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Request for Comment - Proposed Repeal and Replacement of National Policy 58-201 *Corporate Governance Guidelines*, National Instrument 58-101 *Disclosure of Corporate Governance Practices,* and National Instrument 52-110 *Audit Committees* and Companion Policy 52-110CP *Audit Committees*

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We would like to thank the Canadian Securities Administrators (the CSA) for this opportunity to provide comments on the Proposed Repeal and Replacement of National Policy 58-201 *Corporate Governance Guidelines*, National Instrument 58-101 *Disclosure of Corporate Governance Practices,* and National Instrument 52-110 *Audit Committees* and Companion Policy 52-110CP *Audit Committees.* In addition, we commend CSA for following up on its 2005 stated intention to review its governance materials periodically.

The Shareholder Association for Research and Education (SHARE) is a social enterprise that coordinates and implements responsible investment practices. Since its creation in 2000, SHARE has carried out this mandate by providing proxy voting and shareholder engagement services as well as education, policy advocacy and practical research on emerging responsible investment issues. SHARE is dedicated to improving institutional investment practices that protect the long-term interests of investors, communities and society in general.

SHARE has previously contributed to public consultations on corporate governance policies and practices in the Canadian securities marketplace. We provided input in response to the CSA's Request for Comments on Proposed National Policy 58-201 and National Instrument 58-101 in 2004. In 2003, SHARE provided comments to the Department of Finance regarding its proposals on Corporate Governance Reforms for Financial Institutions and submitted comments to the BCSC with respect to its Deregulation Project.

In its Request for Comment, the CSA invites interested parties to comment on the proposed materials generally. We have elected to begin with general comments. This introductory section is followed by our responses to the specific questions set out in the Request for Comments.

General Comments

SHARE has two broad and related concerns about the proposed materials, and most particularly, the implementation of NP 58-201. We believe that Canada's securities regulators must enhance the calibre of the consultation and compliance functions in order to make the transition to a more principles-based corporate govenance regime successful. Therefore, without more information about these elements, we are unable to support the proposed changes.

The proposed NP 58-201 provides commentary and examples of practices with respect to each of nine corporate governance principles. As noted in some of our comments below, we believe that more guidance will be necessary. In the UK, the Financial Services Authority (the FSA) has acknowledged that where it employs more principles-based regulation, it must provide greater information and support to firms

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regarding its expectations than in a predominantly rules based context.[1] We would like to better understand how the CSA intends to support issuer efforts to meet the objectives of the nine principles, and whether it envisions the ongoing participation of investors in this endeavour.

With respect to regulatory compliance activity, the proposed corporate governance regime would give issuers the freedom to establish policies and practices as they see fit, "provided they achieve the objectives of the articulated principles".[2] We require more information about the regulators' expectations of issuers. Specifically, how deferential will regulators be of issuer decisions about the practices they adopt? Our concern is that although issuers will clearly be required to adopt each Principle[3] and do *something* in response to each, the only regulatory requirement will be a clear explanation of each practice developed by the issuer. If an issuer asserts that a practice meets the objective of a Principle, it appears that this assertion will not be challenged by regulators.

As an example, an issuer could not simply reject a principle such as Principle 9 'Engage effectively with shareholders' out of hand. However, an issuer could assert that it meets periodically with its significant (10%+) shareholder(s) and that these meetings achieve the objective of effective shareholder engagement. Based on the contents of the Request for Comment, we do not see that a regulator could determine that such a practice does not meet, or is very unlikely to meet, the objective of 'engag(ing) effectively with shareholders'. In other words, substantive compliance activities do not appear to be comtemplated by the CSA with respect to the proposed governance regime. SHARE's view is that regulators must be empowered to challenge an issuer practice on the ground that it is inadequate to achieve the objective of a Principle.

