

Request for Comment
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 and Companion Policy 52-110CP
Audit Committees

1. REQUEST FOR PUBLIC COMMENT

We, the Canadian Securities Administrators (CSA), are publishing for a 120-day comment period the following documents:

- National Policy 58-201 *Corporate Governance Principles* (the Proposed Governance Policy);
- National Instrument 58-101 *Disclosure of Corporate Governance Practices* (the Proposed Governance Instrument and, together with the Proposed Governance Policy, the Proposed Governance Materials);
- National Instrument 52-110 *Audit Committees* (the Proposed Audit Committee Instrument);
- Companion Policy 52-110CP (the Proposed Audit Committee Policy and, together with the Proposed Audit Committee Instrument, the Proposed Audit Committee Materials) (together, the Proposed Materials).

The Proposed Materials would replace the following documents currently in effect:

- National Policy 58-201 *Corporate Governance Guidelines* (the Current Governance Policy);
- National Instrument 58-101 *Disclosure of Corporate Governance Practices* (the Current Governance Instrument and, together with the Current Governance Policy, the Current Governance Materials);
- National Instrument 52-110 *Audit Committees* (the Current Audit Committee Instrument);
- Companion Policy 52-110CP (together, the Current Materials).

We invite comment on the Proposed Materials generally. In addition, we have raised a number of questions for your specific consideration. The Proposed Materials are set out in Appendix B.

2. BACKGROUND AND PURPOSE

When we published the Current Governance Materials in final form in April 2005, we indicated in the accompanying notice that we recognized that corporate governance is in a constant state of evolution. We stated that we intended to review the Current Governance Materials periodically following their implementation to ensure that the guidelines and disclosure requirements continue to be appropriate for issuers in the Canadian market.

We stated in the Current Governance Policy that we understand that some market participants have concerns about how the Current Governance Materials affect controlled issuers and that we intended to carefully consider these concerns.

On September 28, 2007, we published CSA Staff Notice 58-304 *Review of NI 58-101 Disclosure of Corporate Governance Practices and NP 58-201 Corporate Governance Guidelines* (CSA Notice 58-304), to communicate our plans to undertake a broad review of the Current Governance Materials and to publish our findings together with any proposed amendments for comment in 2008.

In conducting this broad review, we examined corporate governance regimes in other jurisdictions. We also considered the realities of the large number of small issuers and controlled issuers in the Canadian market.

Consistent with CSA Notice 58-304, this Notice and the Proposed Materials reflect the results of our review.

The Proposed Materials are intended to enhance the standard of governance and confidence in the Canadian capital markets. They introduce changes in three main areas of our current corporate governance regime.

First, we propose to replace the Current Governance Policy with a more principles-based policy that is broader in scope. The Current Governance Policy contains a list of specific corporate governance guidelines. The Proposed Governance Policy contains nine broad corporate governance principles and commentary explaining those principles. In addition, it includes examples of corporate governance practices that can be used to achieve the objectives of the principles.

Second, we propose to replace the existing disclosure requirements set out in the Current Governance Instrument with a new set of disclosure requirements. The new set of disclosure requirements are more general in nature (rather than based on a model of “comply-or-explain”) and apply to both venture and non-venture issuers.

Third, we propose to replace the current prescriptive approach to independence in the Current Audit Committee Instrument with a more principles-based approach. Specifically, we propose to include a principles-based definition of independence in the Proposed Audit Committee Instrument with guidance in the Proposed Audit Committee Policy regarding the types of relationships that could affect a director's independence. This guidance would replace the bright-line tests in sections 1.4 and 1.5 of the Current Audit Committee Instrument.

The purpose of the Proposed Materials is consistent with that of the Current Materials. The purpose of the Proposed Governance Policy is to provide guidance on corporate governance practices. The purpose of the Proposed Governance Instrument is to provide greater transparency for the marketplace regarding issuers' corporate governance practices. The purpose of the Proposed Audit Committee Instrument is to provide a framework for establishing and maintaining strong, effective and independent audit committees. The purpose of the Proposed Audit Committee Policy is to provide interpretative guidance for the application of the Proposed Audit Committee Instrument.

