CANADIAN BANKERS ASSOCIATION

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BY COURIER

May 31, 2004

Alberta Securities Commission
Saskatchewan Securities Commission
Manitoba Securities Commission
Ontario Securities Commission
Nova Scotia Securities Commission
Securities Administration Branch, New Brunswick
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

c/o Mr. John Stevenson, Secretary
Ontario Securities Commission
20 Queen Street West
Suite 1900, Box 55
Toronto, Ontario M5H 3S8

Dear Sirs and Madames:

Re: CSA's Corporate Governance Disclosure Policy and Rule
(Proposed Multilateral Policy 58-201 and Proposed Multilateral Instrument 58-101)

The Canadian Bankers Association appreciates the opportunity to provide comments on the Canadian Securities Administrators' (CSA) Proposed Multilateral Policy 58-201 (Proposed Policy) and Proposed Multilateral Instrument 58-101(Proposed Instrument).

We commend the CSA for its effort to develop standards that reflect current North American best practices in corporate governance. In this regard, we have identified a number of provisions that would benefit from clarification and, in some cases, merit revision.

In particular, we urge the CSA to amend the meaning of independence in Multilateral Instrument 52-110 *Audit Committees* or revise the prescribed material relationships in the Proposed Instrument and the Proposed Policy such that the prescribed relationships are no broader than those prescribed by the SEC and the NYSE. We understood that it was not the intention of the CSA to extend the scope of the relationships beyond that which has been applied in the much larger U.S. marketplace.

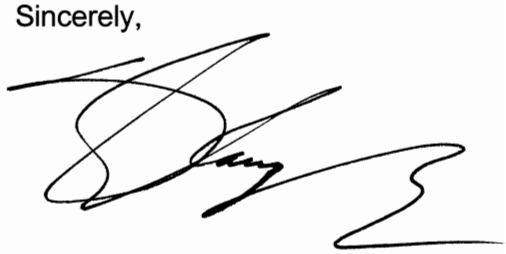
In addition, we are concerned that the level of involvement of the board of directors in the affairs of an issuer that is contemplated by the Proposed Policy and Proposed Instrument, is more reflective of a level of involvement appropriate to management than to a board of directors. Good corporate governance involves the strategic guidance of the company and the effective monitoring of management by the board. The board should provide the highest level of independent oversight of management and operations. Accordingly, we encourage the CSA to review the expectations on boards that would be created by the Proposed Policy and Proposed Instrument so as to ensure that expectations concerning the board's level of involvement in the management of an issuer's affairs remain appropriate.

We also have concerns with the provision requiring that a news release be issued and filed on SEDAR when a waiver to the code of business conduct and ethics is given to a director or officer, and would request that this provision be amended as described and, for the reasons set out, in the attached Appendix.

We note that the Proposed Policy and Proposed Instrument have not been adopted by the British Columbia Securities Commission or the Autorité des marchés financiers. The aforementioned regulators, together with the Alberta Securities Commission, have published for comment Proposed Multilateral Instrument 51-104 *Disclosure of Corporate Governance Practices.* To the extent that one of the purposes of the Proposed Policy and Proposed Instrument is to foster fair and efficient capital markets and sound corporate governance practices, in our view, Canada needs one uniform set of governance standards that are applicable across the country. Accordingly, we would encourage the CSA to develop a Policy and Instrument that would be adopted uniformly by all the securities regulatory authorities in Canada.

We have provided a number of detailed comments in the attached Appendix. We appreciate the opportunity to express our views on this matter and would be pleased to answer any questions that you may have in respect of our comments.

Sincerely,



RKS/

Attachment

APPENDIX

PROPOSED MULTILATERAL POLICY 58-201
-EFFECTIVE CORPORATE GOVERNANCE

Meaning of Independence

Our principal concern relates to the meaning of independence for directors as determined by the prescribed material relationships set out in MI 52-110. The determination of independence is very important and impacts upon the composition of the board of directors and its committees. We note that the CSA has indicated in Appendix B (Summary of Comments and Responses) to the Notice of MI 52-110 that it does not intend the meaning of independence and the prescribed material relationships in that instrument to extend beyond the scope established by the SEC and NYSE rules. We support that intention both because of the additional burden that would be imposed on cross-border issuers if the scope of these relationships were broader than their equivalents under the U.S. rules and because the deemed material relationships under the U.S. rules are already quite far-reaching and are having a significant impact on board membership and director recruitment. While we understand that it was not intended by the CSA, we note that in the following areas under MI 52-110 the prescribed relationships go beyond those in the SEC and the NYSE Listed Company Manual Section 303A (NYSE rules):

(i) individuals whose immediate family members receive compensation from an issuer:

- Differences from NYSE rules – While the NYSE rules and MI 52-110 use the same definition for "immediate family member", under NYSE rule 2(b)(ii), a director continues to be independent if his or her immediate family member receives more than US$100,000 direct compensation from the issuer, as long as the family member is employed by the issuer in a non-executive role. Although the CSA commentary states that MI 52-110 has been revised to provide that an immediate family member must be an executive officer of the issuer in order to preclude independence under section 1.4(3), we note that this change was only incorporated in section 1.4(3)(b), but not in section 1.4(3)(f)(ii). In order to ensure consistency with NYSE rule 2(b)(ii) this latter section should also be revised. Section 1.4(3)(f)(ii) of MI 52-110 currently reads as follows:

  > "an individual who receives, or whose immediate family member receives, more than $75,000 per year in direct compensation from the issuer, other than as remuneration for acting in his or her capacity as a member of the board of directors or any board committee, or as a part-time chair or vice-chair of the board or any board committee, unless the prescribed period has elapsed since he or she ceased to receive more than $75,000 per year in such compensation."

  The CBA supports the addition of the phrase "who is employed as an executive officer of the issuer" to section 1.4(3)(f)(ii) of MI 52-110. If such an amendment is not possible at this time, we would ask the CSA to provide confirmation in the Proposed Instrument and the Proposed Policy that an audit committee member or other board member will continue to be considered independent if he or she has an immediate family member who receives more than the specified threshold amount in direct compensation from the issuer so long as the individual is not employed as an executive officer of the issuer. In addition, we believe that the current proposed

threshold amount of $75,000 is too low and it is out of line with the NYSE requirements. We would ask the CSA to provide in the Proposed Instrument and Proposed Policy that a higher threshold amount in line with the NYSE rules be used to determine the independence of a director for the purposes of the Proposed Instrument and Proposed Policy.

(ii) individuals with immediate family members employed by an issuer's external auditor:

- Differences from NYSE rules – NYSE rule 2(b)(iii) provides that a director is not independent if his or her immediate family member is "affiliated with or employed in a professional capacity by" a present or former internal or external auditor of the issuer. In contrast, section 1.4(3)(d) of MI 52-110 deems a director to have a material relationship with an issuer if an immediate family member is "an affiliated entity of, a partner of or employed in a professional capacity by" the external auditor. After MI 52-110 was published in final form, the NYSE released a FAQ that clarified that the meaning of "in a professional capacity" is intended to cover individuals participating in a firm's audit and assurance and tax compliance (but not tax-planning) practices in a non-support role. In response to a recent inquiry to the NYSE, it has also advised that the words "in a professional capacity" modify both the phrases "affiliated with" and "employed" in NYSE rule 2(b)(iii). While the NYSE does take the view that a partner at an external audit firm is "affiliated with" the external audit firm, that relationship alone need not disqualify the director from being independent unless the partner's relationship with the external audit firm is also "in a professional capacity". Accordingly, the NYSE also confirmed in its response to the recent inquiry that a director of an issuer is not disqualified from being independent simply by the fact that one of his or her immediate family members is a partner at the issuer's external auditor, so long as the partner does not participate in the audit firm's audit and assurance or tax compliance practices. We therefore seek clarification that section 1.4(3)(d) of MI 52-110 should be interpreted on a similar basis. Alternatively, we would request that section 1.4(3)(d) of MI 52-110 be revised in light of the clarifications made by the NYSE, so that it applies on a similar basis. Otherwise, the deeming provisions under the Canadian definition of "independent director" for purposes of MI 52-110, MI 58-101 and MP 58-201 would appear to be substantially more onerous than the corresponding deeming provisions applicable to NYSE-listed issuers.

We note that the individual circumstances of each director must be reviewed by the board of an issuer each year. Narrowing the material relationships prescribed by MI 52-110 and incorporated into the Proposed Instrument and the Proposed Policy to parallel the scope of such relationships under the U.S. rules, will achieve the CSA's objective of not extending the Canadian rules beyond the scope of their U.S. equivalents and, at the same time, will not adversely impact on the quality of independence of Canadian boards as each audit committee member will continue to be subject to review by the board. Circumstances in which concerns were raised regarding director independence would be identified in this process.

We urge the CSA to amend MI 52-110 or, alternatively to revise the prescribed material relationships in the Proposed Instrument and the Proposed Policy so as not to extend the scope of the relationships beyond that which has been applied in the much larger U.S. marketplace.

