July 25, 2001

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

c/o John Stevenson, Secretary
Ontario Securities Commission
20 Queen Street West
Suite 1903, Box 55
Toronto, Ontario M5H 3S8

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

Dear CSA members:

Re: Request for comments on the Notice of Proposed National Policy 51-201 Disclosure Standards

On behalf of the Shareholder Association for Research and Education (SHARE), we write to thank you for the opportunity to comment on the *Notice of Proposed National Policy 51-201 Disclosure Standards and proposed Rescission of National policy 40 Timely Disclosure* ("Proposed NP 51-201"). SHARE is a national, non-profit organization established by the British Columbia Federation of Labour and nine unions through Working Enterprises Ltd. to work with institutional investors across Canada in

fostering responsible investment practices. More details about SHARE are available on our website at <www.share.ca>.

The subject of the Proposed NP 51-201 is of great importance to ensuring a credible investment environment and maintaining investor confidence both Canada and around the world. We regret that we did not become aware of the request for comments until near the deadline for submissions which has prevented us from exploring the issues raised to the degree we would like.

SHARE agrees with the CSA that all investors have equal access to information that may affect their investment decisions. Within the context of rapidly changing global realities and ever-increasing speeds at which information moves around the world, investors must be reassured that they are receiving both *sufficient* and *timely* access to information to make educated investment decisions. The issues of what constitutes material information and the need for timely disclosure of such information has recently come before the attention of the United States Securities Exchange Commission in letters between Congressman Wolf and Acting SEC Chairman Laura S. Unger and memorandum from the SEC's Director of Corporation Finance and Ms. Unger both dated May 8, 2001 in relation to the operations of foreign companies listed on US exchanges (copies attached). Reference will be made to the views expressed by the SEC in our comments below.

Our comments address a number of issues identified in the Proposed NP 51-201 including the approach to the "necessary course of business" exception, the approach to the "generally disclosed" requirement, and the definition and scope of "material information" in the context of timely disclosure.

"NECESSARY COURSE OF BUSINESS" EXCEPTION

As stated in the Proposed NP51-201, the tipping provision in securities legislation permits companies to make selective disclosure if required in the "necessary course of business". Given the lack of sufficient direction on this point from the courts and legislatures, we strongly support the provision of interpretive guidance from the CSA and provincial regulators in this area. It is our opinion that the parties identified in the Proposed NP51-201 with whom communications would fall under the exception requires further qualification. Presuming that information may be disclosed to the parties listed in the "necessary course of business", there is nothing preventing many of these parties from disclosing the information second-hand to select media, analysts or institutional investors since tipping prohibitions only apply to the reporting issuer or other person in a special relationship with the reporting issuer.

We therefore recommend that any interpretation of the "necessary course of business" exception stipulate that any material non-public information provided to parties in the necessary course of business be limited to that single communication. In the long-term, we recommend amendments to securities legislation to extend the tipping provision to apply to all parties that are privy to material non-disclosed information, not only those in a special relationship to the reporting issuer.

Recommendation 1: That NP51-201 explicitly prohibit material non-public information disclosed by a reporting issuer to a party in the necessary course of business to be repeated by the party to a third party, and that provincial regulators extend tipping provisions in their respective legislation to apply to all parties to whom material non-disclosed information about the reporting issuer is communicated.

"GENERALLY DISCLOSED" REQUIREMENT

As with other public institutions, securities legislation should prescribed a list of mandatory methods of disclosure. In the interim, Proposed NP51-201 should provide a similar list. The rationale for this recommendation is that with such a variety of sources for information in today's business environment, investors cannot be assured that they are obtaining all available information through any one source or even a number of sources.

Governments are required to provide notice of legislative and regulatory changes, as well as other information deemed of importance to the general public, through the Canada Gazette. This is widely understood as the definitive source for all such government information. Similarly, investors should feel confident that they can obtain all material information disclosed by a company through as few sources as possible.