Although the Alberta Securities Commission (the ASC) supports the objectives of the Proposed Materials, the ASC is concerned that the Proposed Materials may not substantially improve upon the Current Materials and that the anticipated potential benefits associated with implementing the Proposed Materials may be outweighed by the costs associated with adjusting to, and complying with, the Proposed Materials. Some of the ASC's concerns and specific requests for comment are set out in Appendix A, while other issues are raised in the specific requests for comment in this Notice.

3. SUMMARY OF PROPOSED MATERIALS

Proposed Governance Policy

The Current Governance Policy sets out corporate governance guidelines, grouped under nine main topics. These guidelines are not mandatory. However, because they are coupled with the “comply or explain” disclosure regime in the Current Governance Instrument, some market participants perceived them as prescriptive.

The Proposed Governance Policy establishes nine core corporate governance principles that apply to all issuers. Each principle is accompanied by commentary that provides relevant background and explanation, along with examples of practices that could achieve its objectives. These examples do not create obligatory practices or minimum requirements. The Proposed Governance Policy explicitly recognizes that corporate governance practices of issuers may differ from these examples but be equally good practices provided they achieve the objectives of the articulated principles. The Proposed Governance Policy does not purport to establish minimum standards or “best practices”. It establishes nine principles that a board should consider and in respect of which disclosure is required.

The nine core corporate governance principles are:

- Principle 1 - Create a framework for oversight and accountability
An issuer should establish the respective roles and responsibilities of the board and executive officers.
- Principle 2 - Structure the board to add value
The board should be comprised of directors that will contribute to its effectiveness.
- Principle 3 - Attract and retain effective directors
A board should have processes to examine its membership to ensure that directors, individually and collectively, have the necessary competencies and other attributes.
- Principle 4 - Continuously strive to improve the board's performance
A board should have processes to improve its performance and that of its committees, if any, and individual directors.
- Principle 5 - Promote integrity
An issuer should actively promote ethical and responsible behavior and decision-making.
- Principle 6 - Recognize and manage conflicts of interest
An issuer should establish a sound system of oversight and management of actual and potential conflicts of interest.

- Principle 7 - Recognize and manage risk
An issuer should establish a sound framework of risk oversight and management.
- Principle 8 - Compensate appropriately
An issuer should ensure that compensation policies align with the best interests of the issuer.
- Principle 9 - Engage effectively with shareholders
The board should endeavor to stay informed of shareholders' views through the shareholder meeting process as well as through ongoing dialogue.

The Proposed Governance Policy is broader in scope since the Current Governance Policy does not expressly address the subject matter of Principles 6, 7 and 9.

Principle 6 encourages issuers to establish a sound system of oversight and management of actual and potential conflicts of interest. We think that independence from management of the issuer is required to ensure the adequate supervision of management. We recognize, however, that conflicts of interest may arise in various situations, including if there is a significant divergence of interests among shareholders or their interests are not completely aligned. For example, conflicts of interest could arise in related party transactions to which a control person or significant shareholder is a party. The proposed Principle 6 encourages oversight and management of these conflicts in a manner that does not disqualify a control person or significant shareholder from being considered independent.

Principle 7 encourages issuers to establish a sound framework of risk oversight and management in order to effectively identify and manage significant risks. We think that risk oversight and management are an important component of corporate governance.

Principle 9 encourages the board to stay informed of shareholders' views, in order to facilitate board accountability to shareholders. This principle is intended to foster a productive relationship between shareholders and their elected representatives, the board of directors. We think that the examples of practices set out in this principle can assist the board of directors in keeping abreast of shareholder concerns.