Principles-based securities regulation

The rationale for adopting more principles-based regulation is that in a dynamic marketplace, principles with clear objectives will enable the regulator to alter its expectations more easily and allow regulated entities to respond to changing expectations more efficiently and effectivly than in a more rules based framework. The regulator is freed from constantly revising a list of rigid rules to capture new situations and the regulated do not have to dig their way through that rulebook before getting

[1] "Principles-based regulation: Focusing on the outcomes that matter", The Financial Services Authority, April 2007 at 12, online: http://www.fsa.gov.uk/pubs/other/principles.pdf.

[2] CSA Request for Comment at 3.

[3] Ibid, at 2. "The Proposed Governance Policy establishes nine core corporate governance principles that apply to all issuers".

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down to work on compliance activities that are, in the most enthusiastic characterization, fully integrated into their business activties.[4]

As regulation is ultimately about preventing (or punishing) wrongdoing, rules are seen to be less effective in many situations because they can be gamed by issuers who put themselves in technical compliance while going offside the intent of the provisions. In a less sinister vein, the concern is that in a rules based regime, companies can become fixated on technical requirements and thereby 'lose the plot' as to what the rule is actually meant achieve. In either case, the regulator's goal of protecting investors is frustrated by the lack of a clear course of corrective action.

Principles-based regulation presents difficult challenges to all market participants. Regulators that cannot rely on rules need to make judgment calls about whether issuer decisions are acceptable. As the FSA has noted, this will require a more sophisticated response from regulators: "We recognize the task that we are asking our people to undertake in an outcome- and principles-based environment is much more demanding and complex than that of a few years ago."[5]

Issuers will no doubt recognize that they have a greater role to play where regulators move to more principles-based regulation. Answering specific questions is less challenging than assessing the specific characteristics of an organization and determining what standards should be developed to meet a set of relatively general objectives. It has been noted that the move to more principles-based regulation will shift responsibility for working out the details from regulators to issuers.

More princples based regulation also demands more of investors. Instead of understanding the extent to which issuers comply with rules, they must evaluate the principles and objectives established by the regulator *and* the decisions each issuer has made in an effort to achieve the objectives. Investors must be prepared to take up the challenge, of course, because they have a vested interest. Their protection is the reason that the regulatory structure exists.

[4] FSA, *supra* note 1, at 7.

[5] Ibid, at 18. The FSA has identified imporved recruitment, training, management and reward as key requirements in meeting the challenge of an increasingly principles-based regulatory environment.

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An essential prerequisite for principles-based regulation is the existence of effective and inclusive consultation mechanisms.[6] Principles-based regulation has been alternatively referred to as 'management-based regulation'[7] because the senior managers of each issuer are responsible for deciding how the objectives of the regulator are to be met by issuers. Given that the regulatory burden is shared, it is vital that regulators and the regulated work collaboratively in a 'trusting and communicative relationship'.[8]

However, SHARE notes that in a more principles-based regime, communication need not be restricted to a regulator-regulatee dialogue. In her growing body of work on principles-based securities regulation, Christie Ford explains that in a more principles-based regime, there exists "the recognition that apart from regulators themselves, third party stakeholders exert social, economic and legal influence on industry and therefore play a crucial role in establishing industry standards and filling their content."[9] Ideally, more principles-based regulation will present investors with an opportunity to contribute more fully to the regulatory process.

Requirements of a more principles-based corporate governance regime

(i) Consultation

It is SHARE's view that if implementation of the proposed instruments is to take place, the CSA membership must esablish a broadly based ongoing consultation process to assist issuers as they implement and continue to develop their corporate governance practices under a more principles-based regime.

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[6] Mary Condon, "Comparative Models of Risk-based Financial Services", Research Mandate #5, Ontario Expert Commission on Pensions, October 31, 2007 at 8, online: http://www.blakes.com/english/practiceareas/pensionsOECP/papers/5%20Comparative%20Models%20of%20Risk-based%20Financial%20Services.%20Condon%20.pdf

[7] Julia Black and Herbert Smith LLP, "Making a success of Principles-based regulation", Law and Financial Markets Review, May 2007 at 193, online: http://www.lse.ac.uk/collections/law/projects/lfm/lfmr_13_blacketal_191to206.pdf

