because we see value to investors in the filing of these reports and do not support their replacement with other disclosure documents. FAIR Canada believes that BARs should be retained and required when the acquisition is significant. 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 significance test for financial statement disclosure or eliminates the requirement to file BARs.

6. Pro Forma Financial Statements

6.1. FAIR Canada believes that the pro forma financial statement requirement should be retained but the exchange should have the ability to waive the requirement if the information is not material or is unduly costly to produce.

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[4] See the report commissioned by FAIR Canada on this topic: John W. Carson, "Managing Conflicts of Interest in TSX Listed Company Regulation" (July 23, 2010), available online at: <http://faircanada.ca/wp-content/uploads/2008/12/TSX-Listings-Conflicts-final-report-23-Jul1.pdf>.

[5] *Supra* note 1.

7. Use of Proceeds Disclosure

7.1. FAIR Canada supports enhanced requirements for disclosure in the short form prospectus about use of proceeds. We agree that it is particularly relevant disclosure for venture issuers.

8. Executive Compensation Disclosure

8.1. FAIR Canada is 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) 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.

8.2. FAIR Canada does not support the proposal to only require executive compensation disclosure in the Information Circular. As noted in our comments of October 27, 2011, we believe that executive compensation should be disclosed in the Information Circular as well as in the Annual Report.

8.3. FAIR Canada does not support the proposal that stock options or other securities-based compensation be disclosed on a different basis for venture issuers than is required for other issuers. Disclosure of the fair market value at the time compensation is earned could be an additional disclosure but should not replace the current requirement to disclose the grant date fair value of stock options. 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. Including the additional requirement to disclose the amount realized by the executive at the time it is earned (or "exercised") would allow investors to compare the two amounts. FAIR Canada recommends that there be a broad consultation with all relevant stakeholders, including investors, on the proposal to disclose non-cash compensation such as stock options using fair market value at the time it is earned in addition to the grant date and that such a proposal be considered for all issuers and not just venture issuers.

9. Reduced Governance Disclosure

9.1. **Venture issuers are already subject to reduced corporate governance requirements and FAIR Canada is opposed to any further reduction of such standards.** In FAIR Canada's view, any reduction in governance standards would not be in the interests of retail investors or market integrity. Venture issuers should be subject to the same disclosure requirements as large issuers given that all shareholders are entitled to the same level of information on such important matters.

9.2. FAIR Canada does not agree that venture issuers should not have to: (i) disclose and identify the independent and non-independent directors and the basis for that determination; (2) disclose whether a director is a director of any other issuer and identify both the director and the other issuer; and (3) describe the steps taken to identify new candidates for board nomination including who identifies new candidates and the process used to identify new candidates.

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

10. Audit Committees

10.1. FAIR Canada supports enhanced requirements for impartiality by venture issuer audit committees. FAIR Canada supports the addition of control persons to the list of individuals, which includes executive officers or employees of the venture issuer, who may not make up the majority of the members of the audit committee.

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

11.1. 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. Issuers should be required to be incorporated in a jurisdiction with an acceptable standard of corporate governance (i.e. in a major developed jurisdiction) comparable to standards found in Canadian corporate legislation.

11.2. Our understanding is that the TSX-V 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.[6]

11.3. 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 TSX-V and the issuer and would be difficult or impossible for a shareholder to enforce against an issuer incorporated in the British Virgin Islands or any of the many offshore jurisdictions. Corporate laws that do not include this basic statement of directors' duties should not be acceptable. In addition to the lack of basic corporate law, many jurisdictions (like the British Virgin Islands) are structured to attract private issuers rather than public issuers. Further, the court system in many of these jurisdictions is inadequate.

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

[6] 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.

convenience. Feel free to contact Ermanno Pascutto at 416-214-3443 (ermanno.pascutto@faircanada.ca).

Sincerely,

Canadian Foundation for Advancement of Investor Rights