Specific requests for comment

1. Do you think Principles 6, 7 and 9 provide useful and appropriate guidance? Does this guidance appropriately supplement other corporate law and securities law (including legislation and decisions of Canadian courts) relating to these areas?
2. Does the level of detail in the commentary and examples of practices successfully provide guidance to issuers and assistance to investors without appearing to establish "best practices"?

Proposed Governance Instrument

Required disclosure

A reporting issuer other than an investment fund is required to include in its information circular, annual information form or annual MD&A disclosure regarding its corporate governance practices.

We have significantly revised the disclosure requirements in Form 58-101F1. An issuer is required to disclose the practices it uses to achieve the objectives of each principle set out in the Proposed Governance Policy. An issuer is also required to disclose certain factual information, such as the board's composition and information about any of its standing committees. This disclosure is intended to help investors understand those practices.

The disclosure requirements are no longer based on a model of “comply or explain” against governance guidelines. That is one reason why the Proposed Governance Instrument does not provide an alternative disclosure regime for venture issuers.

Filing of code of business conduct and ethics

We no longer require an issuer to file a copy of its code of business conduct and ethics or an amendment to the code through SEDAR. However, an issuer must provide a summary of any standards of ethical and responsible behavior and decision-making or code adopted by the issuer and describe how to obtain a copy of its code, if any.

Application

We have clarified the application section as it applies to subsidiary entities.

Specific requests for comment

3. In your view, what are the relative merits of a principles-based approach for disclosure, compared to a “comply or explain” model?
4. Is the level of disclosure required under each of the principles appropriate both from an issuer's and an investor's point of view? Specifically, do you think the disclosure in respect of Principles 6, 7 and 9 provides useful information to investors?
5. Should venture issuers be subject to the same disclosure requirements concerning their corporate governance practices as non-venture issuers?

Proposed approach to independence (found in the Proposed Audit Committee Materials)

Definition of independence

The definition of independence in the Current Audit Committee Instrument is:

- (1) An audit committee member is independent if he or she has no direct or indirect material relationship with the issuer.
- (2) For the purposes of subsection (1), a “material relationship” is a relationship which could, in the view of the issuer's board of directors, be reasonably expected to interfere with the exercise of a member's independent judgment.

The definition of independence in the Proposed Audit Committee Instrument is:

A director is independent if he or she

- (a) is not an employee or executive officer of the issuer; and
- (b) does not have, or has not had, any relationship with the issuer, or an executive officer of the issuer, which could, in the view of the issuer's board of directors having regard to all relevant circumstances, be reasonably perceived to interfere with the exercise of his or her independent judgment.

We propose to define independence to mean independence from the issuer and its management as a board of directors has an obligation to supervise the management of the business and affairs of an issuer. Under this definition, employees and executive officers of the issuer can never be considered independent.

While a control person or significant shareholder is not disqualified from being independent, when making independence assessments, boards should consider the control person's or significant shareholder's involvement with the management of the issuer and, depending on the nature and degree of involvement, this relationship may be reasonably perceived to interfere with the exercise of independent judgment.

In addition, the proposed definition captures relationships that are reasonably perceived to interfere with the exercise of independent judgment. In contrast, the current definition captures relationships that are reasonably expected to interfere with the exercise of independent judgment. We think the concept of perception is broader than that of expectation and is appropriate to include in the definition of independence since we are removing the "bright line" tests.

Removal of "bright line" tests

We have removed the "bright line" tests in section 1.4 of the Current Audit Committee Instrument. Instead, we have included guidance in the Proposed Audit Committee Policy for assessing independence. Specifically, we have included in section 3.1 a non-exhaustive list of relationships that could affect an individual's independence. Ultimately determining independence is left to the reasonable judgment of the board of directors.

Application

The new definition of independence will apply to all board members, including audit committee members. Consequently, we have removed the additional requirements for audit committee member independence in section 1.5 of the Current Audit Committee Instrument.