[8] Cristie Ford, "Principles-Based Securities Regulation" Research Study Prepared for the Expert Panel on Securities Regulation, 2008 at 3, online: http://www.expertpanel.ca/documents/research-studies/Principles%20Based%20Securities%20Regulation%20-%20Ford.English.pdf

[9] Cristie Ford, "New Governance, Compliance, and Principles-Based Securities Regulation", American Business Law Journal, forthcoming at 5, online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=970130

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The Notice and Comment process is a good start to this dialogue, but ideally, discussions about the implementation of the corporate governance practices of issuers will not end there. Regulators, issuers and other interested parties must all work together as an interpretive community[10] to ensure the effectiveness of proposed NP 58-201. [11] There is a clear opportunity in the continually evolving area of corporate governance practice and dislcosure for regulators to benefit from the input of shareholders as a group of potentially large size with conisderable practical expertise.

(ii) Compliance

SHARE encourages Canada's securities regulators to provide specific information about its compliance function with respect to the proposed corporate governance regime. This is acknowledged to be a critical element of more principles-based regulation: "credible regulation, including meanfingful enforcement, is even more important within principles-based systems because it ensures the system is not lax"[12]

If a minimal compliance standard is applied – the disclosure must simply be non-contradictory and comprehensible – the new corpoprate governance disclosure regime will fail investors. Investor protection will only be achieved if regulators examine whether issuers have charted a reasonable course for meeting the objective of each principle. A company that clearly states that it does not believe it has any conflicts of interest to deal with or any need to engage with its shareholders should not be found to be in compliance with the NP 58-201. We know that issuer and regulator ends do not always converge. As one commentator puts it "If they were the same, there would be no reason for firms to be regulated in the first place."[13] As Ford points out, the regulator must have the confidence to substitute its judgment for the judgment of someone in the industry.[14]

[10] Ford, *supra* note 7, at 4.

[11] There is precedent for investor involvement in consultation processes in Canada and abroad. The most attractive among these establishes an investor advisory function that is operates independently of the regulator, with a clear framework for activity, dedicated funding for participant remuneration and independent research. Additionally, the advisory body is required to report to the public about its activities. These are the characteristics of the FSA's Consumer Panel.

[12] Ford, *supra* note 7, at 32.

[13] Julia Black, "Forms and Paradoxes of Principles Based Regulation", LSE Law, Society and Economy Working Papers 13, 2008 at 22, online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1267722

[14] Ford supra note 8, at 33.

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Issuer compliance with the current comply or explain approach to corporate governance has presented challenges to both regulators and shareholders. In the CSA's 2007 Corporate Governance Compliance Review, investors were informed that 27 of 65 non-venture issuers in the compliance sample were asked to address disclosure deficiencies. Generally, the problems were that issuers named but did not explain the mechanisms and standards they adopted and that issuers failed to indicate how stated approaches actually worked fulfill their intended governance function. The CSA also reported that nearly one quarter of venture issuers in the sample group of 35 provided no corporate governance disclosure at all.

We understand that the CSA believes that issuer compliance will improve under the proposed more principles-based approach to corporate governance. If the theoretical advantage for investors of the proposed regime is a more engaged issuer population, the CSA must take what steps it can to make it a reality. SHARE believes that the CSA must establish inclusive mechanisms for ongoing, broad based consultation with respect to its proposed corporate governance regime. We are also of the view that the compliance function must be substantive in order to ensure that issuers dedicate the necessary resources to meeting the stated regulatory objectives.

Specific requests for comment

1. *Do you think Principles 6, 7 and 9 provide useful and appropriate guidance? Does this guidance appropriately supplement other corporate law and securities law (including legislation and decisions of Canadian courts) relating to these areas?*

Principle 6: Recognize and manage conflicts of interest.