We recommend that the NP51-201 *require* that companies distribute their news releases through a widely circulated news or wire service, on SEDAR, and on their company website. Mandatory distribution through all three sources is necessary to ensure that no investors are discriminated against for not having access to the internet or print media. This requirement places an insignificant burden on companies far out-weighed by the benefit to the investment community and the preservation of the integrity of the securities industry. It ensures investors that no matter what publicly-traded Canadian company they invest in, they will receive all information that has been disclosed by the company by referring to the three respective sources. Anything less will continue to jeopardize investor confidence.

Recommendation 2: That NP51-201 require all reporting issuers to make timely disclosures through a widely circulated new or wire service, on SEDAR and on their company websites, and that securities regulators incorporate this mandatory requirement into their respective securities legislation.

MATERIALITY

The primary focus of our submissions relates not to the issue of timely disclosure, but to the *adequacy* of the information disclosed. We are aware of the recent consultations on CSA Notice 53-302 that deal in part with recommendations to change the definitions of "material change" and "material fact". While our submissions do not address the issues raised in CSA Notice 53-302, we wish to state that we do not support the removal of the

retroactive element in the definition of "material fact" as it applies outside Quebec. Our comments below with respect to Proposed NP 51-201 are consistent with this position. Should the CSA or individual provincial regulators seek further public input on this matter before making legislative amendments, SHARE requests the opportunity to be consulted.

With regards to Proposed NP 51-201, we wish to start by recommending that CSA follow the timely disclosure policies of the TSE, CDNX and Bourse in requiring timely disclosure of *all material information*, not merely information that constitutes a "material change" in the reporting issuer, and that such disclosure be *mandatory*.[1] Given the already subjective interpretation allowed in determining what constitutes a "material change" and "material fact", reporting issuers should not be allowed to hide behind discretionary policy wording in failing to disclosure where information is clearly material in nature. We would also recommend that necessary amendments be made to the timely disclosure requirements in provincial securities legislation to require disclosure of all material information including material facts.

We also wish to address the scope of what constitutes "material information" in the context of timely disclosure. We appreciate that it is not possible to provide an exhaustive list of types of material information to be provided by reporting issuers, however we strongly urge the CSA to expand the list provided in NP51-201 and to provide more interpretive guidance to reporting issuers on the scope of "material information". We note that the examples provided by Canadian securities exchanges are not meant to be exhaustive, but their failure to go beyond the immediate internal operations of the company suggest a very narrow interpretation of what constitutes "material information".[2]

For example, the complex international political and economic environment in which reporting issuers operate today has direct impacts on the market price or value of their securities. Many reporting issuers now operate in foreign jurisdictions and often remote locations not subject to investor scrutiny. Given this context, investors cannot be expected to have independent knowledge about the political and economic factors which can have significant short and long-term impacts on corporate performance. Section 2.4 of CDNX policy 3.3 on timely disclosure addresses this fact:

> "Issuers are not required to interpret the impact of external political, economic and social developments on their affairs, but if the external development can reasonably be expected to have or has had a direct effect on their business and affairs that is both material in the sense outlined above and uncharacteristic of the effect generally experienced as a result of that development by other companies engaged in the same business or industry, Issuers are urged, where practical, to explain the particular impact on them. For example, a change in government policy that affects most

---

[1] We note ss.2.7 and 3.1 of the CDNX policy 3.3 on timely disclosure which makes timely disclosure of all material information mandatory.

[2] The TSE's Guidelines do include "major labour disputes or disputes with major contractors or suppliers".

companies in a particular industry does not require an announcement, but if it affects only one or a few companies in a material way, an announcement should be made."

The SEC has gone further in expanding on this type of information in the context of foreign companies listed on American securities exchanges. In a recent memorandum from the Director of the SEC Division of Corporate Finance, David B.H. Martin, to Acting SEC Chairman, Laura Unger dated 8 May 2001, Mr. Martin expands on the scope of material information that should be disclosed:

> "A company must also make certain disclosures about its recent past and immediate foreseeable future, including any known trends, events or uncertainties – favorable or unfavorable – that have had or are reasonably expected to have a material impact on results of the company's operations or to cause a material increase or decrease in the company's liquidity or capital resources."[3]

In making this statement, he goes on to enumerate a number of examples of information that are not presently included in the list of examples enumerated by Canadian securities exchanges[4]:

- The ceasing of purchasing, or divestment, of securities of a company by an investor because of the company's actions in a particular country since such actions could have a foreseeable material impact on the company's ability to raise cash through the sale of its securities.
- A consumer boycott of a company if it were viewed as having a potentially material impact on the company's revenues.
- Business risks imposed by political instability or the imposition of economic sanctions. For example, those companies operating in countries under economic sanctions such as the Sudan by the U.S. Treasury Department's Office of Foreign Assets Control. (See text of article entitled "U.S. House Condemns Sudan, Tells Companies to Disclose Business" by Paul Basken dated 13 June 2001 as reported on Bloomberg's.)
- Public opposition to the company's activities.

In addition, we would suggest the inclusion of other types of information based on recent events involving Canadian reporting issuers that are not suggested in the examples cited in the exchange policies of the TSE, CDNX or the Bourse:

- Statements by national or foreign exchanges about the potential for the company to be delisted if certain company activities persist.

[3] Memorandum from Director of Division of Corporation Finance to Acting Chairman Laura Unger on the subject "Response to letter dated April 2, 2001 from Congressman Wolf" (SEC, May 8, 2001) at 2 (attached).
[4] *Ibid.*

- Emerging evidence of connections between company activities and human rights and environmental violations by the government or military of the jurisdiction in which the company has operations.

Given the decision of many institutional investors to divest from publicly-traded companies whose activities fall under these areas and the consequently impact that such movement can have on the value of the company's stock, it would appear that these aspects of company activities meet the definition of "material information" articulated by the American courts, namely that "there is a substantial likelihood that a reasonable shareholder would consider it important in making an investment decision."[5]

Finally, we wish to comment on the scope of the disclosure required in regards to each event. Many companies have interpreted the requirement to provide timely disclosure of material information narrowly to mean simply citing the event with little or no particulars. For example, in response to the requirement to disclose "significant litigation", reporting issuers often simply provide a general statement regarding the existence of pending litigation without providing details of the case(s), presumably on the grounds that they do not feel the litigation is "significant" enough to result in harm to the company and investors. This assessment is presumably based on the likelihood of having to pay damages, but ignores the harm that litigation often has on the company's goodwill and consumer opinion. For example, a recent case brought against 17 retail companies in the United States on behalf of 50,000 Chinese migrant workers for workplace abuses for US$1 billion in damages was not disclosed to investors by the companies. While some companies have since settled with the plaintiffs, the case has been publicized extensively receiving considerable public attention and spurning consumer boycotts. They have also been cited in support of shareholder proposals filed with Canadian and American retailers receiving significant media attention and shareholder support.[6] Yet, timely disclosure of this case was not provided to investors by the respective companies. We therefore recommend that the Proposed NP 51-201 provide interpretative guidance to reporting issuers with respect to the level of detail required in disclosure statements.

Recommendation 3: That Proposed NP 51-201and provincial securities regulators require reporting issuers to provide timely disclosure of all material information, including material facts, and that the securities legislation of each province be similarly amended.

Recommendation 4: That the Proposed NP 51-201 provide greater interpretative guidance to reporting issuers on what constitutes material information, expanding beyond matters pertaining to the companies internal operations and specifically including political, economic and social events and information that are directly related to the affairs and activities of the reporting issuer.

---

[5] *TSC Industries* v. *Northway, Inc.,* 426 U.S. 438, 449 (1976).

[6] In Canada, shareholder proposals filed with the Hudson's Bay Company and Sears Canada during the 2001 proxy season received 15.2% and 10.3% (approximately 30% of minority shareholder support) of votes cast respectively.

Recommendation 5: That the Proposed NP 51-201 provide interpretative guidance to reporting issuers with respect to the level of detail required in disclosure statements.

In conclusion, we support the need for stronger policy in the area of timely disclosure and encourage the CSA to go farther to ensure that investors receive equal and sufficient access to material information about reporting issuers in order to be properly informed about their investment choices and to ensure investor confidence in the securities market. We trust that the CSA will fully consider our recommendations and we remain available at your convenience to provide additional information in support of our comments and to provide further submissions on this topic.

Yours truly,

Gil Yaron
Director of Law & Policy

enc.