Related disclosure requirements

Under the Proposed Governance Instrument, an issuer is required to disclose information regarding director independence. Specifically, an issuer must disclose:

- the names of the directors considered by the board to be independent, with the following information for each of those directors, if any:
 - (i) a description of any relationship with the issuer or any of its executive officers that the board considered in determining the director's independence; and
 - (ii) if the director has a relationship referred to in sub-paragraph (i), a discussion of why the board considers the director to be independent;

- the names of the directors considered by the board to be not independent and the basis for that determination; and
- if a director has a business or other relationship with another director on the issuer’s board, other than common membership on the issuer’s board, information about that relationship.

Specific requests for comment

6. In your view, what are the relative merits of the proposed approach to independence compared to the current approach? In particular:
 - (a) basing the determination of independence on perception rather than expectation; and
 - (b) guiding the board through indicia rather than imposing bright line tests?
7. Is it sufficiently clear that the phrase “reasonably perceived” applies a reasonable person standard?
8. Is the guidance in the Proposed Audit Committee Policy sufficient to assist the board in making appropriate determinations of independence?
9. The proposed definition provides that independence is independence from the issuer and its management, and not from a control person or significant shareholder. Given this definition:
 - (a) should a relationship with a control person or significant shareholder be specified in section 3.1 of the Proposed Audit Committee Policy as a relationship that could affect independence?
 - (b) should such a relationship be solely addressed through Principle 6 – *Recognize and manage conflicts of interest* as proposed?
 - (c) is it appropriate to include as an example of a corporate governance practice that an appropriate number of independent directors on a board of directors and audit committee be unrelated to a control person or significant shareholder?
10. Does the required disclosure on director independence provide useful and appropriate information to investors?

Proposed Audit Committee Instrument

In addition to the changes to the definition of independence discussed above, the most significant changes to the Current Audit Committee Instrument are summarized below:

Exemptions

We have introduced two new provisions that provide transitional relief from the requirement that all audit committee members must be independent. The first provision applies when a venture issuer becomes a non-venture issuer. The second provision applies in the context of a reverse takeover when the acquirer is either a venture issuer or a non-reporting issuer. In addition, we have removed exemptions for controlled issuers in light of the new approach to independence. We have clarified the scope of the exemption for U.S. listed issuers in section 6.1 of the Proposed Audit Committee Instrument.

We have amended the temporary exemption from the requirement that all audit committee members be independent for limited and exceptional circumstances provided in section 3.8 of the Proposed Audit Committee Instrument. We have removed the condition that the board of directors determine, in its reasonable judgement, that the audit committee member relying on this exemption is able to exercise the impartial judgement necessary to fulfill his or her responsibilities. Instead, the exemption does not apply

to an audit committee member unless the issuer's board of directors has determined that the reliance on the exemption will not significantly adversely affect the ability of the audit committee to act independently and to satisfy the other requirements of the Proposed Audit Committee Instrument.

Responsibilities

We have clarified that the issuer or any of its subsidiary entities must not obtain a non-audit service from its external auditor unless the service has been approved by the issuer's audit committee. We have also clarified that the issuer must not publicly disclose information contained in or derived from its financial statements, MD&A or annual or interim earnings news releases, unless the document has been reviewed by its audit committee. Previously, these responsibilities rested with the audit committee.

Application

We have clarified the application section as it applies to subsidiary entities.

Proposed effective date

We recognize that issuers will need a reasonable amount of time to familiarize themselves with the new corporate governance and audit committee regimes, including the new definition of independence. We intend to provide at least six months advance notice of the implementation of the new regimes.

Specific requests for comment

11. Do you think our proposal regarding the effective date adequately addresses the needs of both venture and non-venture issuers?

4. ALTERNATIVES CONSIDERED

We considered maintaining the status quo. However, both issuers and investors have raised concerns about the current governance regime. In addition, since the implementation of the Current Governance Materials, corporate governance has evolved both domestically and internationally.