In SHARE's view, and in accordance with our Model Proxy Voting Guidelines, an issuer's controlling shareholder or a representative of the controlling shareholder is not an independent director on that issuer's board.[15] A shareholder or representative that exercises determinative decision-making power in the context of a public company cannot be independent on that company's board. This is most obvious in a dual class share structure where a shareholder without a majority stake in the company artificially preserves dominion over decision making. Dual class structures override the very rudimentary governance tenet of 'one share, one vote', and therefore make obvious that there is no intention by the major shareholder to treat all shareholders equitably. This is an absolute requirement of true independence, however defined.

[15] SHARE 2009 Model Proxy Voting Guidelines at 8, online: http://www.share.ca/files/2009_Model_PV_Guidelines_WEB.pdf

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We note that a director representing a significant shareholder (10%-49.9%) of total votes) could be an independent director. Each situation requires a complex evaluation on the question of independence, including a review of the company's capital structure and other circumstances.

Principle 7: Recognize and manage risk.

SHARE recommends that Principle 7 be amended to specifically add the obligation to consider social and environmental risks. The amended provision would read "Recognize and manage risk, including social and environmental risk". As noted in the commentary to Principle 7: "Risk oversight and management should focus on identifying the most significant areas of undertainty or exposure that could have an adverse impact on the achievement of the issuers goals and objectives (principle risks)". There is growing consensus in Canada and abroad that social and environmental risks are very often among the most significant business risks, and yet are often underrepresented in company disclosure.

Since its creation in 2000, SHARE has noted a significant shift in thinking about the importance of environmental and social information in the investment decision making process. Increasingly, directors and executives of public companies in Canada and around the world have come to recognize that management of environmental and social risks are part of the value of a company, especially in the long term. As such, addressing these issues is part of managing a business.

As SHARE has indicated in other consultative contexts[16], social and environmental risks require specific mention in legislation and regulation because they are all too often dismissed or ignored by issuers and investors alike.

For investors, access to clear and relevant information about how companies are identifying and addressing operational and reputational risks such as climate change, workplace safety and human rights impacts is crucial. For the investment community, environmental and social considerations are components of a fully-informed evaluation of risk[17] and a potential source of value creation over the long-term. Greater corporate transparency, or disclosure, of environmental and social risk factors is a practical, affordable and feasible method of improving the quality of the information investors use to assess the investment options available to them.

[16] Regulating Pension Fund Investment & Disclosure of ESG Practices (2008); Submission to the National Roundtables on Corporate Social Responsibility (2006); and Memo to the OSC Continuous Disclosure Advisory Committee on Social and Environmental Disclosure Requirements (2005), all online: http://www.share.ca/en/policy_submissions

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Principle 9: Engage effectively with shareholders.

SHARE has extensive experience in this area. We vote proxies and otherwise engage with companies on behalf of a diverse client base. In any given year, we will have some contact with all of the issuers on the S&P/TSX Composite Index. In many cases, a prolonged dialogue is the result of the contact we initiate.

We have found that shareholder engagement with public companies is notable for its variability. Some issuers engage with investors in an open and highly effective manner. We note that we do not mean that the issuer agrees with the shareholder, but that its personnel elect take up our invitation to embark on a substantive discussion of an issue raised by a shareholder. We have also frequently encountered issuers that demonstrate no willingness whatsoever to enter into a dialogue. At the extreme, investors are met with absolute silence in response to their inquiries and/or suggestions.

Based on our experiences, we are of the view that many issuers will require significant guidance from regulators with respect to Principle 9. And yet in the proposed NP 58-201, the Commentary and Examples of practices that accompany Principle 9 are the most rudimentary. Reference is made only to methods of facilitating shareholder participation in annual and special shareholder meetings. There is no guidance offered with respect to the 'ongoing dialogue' beyond the shareholder meeting process that is referred to in Principle 9.

2. *Does the level of detail in the commentary and examples of practices successfully provide guidance to issuers and assistance to investors without appearing to establish "best practices"?*

We note that SHARE does not view the majority of either the commentaries or the examples of practices set out in proposed NI 58-201 as 'best practices'. Collectively, they set out the basic legal responsibilties of the board of directors and enunciate either minimal standards or acceptable practices that shareholders should expect to find in place at Canadian companies.

