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Montréal, May 31, 2004

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Saskatchewan Securities Commission
Manitoba Securities Commission
Ontario Securities Commission
Nova Scotia Securities Commission
Securities Administration Branch, New Brunswick
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Registrar of Securities, Government of Yukon
Registrar of Securities, Department of Justice, Government of the Northwest Territories
Registrar of Securities Legal Registries Division, Department of Justice, Government of Nunavut

- c/o -

John Stevenson, Secretary
Ontario Securities Commission
20 Queen Street West
Suite 1900, Box 55
Toronto, ON M5H 3S8

Dear Sirs:

RE: Corporate Governance Guidelines

This letter is submitted in response to the Request for Comments made by the Canadian Securities Administrators ("CSA") on:

1. Multilateral Policy 58-201 *Effective Corporate Governance* (the "Proposed Policy"); and

2. Multilateral Instrument 58-101 *Disclosure of Corporate Governance Practices* (the "Disclosure Instrument").

This comment letter is being submitted by the Securities Law Group of Ogilvy Renault. It reflects internal comments of the Securities Law Group and also comments communicated to us by clients operating in the Canadian capital markets who together have market capitalization in excess of $68 billion.

We have responded to certain general questions set out in the CSA's Request for Comments and have also commented on specific items of the Proposed Policy and Disclosure Instrument.

General

1. ***Prescriptive or Flexible?*** The CSA have requested views as to whether the Proposed Policy which describes best governance practices and the Disclosure Instrument which requires issuers to make disclosure in relation to such best practices will provide investors with meaningful disclosure. In particular, would the disclosure be more meaningful if issuers were required to describe their practices by reference to certain categories of governance principles rather than by reference to best practices? The CSA states in the Request for Comments that while the Proposed Policy is stated to apply to all issuers, it is not intended to be prescriptive. It is to be implemented flexibly and sensibly.

   Notwithstanding this statement, the standards themselves refer to best practices and are not very flexible. Issuers will either be in compliance with the best practices or not. The standards amount to a "one-size-fits-all" which does not accomplish the intended result, nor does it amount to the most transparent and meaningful disclosure of corporate governance practices. The standards have been largely inspired by the New York Stock Exchange ("NYSE") Corporate Governance Rules for listed issuers (the "NYSE Rules"). However, the NYSE Rules are generally a mandatory code, not a guide for disclosure and therefore reflect a fundamentally different approach to governance.

   The CSA have decided, other than in respect of audit committee matters, to adopt a disclosure based approach to governance. The fundamental premise of such an approach is to recognize that issuers differ and to provide flexibility. Requiring issuers to disclose against certain prescribed practices may lead issuers to adopt practices that are not appropriate to them. While we are strongly in support of moving forward in the area of corporate governance and away from boiler plate disclosure, the Proposed Policy should be amended to provide both issuer flexibility and endorsement of good corporate governance practices. This would be achieved by requiring disclosure on various designated topics and by adding commentary on best practices to the various areas of governance. This would result in issuers providing relevant information on their current practices, rather than requiring issuers to adopt practices which may not be suited to them.

   It is respectfully submitted that outlining categories of governance would, together with governance developments in the market, lead issuers to adopt the appropriate standards based upon their situation. To mandate disclosure against best practices is to provide little flexibility to issuers who are unable to meet the standards and for whom such standards would not be useful. Where it is necessary to mandate best practices, such as in the case of audit committee, specific separate rules can be adopted.

Proposed Policy 58-201

1. ***Meaning of Independence.*** The meaning of independence contained in the Proposed Policy is derived from Multilateral Instrument 52-110 *Audit Committees* (the "Audit Committee Instrument"). The definition of independence therefore includes subsection 1.4(f)(3)(ii) of the Audit Committee Instrument and deems an individual who receives, or whose immediate family member receives, more than $75,000 per year in direct compensation from the issuer to have a material relationship with the issuer that precludes independence.

   This provision is also found in the NYSE Rules in respect of audit committee member independence, albeit with a threshold of US$100,000 (see NYSE Rule 303A2(b)(ii)). The NYSE Rules, however, contain a commentary which clarifies that an immediate family member who receives compensation of more than US$100,000 for service as a non-executive employee of the issuer need not be considered in determining independence under the rule. The CSA has not included the accompanying commentary in respect of either the Proposed Policy or the Audit Committee Instrument and, we suggest, should do so. The concept of independence already recognizes that an individual should not be held to be non-independent by virtue of having an immediate family member who is an employee but not an executive officer (see subsection 1.4(3)(b) of the Audit Committee Instrument). It appears that adding such a commentary would reflect the intent of the Audit Committee Instrument given that the CSA's response to comments on the Audit Committee Instrument indicates that it had amended subsection 1.4(3) of the instrument to provide that an immediate family member must be an executive officer to preclude independence.