We think that the Proposed Materials appropriately address these concerns and developments. We expect that the Proposed Materials will:

- provide greater flexibility, or perceived flexibility, to issuers and their boards of directors;
- improve the quality of disclosure of corporate governance practices provided to investors; and
- better align with international standards while taking into account the realities of Canada's capital markets.

We considered the corporate governance regimes in other jurisdictions, including Australia, the United Kingdom and the United States of America. However, while elements of the Proposed Materials are similar to those regimes, we do not believe that it would be helpful to adopt those regimes in their entirety given the unique characteristics of the Canadian market.

We considered no other alternatives.

5. RELATED INSTRUMENTS

The Proposed Materials cover a broad range of subjects, some of which are addressed in the following Instruments or are related to them:

- National Instrument 51-102 *Continuous Disclosure Obligations*;
- National Policy 51-201 *Disclosure Standards*;
- National Instrument 52-109 *Certification of Disclosure in Issuer's Annual and Interim Filings*; and
- National Instrument 71-102 *Continuous Disclosure and Other Exemptions Relating to Foreign Issuers*.

6. ANTICIPATED COSTS AND BENEFITS

There are two primary sets of stakeholders that will be affected by the Proposed Materials.

Issuers

The Current Governance Policy sets out non-prescriptive guidelines. However, these guidelines, when coupled with the “comply or explain” disclosure model, have been perceived by some issuers and other market participants as creating mandatory obligations. We think that the Proposed Governance Materials clarify that the examples of corporate governance practices included in the Proposed Governance Policy are not mandatory. In our view, issuers will benefit from this change.

One consequence of the Proposed Governance Materials is that issuers will have to re-consider the independence of their directors and audit committee members under the new definition of independence. However, we think that they will benefit from the additional flexibility under the new approach to independence, without compromising investor protection.

Another consequence is that issuers will be subject to different corporate governance disclosure requirements than they are currently. In particular, venture issuers will be subject to more extensive disclosure requirements. This may result in higher compliance costs, primarily in the first year of implementation. We do not expect the increase in compliance costs to be significant. Further, even in the absence of any change to our disclosure requirements, issuers may choose to provide more comprehensive disclosure regarding their governance practices in order to address investor concerns.

Issuers will remain subject to the same audit committee requirements as in the Current Audit Committee Instrument, although they will have to re-confirm the independence of their audit committee members under the new definition of independence.

Investors

We think investors will receive more comprehensive and meaningful information on which to base their investment decisions under the Proposed Governance Instrument. In particular, investors in venture issuers will receive more extensive disclosure than is currently the case.

The results of our corporate governance disclosure compliance review, set out in CSA Staff Notice 58-303 published on June 29, 2007, revealed that current corporate governance disclosure by issuers is often inadequate and does not provide clear or complete accounts of governance practices. In these instances, market participants have expressed concerns that the disclosure being provided is not sufficiently informative or meaningful to acquire an understanding of the issuer's governance practices to inform an investment decision. We think the requirements of the Proposed Governance Instrument respond to these concerns.

The proposed disclosure requirements will cover the same general topics as are currently set out in the Current Governance Instrument, plus three additional topics (conflicts of interest, risk management and shareholder communication). The addition of these topics is largely consistent with the disclosure requirements in other jurisdictions.

Disclosure provided to investors regarding audit committees will generally remain the same, except an issuer will be required to provide more comprehensive information about the independence of its audit committee members under the Proposed Governance Instrument.

We anticipate the benefits of greater transparency and flexibility will exceed the cost for issuers to reassess the independence of their directors and provide the disclosure required under the Proposed Materials.

7. RELIANCE ON UNPUBLISHED MATERIALS

In developing the Proposed Materials, we did not rely upon any significant unpublished study, report or other written materials.

