SHARE | Shareholder Association for Research and Education

August 24, 2003

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission – Securities Division
Manitoba Securities Commission
Ontario Securities Commission
Office of the Administrator, New Brunswick
Registrar of Securities, Prince Edward Island
Nova Scotia Securities Commission
Newfoundland and Labrador Securities Commission
Registrar of Securities, Northwest Territories
Registrar of Securities, Yukon Territory
Registrar of Securities, Nunavut

c/o Rosann Youck
Chair of the Continuous Disclosure Harmonization Committee
British Columbia Securities Commission
PO Box 10142, Pacific Centre
701 West Georgia Street
Vancouver, British Columbia
V7Y 1L2
Email: ryouck@bcsc.bc.ca

Denise Brosseau, Secretary
Commission des valeurs mobilières du Québec
Stock Exchange Tower
800 Victoria Square
P.O. Box 246, 22nd Floor
Montréal, Québec
H4Z 1G3
Email: consultation-en-cours@cvmq.com

Dear Canadian Securities Administrators:

Re: NI 51-102

On behalf of the Shareholder Association for Research and Education (SHARE), I write in response the CSA's request for comments on proposed National Instrument 51-102. On behalf of its affiliates with total assets exceeding $2 billion dollars, SHARE has had a long-standing interest in continuous disclosure obligations of public issuers. I currently

represent SHARE on the Ontario Securities Commission's Advisory Committee on Continuous Disclosure (ACCD) and have made submissions on behalf of SHARE to corporate and securities administrators on CD-related issues over the past several years.

SHARE is generally supportive of proposed National Instrument 51-102. We particularly wish to congratulate the CSA for expanding the requirements for material social and environmental disclosures by reporting issuers in accordance the recent MD&A guidelines issued by the Canadian Institute of Chartered Accountants.

Due to unavoidable constraints on time, our submissions are concise without little elaboration. We welcome any questions regarding the substance of these submissions and would be pleased provide CSA members with additional supporting information upon request.

Materiality Standard

SHARE endorses the views of the Ontario Teachers' Pension Plan calling on the CSA to adopt a "material information" continuous disclosure standard.

Currently, securities law only requires continuous disclosure of "material changes" by reporting issuers. National Policy 51-201 recommends that issuers disclose all "material information", however this is a policy statement not a rule. As the OSC Five Year Review Committee Draft Report states (at p.83-85):

> "…the prospectus is the base document for an issuer's disclosure. Both the preliminary and the final prospectus must contain full, true and plain disclosure of all *material facts* relating to the securities issued or proposed to be distributed…. After a preliminary prospectus has been filed, an issuer's disclosure is driven by *material changes*."

Therefore, material facts are considered part of the disclosure requirements under the initial prospectus, not as part of ongoing disclosure requirements. National Policy 51-201 and stock exchange timely disclosure policies recommend disclosure of all material information, but the comments of the OSC Five Year Review Committee indicate that this is in the context of an understanding that material facts are *existing* information, whereas only material changes are *forward looking*:

> "How does a material change differ from a material fact? First there must be a "change" (as opposed to the existence of a "fact"). Second, the "change" must be in the business, operations or capital of the issuer (a material "fact" can be unrelated to an issuer's business, operations or capital so long as it has a significant effect on the market price or value of the securities being issued). Issuers are not expected to continually interpret external political, economic, and social developments as they affect the affairs of the issuer, unless the external development will result in a change in the business, operations or capital of the issuer, in which case, timely disclosure of the change must be made. However, we would expect that in the current environment reporting issuers would discuss external developments and the effect of such events on their companies in their interim and annual MD&A. Finally, the threshold for a "material change" is forward

> looking – the change in the business, operations or capital of the issuer must be one that *would reasonably be expected* to have a significant effect on the market price or value of any of the securities of the issuer. The commencement of a major law suit may be a material fact (discloseable in a prospectus) but not a material change (and therefore not giving rise to a material change report and press release) because it does not constitute a change to the issuer's business, operations or capital. Similarly, it may be a material fact that an issuer has engaged financial advisers with respect to a recapitalization. However, until the issuer makes a decision to proceed, no material change has occurred."

Based on this interpretation, SHARE views the current "material change" disclosure standard to be inadequate. We strongly urge the CSA to adopt the higher "material information" standard to achieve harmonization with stock exchange timely disclosure policies and to send guidance to reporting issuers on the expected scope and nature of material disclosures, particularly the inclusion of forward-looking social and environmental risk factors (see comments below).

Disclosure of auditor review of interim financial statements

In keeping with the objective of enhancing investor confidence with regards to financial irregularities, SHARE supports the requirement of issuers to disclose in their interim financial statements or their interim MD&A if their auditors have not reviewed the interim financial statements, or have expressed a qualified or adverse communication, or denied any assurance.