   It would be useful, especially for issuers that are listed on the NYSE, to harmonize the threshold in both the Audit Committee Instrument and the Proposed Policy with that contained in the NYSE Rules (US$100,000). Hence, an issuer would not be placed in a situation where a board member is independent for US purposes but not for Canadian purposes.

2. ***Executive Meetings.*** Subsection 2.2(2) of the Proposed Policy sets out as a best practice that the independent board members should hold separate, regularly scheduled meetings at which members of management are not in attendance. The NYSE Rules require regularly scheduled meetings of non-management directors, not independent directors. The NYSE Rules then state that at least once a year an executive session, including only independent directors, should be scheduled.

   We suggest that Subsection 2.2(2) of the Proposed Policy be amended to accord with the NYSE Rules; we believe the provision in its current form goes beyond what is necessary. The goal should be to have meetings of non-management directors to ensure there is an effective check on management. Frequent meetings of independent directors may result in the development of a two-tier board and impair the board from working effectively as a single unit, where the diverse skills of its members are well-utilized. Corporate law also offers significant protections regarding situations where directors would have potential conflict of interests or breaches of fiduciary duty. Finally, it should be remembered that

under the new Audit Committee Instrument, a fully independent audit committee will be meeting without management at regular meetings to discuss financial matters.

3. ***Independent Lead Director.*** Subsection 2.2(3) of the Proposed Policy states that the chair of the board should be an independent director. This section should be amended to delete this requirement and to simply provide that if the chair is not an independent director, a lead director should be appointed. Such a lead director's role should be limited to matters involving independent directors. Leading the board and preparing the board agenda should always be the prerogative of the chair of the board.

4. ***Board mandate.*** Subsection 2.2(4) of the Proposed Policy provides that the board should adopt a written mandate in which it explicitly assumes responsibility for stewardship of the issuer including responsibility for certain prescribed items. The introductory language does not clearly reflect the appropriate role of the board of directors.

   The *Canada Business Corporations Act* provides that the directors shall manage or *supervise the management* of the business or affairs of the corporation. This section of the CBCA was recently amended to recognize that directors are not, especially in public corporations, directly involved as such in the day-to-day management of the corporation. The Proposed Policy should reflect that the role of the directors is generally one of oversight. The lead-in language of Subsection 2.2(4) should be clarified by deleting the word "responsibility" after the word "including" or, in the alternative, amending the wording to read "responsibility for overseeing".

   Subsection 2.2(4) should also be amended to recognize the concept of delegation by the board in appropriate circumstances.

   Subsection 2.2(4)(a) states, among other things, that the board should adopt in its mandate responsibility for satisfying itself as to the integrity of the CEO and other senior officers. We are of the view that this item lacks clarity and will not provide meaningful disclosure or useful guidance to shareholders. A similar requirement is not contained in the NYSE Rules. What is important to shareholders is establishing that the CEO and senior officers have appropriately performed and discharged their duties. This assessment is undertaken by the compensation committee and/or the board of directors when they review the performance of and set the compensation for such officers. The trustworthiness of the senior officers will necessarily be a key component of such assessment. The meaningful disclosure therefore is the process of assessment itself and not merely a statement as to the board's satisfaction as to the integrity of the CEO and other senior officers. We would submit that this provision will create confusion due to its lack of clarity and should be deleted.

   With respect to the other prescribed items, as stated above, the wording should be clarified to make it clear that the role of the board is not one of active management but rather to consider whether such items are appropriate for the issuer and if so, to oversee the function. Depending upon the final text of the introductory paragraph, the language of the particular items may need to be amended to clarify that the role of the directors is to "review or oversee" such functions.

Subsections 2.2(4)(i) and (ii) of the Proposed Policy prescribe that the mandate should set out the decisions requiring prior approval of the board and the measures for receiving feedback from security holders. If the intention of Subsection 2.2(4)(i) is to require disclosure of any authority which is delegated by the board, such an approach is not practical in light of most corporate statutes which Canadian reporting issuers are subject to. Under these statutes, the board of directors manages or supervises the management of the business and affairs of a corporation. The board of directors may, subject to certain limitations, delegate its powers to committees of the board of directors or to officers. To give effect to such delegation, many Canadian corporations adopt schedules of delegated authority specifying types of decisions, transactions, monetary thresholds, or other matters delegated to various committees or specific officers. Strict compliance with the disclosure requirement prescribed in Subsection 2.2(4)(i) could require reporting issuers to disclose all items of delegated authority. Due to the lengthy and complex nature of delegated authority of some issuers, such disclosure may very well be confusing to investors rather than being significant or meaningful. In addition, such information may be proprietary information which issuers would wish to keep confidential *vis-à-vis* third parties, especially competitors.