We understand that the CSA is clear that its "Proposed Governance Policy does not purport to establish minimum standards or 'best practices'."[18] However, our research and dialogue to date indicates that there is a high probably that issuers will adopt the examples of practices set out in the proposed 58-201 in order to minimize the risk that regulators (and shareholders) may find fault with any alternative practices adopted. The adoption by issuers of 'examples' provided by regulators is itself apparently a risk

[18] Request for Comment at 3.

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of any regulatory effort to move toward a more principles-based approach.[19] It is difficult to see how this outcome may be avoided other than through ongoing dialoge in an 'interpretive community' as discussed in our general comments above.

3. *In your view, what are the relative merits of a principles-based approach for disclosure, compared to a "comply or explain" model?*

In our view, the CSA appropriately describes the proposed corporate governance regime as a 'more principles-based' approach than the current comply or explain model.[20] While it is perhaps theoretically possible to have 'pure' principles-based approach to corporate governance disclosure, that is not what the proposed instruments set out. An issuer is not at liberty, for example, to determine that its CEO functions independently of management when he executes his duties as a director. A clear rule applies to bar an issuer from making such a determination.[21]

It is evident that changing to a more principles-based approach will require more effort on the part of issuers. SHARE is of the view that by removing the comparability among issuers that comply or explain affords, the CSA has also created additional work for investors. Comparability is of necessity sacrificed in a more principles-based regime that allows issuers to chart their own course to compliance with the corporate nine corporate governance principles. We have attempted to demonstrate in our general comments that it is inevitable that *effective* implementation of the proposed corporate governance regime will result, at least in the initial stages, in an increased burden for Canada's regulators.

In making these observations, it is not our intention to reject the proposed approach outright. We do think it is vital to recognize its ambitious nature and the increased effort that will be required of all market participants to ensure that the proposed regime will provide improved governance practices and disclosure from issuers. If comparability is to be sacrificed in the new structure, all market participants must be given a role in ensuring that a truly superior corporate governance regime grows up in place of the current comply or explain requirements.

4. *Is the level of disclosure required under each of the principles appropriate both from an issuer's and an investor's point of view? Specifically, do you think the*

[19] Ford, *supra* note 7, at 11. One of the risks of having a regulator share examples of good practices is that regulatees will interpret the good practices as de facto mandatory, process-based expectations to be applied across the board.

[20] CSA Request for Comment at 2

[21] We acknowledge, but do not agree with, the concerns the Alberta Securities Commission has expressed with respect to this bright line rule in Appendix A of the Request for Comment document.

disclosure in respect of Principles 6, 7 and 9 provides useful information to investors?

As a general comment, we note that the CSA's 2007 Staff Notice 58-303 frequently characterized deficiencies in non-venture issuer corporate governance disclosure as failures to describe the indicia of a particular mechanism adopted by an issuer and to indicate *how* it would achieve the relevant objective. In both its current and proposed forms, NI 58-101 relies heavily on asking issuers to 'describe' particular aspects of their corportate governance regimes. It would appear that the CSA's 2007 review found a significant gap between regulator and issuer understandings of the meaning of the word 'describe'. This suggests that the current guidance as to what an adequate discription entials is not adequate, and we do not see any evidence that the proposed regime has provided issuers with more substantial information in this regard.

SHARE does not know if issuers have now been provided with sufficient guidance to appreciate the expectation embodied in a CSA requirement to 'describe' a corporate governance practice. If not, further guidance will need to be provided in this area.

We offer the following comments in relation to specific disclosure requirments set out in NI 58-101:

Principle 7: We refer to our CSA question 1 above in support of our view that the related disclosure should include specific reference to environmental and social risks. We note that the proposed requirement that issuers "Disclose a summary of any policies on risk oversight and management adopted by the issuer" could, if no such policies exist, result in no disclosure of board considerations of environmental and social risks. At a minimum, disclosure should include the principle risks of the issuer's business that the board (or risk committee) has idenified and/or examined in the most recently completed fiscal year. This would assist investors to evaluate the effectiveness of board oversight of risk management.