Composition of the Board

The drafting of section 2.2 (2) appears to confuse the concept of "independent" directors with that of "non-management" directors. We are of the view that the purpose of this provision should be to empower non-management directors to serve as a more effective check on management. The corresponding NYSE rule 3 provides that "to empower non-management directors to serve as a more effective check on management, the non-management directors of each company must meet at regularly scheduled executive sessions without management." We would ask the CSA to amend this provision to replace the concept of "independent" members with that of "non-management" members in order to provide for greater harmonization and to further the goal of empowering non-management directors.

Board Mandate

The drafting of section 2.2(4) could be interpreted to the effect that the board's responsibilities involve the management of the company rather than the oversight of management. We are of the view that the language of this provision should generally be reframed to reinforce the notion that the board's responsibilities involve oversight of management and not management of the company. We do not believe that it was the intention of the CSA to diverge from the established principle of corporate governance that the role of the board is the oversight of management.

Section 2.2(4)(a) provides that the board's mandate should include responsibility for "satisfying itself as to the integrity of the CEO and other senior officers and that the CEO and other senior officers create a culture of integrity throughout the organization." While the integrity of management is pivotal to good corporate governance and it may be appropriate for the board's mandate to recognize that responsibility for overseeing organizational integrity resides with the board, we are of the view that it would be difficult for the board members to implement procedures to meet this requirement. It is the responsibility of the board to establish the values of the organization by approving the policies set out in the code of business conduct and ethics (Code), rather than the verification of the integrity of individuals. We have strong concerns with the imposition of a board's duty to verify the integrity of individuals and request that the CSA delete this requirement, inasmuch as there would be no certainty as to the duty imposed upon the board and what steps would need to be taken by a board to discharge this duty.

Section 2.2(4)(c) provides that the board's mandate should include responsibility for "identifying the principal risks of the issuer's business, and ensuring the implementation of appropriate systems to manage these risks." It is our view that "identifying" risks is suggestive of an active management role for the board, rather than its actual role of supervising management. We would ask that the CSA amend this section to read: "overseeing the effectiveness of processes to identify the principle risks of the business."

Section 2.2(4)(f) provides that the board's mandate should include responsibility for "ensuring the integrity of the issuer's internal control and management information systems." We are of the view that this is worded too specifically and, accordingly, is suggestive of an active management role for the board. We would ask that the CSA amend this section to read: "overseeing the effectiveness of internal controls and management information systems."

Section 2.2(4)(i) provides that the board's mandate should also set out "the decisions requiring prior approval of the board." We are of the view that this is too much detail for a board mandate and is inappropriate for public disclosure. In the case of financial institutions, delegations of authority on credit matters, for example, are proprietary and public disclosure could lead to competitive business disadvantage, with no offsetting public benefit.

We are unclear as to the corporate governance purpose of section 2.2(4)(ii) and (iii). We would suggest that measures for receiving feedback from security holders and the board's expectations of management are not appropriate matters for the board's mandate and would request that the CSA delete these provisions.

Position Descriptions

The drafting of Section 2.2(5) is vague and may be interpreted as requiring the board to develop position descriptions for each individual director. We do not agree with this interpretation. Form 58-101F1 3(a) requires disclosure "whether or not your board has developed written position descriptions for the following *roles* ... director" (emphasis added). Requiring position descriptions for individual directors increases director liability unnecessarily given the duties imposed by law on directors. In addition, such descriptions are not required by the NYSE rules, thereby subjecting directors of interlisted issuers with operations in the U.S. to increased exposure to the U.S. litigation environment. We believe this will affect director recruitment and potentially deter qualified candidates from accepting nominations. Accordingly, we request clarification that individual job descriptions for each board member are not required.

The provision also requires that the board develop a clear position description for the CEO, which includes delineating management's responsibilities. It would be helpful to clarify what is meant by "delineating management's responsibilities".

Code of Business Conduct and Ethics

Section 2.2(9) provides that the board should be responsible for monitoring compliance with the Code. We are of the view that this requirement is not appropriate from a corporate governance perspective, nor does it properly reflect the corporate law principle that the board's role is one of oversight. Monitoring compliance is the role of management, not of the board. We would ask that the CSA amend this section to read: "The board should be responsible for overseeing the effectiveness of processes for monitoring compliance with the Code". We also note that corresponding changes should be made to section 5 of Form 58-101F1.

Nomination of Directors

Section 2.2(12) provides for a 2-step process for nominating and appointing directors. We are of the view that this provision is unnecessarily detailed, restrictive and prescriptive. In order to better harmonize these provisions, we suggest that the CSA amend the criteria and consider the analogous NYSE rule 4 which deals with nomination more generally, by merely stating that the committee should identify individuals qualified to become board members, consistent with criteria approved by the board.