8. CONSEQUENTIAL AMENDMENTS

We are also publishing for a 120-day comment period, amendments to the following:

- National Policy 12-202 *Revocation of a Compliance-related Cease Trade Order*;
- National Instrument 41-101 *General Prospectus Requirements* and Form 41-101F1 *Information Required in a Prospectus*;
- National Policy 41-201 *Income Trusts and Other Indirect Offerings*;
- Form 51-102F2 *Annual Information Form*;
- Form 51-102F5 *Information Circular*; and
- Companion Policy 71-102CP to National Instrument 71-102 *Continuous Disclosure and Other Exemptions Relating to Foreign Issuers*.

The proposed amendment instruments are set out in Appendix C .

9. WITHDRAWAL OF NOTICE

We are withdrawing CSA Staff Notice 58-304 in all Canadian jurisdictions in which it was published as it is no longer required.

10. PUBLISHING JURISDICTIONS

The Proposed Materials are initiatives of the securities regulatory authorities in all Canadian jurisdictions. If adopted, the Proposed Governance Instrument and the Proposed Audit Committee Instrument are expected to be adopted as rules in all Canadian jurisdictions except Saskatchewan and Québec. They will be adopted as Commission regulations in Saskatchewan and as regulations in Québec.

We expect that the Proposed Governance Policy and the Proposed Audit Committee Policy, if adopted, will be adopted as policies in all Canadian jurisdictions.

11. COMMENTS

We invite interested parties to make written submissions on the Proposed Materials. We will consider submissions received by April 20, 2009. **Due to timing concerns, we will not consider comments received after this deadline.**

Please address your submissions to the following securities regulatory authorities:

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
New Brunswick Securities Commission
Nova Scotia Securities Commission
Office of the Attorney General, Prince Edward Island
Securities Commission of Newfoundland and Labrador
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

Please send your comments to the addresses below. Your comments will be distributed to the other participating CSA members.

Me Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
800, square Victoria, 22e étage
C.P. 246, tour de la Bourse
Montréal (Québec) H4Z 1G3
Fax: 514-864-6381
E-mail: consultation-en-cours@lautorite.qc.ca

John Stevenson, Secretary
Ontario Securities Commission
20 Queen Street West
Suite 1900, Box 55
Toronto, Ontario M5H 3S8
Fax: 416-593-8145
E-mail: jstevenson@osc.gov.on.ca

If you do not submit your comments by e-mail, provide a diskette containing the submissions in MS Word format.

Please note that all comments received during the comment period will be made publicly available.

We cannot keep submissions confidential because securities legislation in certain provinces requires publication of a summary of the written comments received during the comment period be published. We will post all comments received during the comment period to the Ontario Securities Commission website at www.osc.gov.on.ca to improve the transparency of the policy-making process.

12. QUESTIONS

Please refer your questions to any of:

Autorité des marchés financiers

Lucie J. Roy, Conseillère en réglementation
Surintendance aux marchés des valeurs
Phone: 514-395-0337, ext. 4464
E-mail: lucie.roy@lautorite.qc.ca

Sylvie Anctil-Bavas, Chef comptable
Surintendance aux marchés des valeurs
Phone: 514-395-0337, ext. 4291
E-mail: sylvie.anctil-bavas@lautorite.qc.ca

British Columbia Securities Commission

Sheryl Thomson, Senior Legal Counsel
Corporate Finance
Phone: 604-899-6778 (direct)
800-373-6393 (toll free in BC and Alberta)
E-mail: sthompson@bcsc.bc.ca

Jody Ann Edman, Senior Securities Analyst
Corporate Finance
Phone: (604) 899-6698 (direct)
(800) 373-6393 (toll free in BC and Alberta)
E-mail: jedman@bcsc.bc.ca

Alberta Securities Commission

Samir Sabharwal, Legal Counsel
Office of the General Counsel
Phone: 403-297-7389
E-mail: samir.sabharwal@asc.ca

Patrizia C. Valle, Legal Counsel
Office of the General Counsel
Phone: 403-355-4478
E-mail: patrizia.valle@asc.ca

