

March 17, 2005

**EMAIL: rule-comments@sec.gov**

Mr. Jonathan G. Katz  
Secretary, Securities and Exchange Commission  
450 Fifth Street NW  
Washington, DC  
20549-0609

Dear Mr. Katz:

**Re: Nasdaq Rule Changes Permitting Foreign Private  
Issuers to Follow Home Country Governance Practices**

We represent a number of Canadian issuers that are quoted on Nasdaq and listed on the Toronto Stock Exchange. This is our firm's response to Nasdaq's request for comment on changes to NASD Rule 4350(a)(1) and (5) and Interpretive Material 4350-6(1) published on February 17, 2005. We support Nasdaq's rule changes as we believe that a disclosure-based regime is better for cross-listed companies and is consistent with the protection of investors. The rule changes are also more consistent with the Canadian approach to corporate governance and the NYSE's treatment of foreign private issuers.

We have the following comments on Nasdaq's rule changes.

**Limit Disclosure to Significant Deviations from Nasdaq's Governance Requirements**

We believe that many minor differences could exist between Nasdaq's corporate governance requirements and a foreign private issuer's practices that would be of little or no significance to investors. As part of its move to a disclosure-based regime, we suggest that Nasdaq clarify that its new rules require companies to disclose only the *significant* Nasdaq requirements that they do not follow and the home country practices that they follow instead.

If companies begin disclosing every deviation from Nasdaq's requirements, the important deviations could be obscured by a large number of insignificant deviations (such as giving an independent board committee a different name or having a committee charter worded differently). If Nasdaq clarifies that insignificant deviations from the rules do not need to be disclosed, companies' disclosures will be more succinct, less cumbersome to draft and easier for investors to understand. The disclosure would be more similar to NYSE-listed companies' disclosure, which we believe is beneficial.

## **External Counsel's Certification**

### *Time of Providing Certification*

Under the new rules as drafted, Nasdaq requires a listed company to provide a certification from independent counsel at the time it seeks to adopt its first non-compliant practice. In its letter to listed companies dated February 11, 2005, we note that Nasdaq wrote that counsel is only required to provide the certification once. We suggest that Nasdaq clarify whether independent counsel's certification is required each time a company adopts a non-compliant practice or whether the first certification will be deemed to cover future adoptions of non-compliant practices.

### *Certification Less Meaningful than Disclosure*

We suggest that Nasdaq require a certification from independent counsel only at the time of an initial listing. For companies that are already listed, whose existing exemptions will be grandfathered, we believe that Nasdaq's disclosure requirement is the more meaningful regulatory mechanism for the protection of investors and external counsel's certification would be of little additional benefit.

### *Independent Counsel Should Provide Opinion Rather than Certification*

Independent counsel's certification is supposed to state that a company's practices are not prohibited by home country law. We believe this should take the form of a legal opinion rather than a certification because the term "certification" suggests a higher level of assurance than external counsel could give as to an issuer's compliance with legal requirements. Accordingly, we suggest that Nasdaq refer to the communication from external counsel as an opinion rather than a certification.

We appreciate the opportunity to comment on Nasdaq's new rules and would be pleased to discuss any aspect of this submission with you.

Yours truly,

"Leslie McCallum"

**Torys LLP**

LM/tc

cc: Andrew J. Beck, *Torys LLP*  
Daniel M. Miller, *Torys LLP*