Compensation

Section 2.2(17)(a) provides that the compensation committee should make recommendations to the board with respect to the CEO's compensation level. While we support this provision, we are of the view that, inasmuch as the compensation committee must be independent, it should also be able to determine and approve the CEO's compensation level. We are of the view that it is important that issuers be given the flexibility to determine how best to set the CEO's compensation level. Accordingly, we would ask the CSA to amend this provision to permit the compensation committee to both determine and approve the CEO's compensation or to make recommendations to the board with respect to the CEO's compensation level.

Section 2.2(17)(b) provides that the compensation committee should make recommendations to the board with respect to non-CEO compensation, incentive-compensation plans and equity-based plans. Similarly, we would ask the CSA to amend this provision to permit the compensation committee to approve the non-CEO's compensation, incentive-compensation plans and equity-based plans or to make recommendations to the board with respect to the aforementioned.

Regular Board Assessments

Section 2.2(18) provides that the board should regularly assess its own effectiveness, and the effectiveness and contribution of each board committee and individual director. While we acknowledge that the assessment by the board of its effectiveness represents good governance, we would ask that the CSA consider amending this provision such that it is more closely harmonized with the corresponding NYSE rule 9 and not require the assessment of each director on an individual basis.

PROPOSED MULTILATERAL INSTRUMENT 58-101
-DISCLOSURE OF CORPORATE GOVERNANCE PRACTICES

Meaning of Independence

We have the same comments as those expressed for MP 58-201.

Application

The lists of entities exempted from the application of MI 52-110 at section 1.2 and the Proposed Instrument at section 1.4 are identical except to the extent that the exemption provided for in section 1.2(e) of MI 52-110 is not duplicated in the Proposed Instrument. The exemption as provided for in section 1.2(e) of MI 52-110 applies to exempt subsidiary entities from the application of that Instrument if:

(i) the subsidiary entity does not have equity securities (other than non-convertible, non-participating preferred securities) trading on a marketplace, and

(ii) the parent of the subsidiary entity is

(A) subject to the requirements of [MI 52-110], or

(B) an issuer that (1) has securities listed or quoted on a U.S. marketplace, and (2) is in compliance with the requirements of that U.S. marketplace applicable to issuers, other than foreign private issuers, regarding the role and composition of audit committees.

Certain bank subsidiaries without equity securities are issuers of securities that provide innovative Tier 1 regulatory capital to their parent banks, and these subsidiaries have been granted exemptions from continuous disclosure obligations so long as they file the disclosure of their respective bank parents. We respectfully question the rationale for not providing these entities with an exemption from the corporate governance disclosure requirements of the Proposed Instrument and therefore ask that the CSA add the wording of the exemption provided

for in section 1.2(e) of MI 52-110 to section 1.4 of the Proposed Instrument, so as to exempt subsidiary issuers without equity securities from the latter's application.

Required Disclosure

Section 2.1 provides that the disclosure required by Form 58-101F1 be included in the issuer's AIF.

We are of the view that the AIF is not the appropriate place for corporate governance disclosure and that there should be more flexibility as to the location of the disclosure. We note that pursuant to the NYSE provisions, certain corporate governance matters are permitted to be disclosed on a company's corporate web site, while other matters require disclosure in a company's proxy statement or annual report.

If the goal of the disclosure provision is to make the information publicly available in the same manner as under the corresponding U.S. rules, we ask that the CSA amend section 2.1 and Form 58-101F1 to provide for greater flexibility, and give the issuer the option to make its corporate governance disclosure in its management information circular or on its web site with notice in its annual report or management information circular that the information is available on its web site and upon request in print, rather than requiring that the issuer's disclosure be made in its AIF. Such an amendment would correspond with the NYSE requirements applicable to U.S. listed companies and thereby avoid different disclosure techniques across different regulatory environments.

Filing of Code of Business Conduct and Ethics

Section 2.3(3) requires the issuance of a news release in connection with an issuer's waiver of its code of business conduct and ethics given to an officer or director of the issuer or a subsidiary entity of the issuer. We are of the view that it is not necessarily appropriate to issue a news release in this regard. The issuer should file notice of the waiver on SEDAR in any event, but be required to issue a news release only if the issuer determines that the matter is a material change. To require otherwise may have an inadvertent detrimental effect on the marketplace. We also note that there is no comparable provision to file a news release in the NYSE rules.

We have a concern that the definition of "officer" is too wide and its application unworkable. We are of the view that waivers of the Code should be applicable to a narrower class of executive officers who perform a policy-making function. Financial institutions, for example, have hundreds of "officers'' who do not perform policy-making functions. In this regard, we ask that the CSA amend this provision to replace the term "officer" with that of "executive officer" as that term is defined in MI 52-110. We also note that a corresponding change should be made to section 5 of Form 58-101F1.