Furthermore, many responsibilities of the board are prescribed by statute. It would be redundant and not efficient to list all such statutory duties. Furthermore, it would not be likely to provide meaningful disclosure to an investor. A complete list of responsibilities would be very lengthy and there would always be a risk that certain responsibilities may be inadvertently omitted when preparing the list. A more appropriate disclosure requirement would be to require a general discussion of the issuer's general principles of delegation, including a general description of the types of decisions and matters which have not been delegated. Therefore, the requirement of prescribing items for board approval in the mandate should be deleted or reformulated as indicated above.

With respect to Subsection 2.2(4)(ii) of the Proposed Policy, shareholders who wish to express disapproval with the management or affairs of the corporation have prescribed rights under corporate law, including the right to make shareholder proposals and to exercise the voting rights attached to their securities. The current wording of Subsection 2.2(4)(ii) appears to require the outlining of additional measures to receive shareholder feedback. The disclosure requirements at Subsection 2.2(4)(ii) should be amended to require disclosure of whether the board has taken steps to ensure that measures for receiving feedback from security holders are in place, as opposed to describing these measures.

5. ***Position Descriptions.*** Subsection 2.2(5) of the Proposed Policy states that the board should develop clear position descriptions for directors, including the chair of the board and the chair of each board committee.

We question whether it is necessary for there to be a generic position description for "directors", as the board itself has a mandate and each director participates in the discharge of this mandate, while fulfilling the duty of care prescribed by corporate law. Requiring a description of the "director" position may result in boilerplate position descriptions which do not provide meaningful disclosure to investors.

If the requirement for a position description for "directors" is maintained, it should be clarified in the Proposed Policy that such position description should not be in respect of individual directors but rather in respect of the role of the directors as a group. We would have significant concerns if each director were required to have his or her own job description tailored specifically to his or her skills. Such an approach is contradictory to the concept that a board draws much of its strength from the combination of its members and their skills and may inadvertently entail additional liability for individual directors due to the disclosed expectations of them based upon their individually identified expertise and experience.

We also question the necessity to have a job description for the chair of each board committee where each board committee has its own charter or mandate setting out what the work of the committee is. We would submit that these additional descriptions create additional work for the issuer but not a corresponding benefit for investors.

6. ***Orientation and Continuing Education.*** Section 6 of the Proposed Policy requires the board to ensure that all directors receive a comprehensive orientation and education. In particular, the section prescribes that all new directors should fully understand the nature and operations of the issuer's business. We are of the view that given the diverse backgrounds of appointees to a board of directors, the area of orientation and education should be flexible, not prescriptive. Depending upon the nature of the issuer's business and/or the skills and expertise of a new director, the nature and extent of orientation and continuing education will vary significantly between issuers and among directors. The NYSE Rules merely provide that an issuer disclose its practices under the heading "Director orientation and continuing education". As discussed under "General" above, flexibility may be best served in this category by following the NYSE approach.

If the CSA choose not to adopt this approach, the requirement should be amended to provide that directors should have a "general understanding" of the nature and operations of the issuer's business and provide a transition period during which a new director will be able to become knowledgeable as to the issuer's business. A new director will learn about an issuer's business not only from a formal orientation but more likely from his or her ongoing duties. The need for a transition period to obtain necessary skills has already been reflected in the Audit Committee Instrument.

7. ***Code of Business Conduct and Ethics.*** Section 8 of the Proposed Policy states that the board should adopt a written code of business conduct and ethics (a "Code") and should be responsible for monitoring compliance with the Code. In our view, this last requirement is unnecessarily restrictive and not in accordance with the role of directors as prescribed by corporate law. The board of directors should oversee that compliance with the Code is effectively monitored but this should be done by appointing a responsible individual or committee to monitor compliance. We note that there is no requirement under the NYSE Rules for the board to monitor compliance with such a code.

We are of the view that the content of the Code should not be prescribed in the Proposed Policy but should be flexible to reflect issuer differences. In addition, as in the United States, the flexibility, if an issuer chooses, to have more than one code applicable to each

of its directors, executive officers and employees, should be reflected in the Proposed Policy.