Manitoba Securities Commission

Bob Bouchard, Director and Chief Administration
Officer
Phone: 204-945-2555
E-mail: bob.bouchard@gov.mb.ca

Ontario Securities Commission

Rick Whiler, Senior Accountant
Phone: 416-593-8127
E-mail: rwhiler@osc.gov.on.ca

Jo-Anne Matear, Assistant Manager
Phone: 416-593-2323
E-mail: jmatear@osc.gov.on.ca

Frédéric Duguay, Legal Counsel
Phone: 416-593-3677
E-mail: fduguay@osc.gov.on.ca

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Appendix A

The ASC has concerns about certain aspects of the Proposed Materials, some of which are reflected in the specific requests for comment in the CSA Request for Comment. The remaining concerns are outlined herein with additional requests for comment.

Proposed approach to independence (found in the Proposed Audit Committee Materials)

Definition of independence

As stated in the CSA Request for Comment, the proposed definition of independence in the Proposed Audit Committee Instrument is:

A director is independent if he or she

- (a) is not an employee or executive officer of the issuer; and
- (b) does not have, or has not had, any relationship with the issuer, or an executive officer of the issuer, which could, in the view of the issuer's board of directors having regard to all relevant circumstances, be reasonably perceived to interfere with the exercise of his or her independent judgment.

The ASC is concerned that clause (b) of the proposed definition of independence may remove the discretion of the board to determine whether or not a director who is not an employee or executive officer is independent. Under the proposed definition of independence, such a director cannot be labeled independent if a relationship exists which a "reasonable person" could perceive would interfere with the exercise of that director's independent judgment. This would be the case notwithstanding that a board, with its collective experience and specific knowledge of the director in question, may subjectively and reasonably come to a different conclusion. The ASC is concerned that under the proposed definition of independence, a reasonable but less informed and less experienced person's perception is the determining factor. Ultimately, the concern is that the best available directors may not become members of boards because of the application of this particular definition of independence.

Related disclosure requirements

The ASC is concerned that the disclosure requirements imposed by the Proposed Governance Instrument may ultimately have a detrimental effect on issuers' ability to attract and retain the best available directors. The Proposed Governance Instrument requires issuers to explain why a director has been found to be independent if a relationship enumerated in section 3.1 of the Proposed Audit Committee Policy exists. Such a requirement could result in market participants improperly assuming that such a relationship usually impedes the exercise of independent judgment unless the board is able to provide an explanation that proves otherwise. In addition, the requirement that the issuer identify the remaining directors as "not independent" implies that those directors are not capable of exercising independent judgment. The concern is that such a label will dissuade valuable directors from acting as members of boards.

Specific requests for comment

1. Instead of the "reasonable person" test, do you think the definition of independence should:
 - (a) allow the board to subjectively determine whether or not a director is independent; and
 - (b) require that the board's subjective decision be reasonable (i.e., there is a line of analysis that could reasonably lead the board from the factors it considered to the conclusion it reached, even if it is one with which others may disagree)?

2. Concerns have been expressed with respect to the effect the Current Materials have on controlled issuers. Is it appropriate to include being actively involved in the management of the issuer, which may include a control person or a significant shareholder, as one of the relationships that could affect independence enumerated in section 3.1 of the Proposed Audit Committee Policy?
3. Given that it is in all market participants' interests for issuers to have the best directors available:
 - (a) is it appropriate to require that the board explain why a director was found to be independent?
 - (b) could requiring such an explanation create a presumption that each relationship enumerated in section 3.1 of the Proposed Audit Committee Policy affects the exercise of independent judgment unless the contrary is proven?
 - (c) if so, do you think it is preferable that the disclosure requirements oblige an issuer to disclose the referenced relationships with respect to any director whom the board determines is independent without requiring an explanation for why that director is independent?
 - (d) do you think the requirement that the issuer identify the remaining directors as "not independent" might result in the perception that such an individual cannot exercise independent judgment and, as such, affect that individual's willingness to serve as a director?