

June 22, 2012

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Dear Ms. Corrigan-Brown:

**Re: Second Notice and Request for Comment Maple Group Acquisition Corporation Proposed Acquisition of TSX Venture Exchange Inc. dated May 24, 2012 (the “BCSC Notice and Request for Comment”)**

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FAIR Canada is pleased to offer a submission to the British Columbia Securities Commission (“BCSC”) on the Draft Recognition Order Conditions for the TSX Venture Exchange (the “Draft Recognition Order”), found at Appendix A to the BCSC Notice and Request for Comment dated May 24, 2012 (the “BCSC Notice”).

## ***1. Listing Regulation Conflicts of Interest Needs to be Addressed***

**1.1. FAIR Canada believes that specific and sound measures to manage the conflicts of interest between the listing regulation responsibilities and listing business operations of Canadian for-profit exchanges are long overdue.**

**1.2.** The BCSC Notice discusses the Ontario Securities Commission’s (OSC’s) Proposed Recognition Order in which the BCSC Notice states that the OSC’s Proposed Recognition Order provides a comprehensive set of conditions and undertakings intended to address the public interest issues arising from the proposed acquisition. These public interest issues include the opportunity for significant conflicts of interest and inappropriate access to market information by Maple owners. The BCSC Notice indicates that the OSC’s conditions and undertakings do not extend to the TSX Venture Exchange (the “TSX-V”): “We think that the conditions and undertakings proposed by the OSC for Maple, TMX Group, and TSX ought to apply as well to [TSX-V]”<sup>1</sup>. FAIR Canada agrees that the OSC’s conditions and undertakings with respect to managing conflicts of interest should also apply to the TSX-V. Most critically, FAIR Canada believes that specific and sound measures to adequately manage the conflicts of

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<sup>1</sup> BC Notice 2012/11, Second Notice and Request for Comment Maple Group Acquisition Corporation Proposed Acquisition of TSX Venture Exchange Inc. (the “BCSC Notice”) at 5.

interest in the listings business and the listings regulatory mandates of for-profit exchanges need to be implemented at this time.

**1.3. The Maple acquisition provides securities regulators with the opportunity, and imposes an obligation, to finally put in place adequate safeguards which meet the minimum international ‘best practice’ standard<sup>2</sup>.** FAIR Canada believes that the OSC’s Proposed Recognition Order does not address the conflicts of interest adequately and does not institute an approach which meets the minimum international ‘best practice’ standard and, therefore, needs to be rethought<sup>3</sup>. We are similarly of the view that the BCSC’s Draft Recognition Order (and in particular, sections 11, 12, and 25) does not adequately address the conflicts of interest for the TSX-V and does not institute an approach which meets the minimum international ‘best practice’ standard. Now is the time to take concrete steps to put into place the appropriate structure and mechanisms in order to safeguard market integrity and investor protection.

**1.4. The current structure is not providing sufficient oversight and protection. An example of the conflicts of interest has been illustrated in the TSX and TSX-V’s marketing efforts to attract China listings over the last decade, absent a satisfactory evaluation of whether the regulatory framework in Canada is adequate to ensure sufficient oversight and protection.** Recent events involving Sino-Forest and, more than a dozen TSX-V issuers, that are also emerging market listings, have resulted in billion dollar losses for investors, and in particular, retail investors. These events clearly demonstrate that the TSX and TSX-V have not properly considered the risks or the public interest in their campaign to increase their China listings. **In fact, they appear to continue to ignore the risks as the TSX announced this past November that it has opened an office in China in order to attract new China listings, which appears to show that the TSX is not deterred by widespread fraud and other major regulatory problems with China listings. It is critical that the TSX and TSX-V, under the new recognition orders, chart a different course.**

## **2. Need Measures that Meet International Best Practices**

**2.1.** FAIR Canada’s preferred approach is to transfer the listings regulation functions of all exchanges in Canada to another regulator, preferably an independent self-regulatory organization (“SRO”). This was the approach taken by Canadian regulators with respect to the TSX’s member regulation and market regulation functions when the TSX demutualized. Alternatively, we recommended that there be established a regulation subsidiary company with independent governance which performs listing regulation (as the NYSE has done). These two approaches were presented in the expert report

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<sup>2</sup> One of the three main approaches employed by the seven exchanges reviewed in the FAIR Canada Report to address conflicts of interest in listings regulation would meet a minimum international ‘best practice’ standard. See John W. Carson, “Managing Conflicts of Interest in TSX Listed Company Regulation” (2010), prepared for FAIR Canada July 23, 2010 (the “FAIR Canada Report”). Available online at: FAIR Canada <http://faircanada.ca/wp-content/uploads/2008/12/TSX-Listings-Conflicts-final-report-23-Jul1.pdf> (the “FAIR Canada Report”, at 29).