Principle 8: We note that disclosure with respect to a board's approach to executive compensation is required under proposed NI 58-101 *and* in accordance with Form 52-102F6, issuers and investors will have to be clear about the information that is appropriate in each case.

The disclosure required with respect to Principle 8 in NI 58-101 compensation disclosure and analysis (CD&A) in Form 51-102F6 is of the significant principles underlying its compensation policies. The practices the issuer uses to establish and maintain those same compensation policies is then disclosed in NI 50-101. In more simplified terms, it would appear that the CD&A sets out the compensation principles that underly compensation policies. These policies are implemented by way of practices disclosed in 58-101.

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The CSA may find it useful to provide guidance regarding its view of the relationship between these two compensation disclosure requirements. This would avoid any confusion and underscore that an issuer is being asked about two different aspects of its compensation policies.

In addition, we note that SHARE welcomes the more fulsome disclosure regarding any compensation consultant(s) retained in the most recently completed fiscal year that is required under proposed NI 58-201.

Principle 9: Please refer to our comments with respect Principle 1 in response to CSA question 1 above. Our comment on the disclosure requirements is similar: the disclosure refers only to the shareholder voting process, and not to ongoing dialogue. We do not believe that the disclosure in respect of Principle 9 will provide any useful information to investors about issuer approaches to dialogue with investors 'beyond the proxy ballot'.

We also note that although NI 58-101 requires disclosure of an issuer's selection of a director election policy, not all majority voting policies are the same. Some boards reserve the right to reject the resignation of a director who has been 'defeated'.[22] Strict application of majority voting in director elections would not permit the board to override the shareholder vote, and is the only method under our current corporate law requirements which would allow shareholders to participate in an actual 'election' of the director nominees.

5. *Should venture issuers be subject to the same disclosure requirements concerning their corporate governance practices as non-venture issuers?*

We believe that some corporate governance disclosure requirements must apply to all public issuers. When a company becomes public, its board and management must accept significantly increased systematic and transparent accountability to its investors.

We appreciate, however, that in order to make it possible for investors in venture issuers to receive disclosure of reasonable quality, the regime must continue to be tailored to the more limited resources and simpler board and management structures that dominate that exchange. The current stepped disclosure requirements provide a reasonable compromise.

SHARE acknowledges that comply or explain can be viewed as a disclosure model that must be constructed in a stepped fashion for venture and non-venture issuers, whereas, due to its flexibility, the proposed more principles-based regime may apply to constituents of both. We do not view the application of differing sets of disclosure

[22] Meaning that the director's candidacy attracted a larger number of 'withhold' votes than 'for' votes.

requirements to venture and non-venture issuers as a problem in and of itself, however.

As noted above, SHARE believes that without the support of ongoing guidance from regulators, open communication from issuers and consultation with investors, a more principles-based regime is unlikely to meet its objective of providing greater transparency for investors regarding issuers' corporate governance practices across the marketplace.

6. In your view, what are the relative merits of the proposed approach to independence compared to the current approach.

In particular:

(a) basing the determination of independence on perception rather than expectation;

In SHARE's view, there is a high risk that independence is compromised if a director has a material relationship with the issuer or management other than his or her duties as a director. We do not accept the 'pool argument' as a reasonable justification for selecting board members with material ties to the company. In our view, boards that are two-thirds independent greatly reduce the risk to shareholders of self-dealing and/or a lack of rigour in decision-making on the part of non-executive directors. We evaluate director independence in light of all publicly available information that we deem relevant. The decisions that boards reach when determining questions of independence is relevant to our analysis only insofar as the caliber of board decisions about independence impacts our perception of the quality of an issuer's commitment to corporate governance best practice.

(b) guiding the board through indicia rather than imposing bright line tests?