8. ***Nomination of Directors.*** Sections 10 and 15 set out that the nominating and compensation committees should be composed entirely of independent directors. The requirement as drafted is not realistic or practical for closely-held companies or companies which have a significant shareholder. Where an issuer has a majority shareholder or a significant shareholder such committees will not operate effectively without the input of that shareholder. For example, in the case of a closely-controlled issuer it is unrealistic to expect a nominating committee to propose directors not supported by the controlling shareholder who would then be unable to be elected by shareholders at an annual meeting. We note that the Canadian Corporate Governance Coalition has set out in its standards that an issuer should appoint a majority of independent directors to the nominating and compensation committees. The NYSE Rules provide an exemption for controlled companies from the requirements to have fully independent nominating/corporate governance and compensation committees. We would submit that this guideline should be amended to state that a majority of the members of such committees should be independent and that controlled companies are exempt from the independence requirements.

   The Proposed Policy outlines what should be included in the charter of either a nominating committee or a compensation committee. In our view, the prescribed items should be restricted to discussing the purpose and responsibilities of the committee rather than member qualifications, member appointment and removal, and structure and operations. These last items are procedural, restrictive and prescriptive. It was recognized by the CSA in their response to comments on the Audit Committee Instrument that issuers should be free to establish the procedures relating to their audit committees.

   With respect to Subsection 2.2(12), we are of the view that the CSA should not be prescribing the manner in which the board of directors should consider nominating or appointing individuals as directors. Such prescription unduly fetters the discretion of the board to make such determinations as it thinks are necessary with a view to ensuring the board is effective and competent.

9. ***Regular Board Assessments.*** Subsection 2.2(18) of the Proposed Policy prescribes that in accessing the board's effectiveness, the board should assess the effectiveness of each board committee member and individual director. In addition, the board should consider the position description(s) applicable to each director. As stated above we are of the view that there should not be individual descriptions for each director.

   We believe that the best interests of a corporation and its shareholders will generally be served by having a balanced board consisting of directors with diverse expertise and experience. The ultimate purpose of the assessment of the board should be to determine whether the board operates effectively as a whole. The use of individual descriptions does not assist in meeting this goal. The NYSE Rules provide that the board needs to self-evaluate to determine whether the board and its committees, not each individual director, function effectively. An evaluation tied to individual job descriptions based on skills and expertise of particular directors does not necessarily contribute to the best

governance objective, namely a diverse and skilled board which operates as an efficient unit whose members are complementary of each other. In addition, individualizing assessment may result in concerns of increased liability for directors without a corresponding benefit to shareholders.

Disclosure Instrument

1. ***AIF.*** The Disclosure Instrument prescribes that the disclosure of certain items regarding an issuer's corporate governance practices should be contained in an issuer's AIF. There should be more flexibility in determining the location of the disclosure. We would submit that the more appropriate place for such disclosure would be in the Information Circular prepared by the issuer for its annual meeting or in an issuer's Annual Report which are normally posted on an issuer's website. The information circular and Annual Report are generally sent to stockholders whereas the AIF is not. Furthermore, Multilateral Instrument 51-102 allows a company to incorporate by reference in its AIF, any information required to be therein. Therefore, we could argue that the required information could be inserted in the Information Circular and incorporated by reference in the AIF. However, we believe that the Disclosure Instrument should clarify this point. Similar amendments should be made to the Audit Committee Instrument.

2. ***Filing of Code of Business Conduct and Ethics.*** We would suggest that the Code be filed on an issuer's website, if the issuer has a website. This will normally be where shareholders would first look for information on an issuer. If an issuer does not have a website, then the filing should be made on SEDAR. Again, the location of the full text of the Code could be referenced in the relevant disclosure document.

3. ***Waivers of Code.*** Subsection 2.2(8) of the Proposed Policy states that the Code should be applicable to directors, officers and employees of the issuer. Subsection 2.2(9) of the Proposed Policy states that any waivers from the code for directors or senior officers should be granted by the board or a board committee. Subsection 2.3(3) of the Disclosure Instrument requires public disclosure of a waiver where one is granted by the board of directors in favour of an "officer or a director of the issuer or a subsidiary entity of the issuer". Although we agree that waivers should be disclosed, the language in Subsection 2.3(3) should be amended to provide it applies to waivers to "directors or executive officers of the issuer". This would bring the Disclosure Instrument in line with the Proposed Policy and the NYSE Rules (which require disclosure of executive officers' or directors' waivers).

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This letter has been prepared by the Securities Law Group of Ogilvy Renault and incorporates views expressed by one or more of the capital market participants who participated in this review. Each of the views expressed herein are not necessarily shared by all of these capital market participants nor do they reflect the individual views of all Ogilvy Renault partners. If you have any questions concerning these comments, please contact Tracey Kernahan (Direct Line: 416-216-2045 or by e-mail at tkernahan@ogilvyrenault.com or by fax at 416-216-3930) or

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Yours very truly,

Ogilvy Renault

cc: British Columbia Securities Commission
Autorité des Marchés Financiers