<sup>3</sup> Please see our letter to the OSC dated June 4, 2012. Available online at <http://faircanada.ca/wp-content/uploads/2011/01/120604-FAIR-Submission-re-Proposed-Recognition-Order-for-Maple-Final.pdf>.

commissioned by FAIR Canada entitled “**Managing Conflicts of Interest in TSX Listed Company Regulation**” (the “**FAIR Canada Report**”).<sup>4</sup>

- 2.2. Oversight, monitoring and reporting will not be effective unless the appropriate structure or mechanisms are first put in place.** At a minimum, as set out in the FAIR Canada Report<sup>5</sup>, there needs to be a separation of the listing regulation department from the business operations of the exchange (including listing business development) in order to effectively perform the listings regulatory function. No amount of oversight, monitoring or reporting can provide adequate protection in the absence of stipulating the mechanisms that need to be implemented. We urge the BCSC to adopt such measures for the TSX-V.
- 2.3. Conflicts of interest policies and procedures are usually implemented as a supplement to the best practice mechanisms and should not be relied upon in the absence of such a mechanism. There are simply too many conflicts to rely solely on written policies and procedures in order to manage them effectively. The concentration of trading and listing activity makes it critical to address the conflict. Conflicts policies and procedures cannot, on their own, effectively manage the conflicts of interest in a manner without risk to the public and, in particular, retail investors.**

### **3. Now is the Time to Implement a Best Practices Approach**

- 3.1.** FAIR Canada does not believe that the BCSC should take a wait and see approach in addressing this issue. The OSC’s Proposed Recognition Order provides for an independent governance review to take place within three years which will examine how the Regulatory Oversight Committee (established by the OSC’s Proposed Recognition Order) discharges its mandate (including whether it manages the conflicts of interest effectively and whether further measures are warranted). There is no assurance that the governance review will address the listing regulation conflict of interest. As the years drag on with no action by regulators, the TSX or the TSX-V, investors stand to lose significantly as does the reputation of Canadian markets and the regulatory system. In addition, reconsideration of the issue down the road will likely face greater resistance as the Maple Group will have already received its approval for the acquisition and will have been in operation for some time.

### **4. ROC Model Needs, at a Minimum, Further Safeguards**

- 4.1. If the BCSC nonetheless defers the issue and pursues the ROC model proposed by the OSC, FAIR Canada strongly recommends that, as an absolute minimum, the BCSC should take the following steps :**
- 1) acknowledge in the Draft Recognition Order that the current structure does not adequately address conflicts and is not up to international ‘best practice’ standard;**

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<sup>4</sup> Supra, note 6.

<sup>5</sup> The FAIR Canada Report, at 31-32, 38-40 and 55.

- 2) expressly require a report on addressing the conflicts of interest in listings regulation within 12 months of the Draft Recognition Order coming into effect; and
- 3) require that the proposed new listings regulation structure set out in the report meet international best practice standards.

#### 5. *Advisory Committees Need Investor Perspective*

- 5.1. If the BCSC implements an industry advisory committee comprised of participants in the Canadian public venture capital market to provide advice and recommendations to the TSX-V on all policy and other issues that are likely to have a significant impact on the venture market, FAIR Canada recommends that the BCSC appoint at least two persons who are retail investor participants in the TSX-V to also participate on the committee. This will allow the retail investor perspective to be part in the policy-making process.

FAIR Canada strongly recommends that the BCSC put into place an adequate structure and mechanisms to deal with conflicts of interest in the Draft Recognition Order. We thank you for the opportunity to provide our comments and views in this submission. We welcome its public posting and would be pleased to discuss this letter with you at your convenience. Feel free to contact Ermanno Pascutto at 416-214-3443 ([ermanno.pascutto@faircanada.ca](mailto:ermanno.pascutto@faircanada.ca)) or Marian Passmore at 416-214-3441 ([marian.passmore@faircanada.ca](mailto:marian.passmore@faircanada.ca)).

Sincerely,



Canadian Foundation for Advancement of Investor Rights