Due to the (in our view mild) negative consequences that can flow from investor determinations that directors are not independent, we anticipate that some boards will work very hard to 'find' that its directors do not have "any relationship with the issuer...which could...be reasonably perceived to interfere with the exercise of his or her independent judgment." Internal and external advisers to boards, lacking bright line tests in all but the most obvious cases, will find it much more difficult to challenge such conclusions.[23] Given that there probably are investors who rely on board determinations of independence, we view the bright line tests as superior to the proposed approach.

[23] Condon, *supra* note 5, at 33; Black *et al*. *Supra* note 6, at 203.

7. *Is it sufficiently clear that the phrase "reasonably perceived" applies a reasonable person standard?*

Yes. However, as noted in our response to CSA question 6 above, many investors conduct their own evaluation of director independence, and will therefore decide what is and is not reasonable with respect to director independence. SHARE will take a dim view of issuers that make highly suspect claims for the independence of directors under a more principles-based corporate governance regime.

8. *Is the guidance in the Proposed Audit Committee Policy sufficient to assist the board in making appropriate determinations of independence?*

SHARE believes that the proposed approach to independence carries a far greater risk that inappropriate determinations of independence will be made by boards than under the relevant provisions of MI 52-110. We believe that enhanced guidance will better address this risk.

9. *The proposed definition provides that independence is independence from the issuer and its management, and not from a control person or significant shareholder.*

Given this definition:

(a) should a relationship with a control person or significant shareholder be specified in section 3.1 of the Proposed Audit Committee Policy as a relationship that could affect independence?

Yes. As noted in response to CSA question 1, we are of the view that a controlling shareholder is not independent on that issuer's board.

(b) should such a relationship be solely addressed through Principle 6 – Recognize and manage conflicts of interest as proposed?

No. The current approach is preferable.

(c) is it appropriate to include as an example of a corporate governance practice that an appropriate number of independent directors on a board of directors and audit committee be unrelated to a control person or significant shareholder?

Yes. This is a basic shareholder expectation.

A serious deficiency in the proposed NI 58-101 is that board and key committee independence are not queried. Instead, they are examples of practices that a board is merely encouraged to consider as it formulates its approach to principles 2, 3 and 8.

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This may leave the impression that the duties assumed by board committees are somehow less significant than those of the audit committee. Independence is crucial for committees responsible for executive compensation, director nomination, risk and governance.

10. *Does the required disclosure on director independence provide useful and appropriate information to investors?*

The current comply or explain requirements ensure that boards are attentive to, and directly address, the relative independence of the compensation and nominating committees (if any), and the board as a whole, as well as whether the board has an independent chair. We do not believe that investors will be well served by providing companies with the opportunity to sidestep directly addressing such questions. That said, we acknowledge that the board will be required to provide more detail about the factors that contributed to its decision about the independence or non-independence of each director.

11. *Do you think our proposal regarding the effective date adequately addresses the needs of both venture and non-venture issuers?*

We encourage the CSA to be attentive to reasonable feedback from issuers regarding the timetable for implementation so that issuer practices and disclosure to the marketplace are of the highest quality possible. At the same time, we urge the CSA to be mindful of the fact that unduly lengthy delays in implementation leave investors with a regime which is unlikely to be updated as resources are dedicated to its proposed successor.

Concluding Observations

In this submission, we have put forward recommendations geared ensuring that issuers develop highly effective corporate governance practices under the proposed corporate governance regime. The following are our 'Criteria for Effectiveness':

1. Put effective and inclusive consultation mechanisms in place in order to ensure that issuers develop appropriate governance practices, and

2. Approach the compliance function with a willingness to sanction issuers for substantive failure in order to avoid lowering corporate governance standards in the Canadian securities maketplace.

Finally, we think that the current comply or explain regime *is* light touch and predominantly principles-based. The current NP 58-201 and NI 58-101 contain more bright line standards that the proposed regime, but issuers are under no *regulatory* obligation to adhere to them if they explain the alternative they employ.

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In SHARE's view, the current comply or explain model is preferable to a principles-based approach for disclosure unless CSA members make concerted efforts to build in the consultation and compliance mechanisms required to ensure that the proposed approach functions effectively to protect shareholder interests.

Sincerely,

Laura O'Neill
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