Board approval of interim and annual financial statements

SHARE supports the requirement to have directors approve all interim and annual financial statements. Requiring board approval, rather than board review, provides greater clarity to all market participants as well as more a more definitive basis for determining compliance with a director's fiduciary duty. We note that there was agreement amongst members of the ACCD on the use of the term "approval".

Delivery of financial statements to securityholders

SHARE has made substantial submissions to the CSA in the past regarding the scope and implications of NI54-101. We have grave reservations about this policy and the adverse implications it will have on market disclosure and investor confidence. While amendments to NI51-102 serve only to create a harmonized regime with NI54-101, we take this opportunity to raise our concerns again and urge the CSA to review the entire framework governing the delivery of documents to securityholders. A copy of our submission on NI54-101 is available upon request.

Board approval of interim and annual MD&A

Consistent with our position on board approval of interim and annual financial statements, SHARE supports the decision to require board approval of interim and annual MD&A.

Audit committee review of MD&A

SHARE full supports the review of the MD&A by the audit committee where one exists. We see this as part of a comprehensive review and approval process culminating with board approval.

Delivery of MD&A to securityholders

See comments above with respect to delivery of financial statements.

Disclosure of auditor review of MD&A

See comments above with respect to disclosure of auditor review of interim financial statements.

Proxy Solicitation

We support the submissions of the Ontario Teachers' Pension Plan dated September 17, 2002 with respect to the definition of "solicit". We view the lack of harmonization in the definitions of "solicit" or "solicitation" between corporate and securities law to be problematic. The CSA's response states that harmonizing definitions would require amendments to provincial securities legislation. While legislative amendment is ultimately necessary, we do not see any reason why the securities administrators cannot provide greater clarification in the interim on the nature of solicitation in NI51-102 where it does not conflict with the legislative definition.

Disclosure of social and environmental policies and risks

In accordance with the recommendations of the Social Investment Organization, SHARE welcomes the CSA's decision to modify NI51-102 to require disclosure of social and environmental policies by reporting issuers. However, disclosure of policies is only the first step. While some guidance is provided regarding the types of risk factors that should be disclosed by issuers, we feel the guidance is insufficient and falls short of what investors are seeking from public companies in the face of growing social and environmental risks associated with increasingly complex operating environments. Investors must also receive sufficient information to be able to verify that issuers are complying with their policies. Such risk factors are not limited to "environmental and health risks" and "political conditions", but extend to a much broader range of factors that studies continue to demonstrate have a material impact on corporate financial performance. We therefore encourage the CSA to require reporting issuers to disclose information regarding actual and potential social and environmental risk factors in their AIF or MD&A. As discussed above, public issuers do not generally view this type of information to be material in nature or to constitute a "material change" and therefore do not provide virtually any disclosure in this respect. Implementing a "material information" disclosure standard would go some way to rectifying this deficiency.

Form 51-102F5 Information Circular

SHARE supports all of the proposed amendments to Form 51-102F5 (Information Circular), particularly the amendment requiring reporting issuers to disclose the bankruptcies of proposed directors, and any penalties, sanctions, or bankruptcies of companies that the proposed directors were directors or executive officers of.

Vote results from shareholder meetings

With the amendments to the CBCA in November 2001 and the corporate scandals in the past several years, shareowners have been taking a more active role in corporate governance. However, shareholders still have no clear right to receive such information as vote totals on management and shareholder resolutions considered at annual general meetings.

Each year, SHARE attempts to obtain vote totals on all resolutions from public issuers on behalf of our affiliates. These totals are published on our website. Each year, a handful of companies refuse to provide this information stating that they are not obligated to do so. Others only agree to indicate whether a vote exceeded a certain percentage threshold. Some companies only provide percentages and refuse to disclose the numbers of votes cast for and against.

In its submission dated September 17, 2002, the OTPP called on the CSA to require reporting issuers to disclose information on vote totals to shareowners. In early 2003, members of the OSC Advisory Committee on Continuous Disclosure were informed that the OSC would be requiring reporting issuers to provide such disclosure in a standard form.

SHARE views disclosure of information regarding vote totals to be a significant part of any reporting issuer's continuous disclosure obligations. Shareowners are entitled to this information. We therefore call on the CSA to include this requirement it NI51-102 along with a standardized form where reporting issuers provide actual vote totals and vote percentages. We recommend that issuers be required to complete the form within 30 days of their AGM and post them on SEDAR.

This concludes our comments on NI51-102. We thank the CSA for this opportunity and welcome any questions you may have regarding our submission.

Yours truly,

Gil Yaron
Director of Law & Policy