SHARE
Shareholder Association
for Research and Education

28 March 2003

Gerry Salembier
Director
Financial Institutions Division
Department of Finance
140 O'Connor Street
Ottawa, Ontario
K1A 0G5

Dear Mr. Salembier:

Re: Proposed Corporate Governance Reforms for Financial Institutions

The Shareholder Association for Research and Education (SHARE) would like to thank the Department of Finance for the opportunity to comment on proposed reforms to the governance framework for financial institutions as laid out in its consultation paper *Corporate Governance of Financial Institutions.*

SHARE is a national, not-for-profit organization working with institutional investors to promote responsible investment practices through research, educational activities, and advocacy. On behalf of our affiliates with total assets exceeding $2 billion, SHARE made representations to the federal government with regards to the CBCA amendments implemented in November 2001. Our submissions below reflect SHARE's direct experience working with the CBCA reforms over the past two years.

Since the implementation of the CBCA reforms and as a result of the corporate scandals and failures of the past two years, institutional investors' interest in corporate governance has been significant. Investors want good governance practices that ensure active shareholder participation. Our comments under the sections entitled rights of shareholders and modernizing governance practices reflect these goals and identify some persistent problems with the mechanisms enacted under the *CBCA*.

Our comments below follow the framework outlined in chapter two of the consultation paper. We believe that they are consistent with the Department of Finance's key objectives as detailed in the consultation paper, namely, enhancing the effectiveness of corporate governance rules for financial institutions, clarifying the roles and responsibilities within said governance system, enhancing safety and soundness, and fostering competitiveness and innovation of financial institutions.

I. Role of Directors

1. Due Diligence Defense for Directors

As noted in the consultation paper, a due diligence defense for directors when assessing liability is warranted to acknowledge their efforts. However, providing a due diligence defense implies that there are certain actions which are expected of directors. Current regulation places few requirements on directors with respect to corporate governance. Furthermore, requiring directors to set corporate governance policies and procedures as suggested in the consultation paper is insufficient. Directors must ensure that such policies and procedures are implemented and must provide ongoing monitoring to ensure their effectiveness. Absent mandatory corporate governance requirements, a due diligence defense provides little direction for directors in the execution of their fiduciary responsibilities and eliminates security for shareholders. When challenged, directors may argue that they have satisfied the due diligence requirement by meeting the lowest voluntary standards. Courts have historically deferred to the board of directors in assessing their level of diligence to the detriment of shareholders.

Accordingly, SHARE does not support the proposal to introduce an express due diligence defense in the absence of clear, mandatory corporate governance standards for directors.

2. Modified Proportionate Liability

SHARE supports the Department's proposal to not introduce a modified proportionate liability regime into financial institutions legislation for the reasons detailed in the consultation paper.

3. Directory Residency Requirements

In 2001, SHARE made representations to the Senate Standing Committee on Banking Trade and Commerce to maintain the requirement that a majority of corporate directors of federally incorporated corporations be resident in Canada. The operation of Canadian financial institutions and the direct influence that such institutions have on the Canadian economy necessitate that they be overseen by Canadians in the interest of Canadians. We firmly believe that concerns about the limited pool of available board candidates are overstated. Financial institutions, and indeed the entire corporate sector, must look beyond the pool of chief executive officers and current directors to capitalize on the abundant expertise available and to reflect the existing diversity within this country.

SHARE therefore supports the proposal to retain the current two-thirds Canadian residency requirements.

II. Rights of Shareholders

1. Proxy Solicitation

The reforms to the proxy solicitation provisions of the CBCA have had a very positive impact on the ability of shareholders to communicate with each other on matters related to the business and affairs of the corporation. Canadian shareholders traditionally operated within a framework that encourages a passive approach and reforms such as those to the CBCA's proxy solicitation rules have been instrumental in redressing this situation and encouraging shareholders to act as shareowners.

SHARE therefore supports the proposal to introduce changes to the proxy solicitation provisions in the financial institutions legislation similar to those implemented under the CBCA.

2. Electronic Participation in Shareholder Meetings

Section 132(5) of the CBCA as amended in November 2001 provides that the directors or shareholders that call a meeting of shareholders may hold the meeting entirely by electronic means. Since the introduction of this amendment, many Canadian public companies have amended their bylaws to allow their shareholder meetings to be conducted entirely by electronic means. Examples of federally incorporated companies that introduced such bylaws in 2002 include Agrium Inc., Ballard Power

Systems, BCE, BCE Emergis, Cott Co., Canadian National Railway, Cognos, Dofasco, Dupont Canada, Petro-Canada, Roger Wireless Communications, Stratos Global, Suncor, Placer Dome, and Zarlink Semiconductor.

SHARE views this reform as regressive and detrimental to the interest of investors and to good governance. The annual general meeting of shareholders is the sole opportunity for shareholders to meet management and directors face-to-face to discuss the business and affairs of the corporation. Limiting shareholder meetings to electronic communications alone allows management to potentially abuse their control over proceedings and prevents shareholders from being able to interact with each other. For example, in 2002, shareholders experienced companies that cut off webcasts of annual general meetings prematurely. Shareholders often learn about each other's concerns during shareholder meetings because their ability to communicate in other ways is severely constrained due to resource limitations and a system that discourages communication (e.g. the inability of beneficial shareholders to obtain the names of other beneficial shareholders).

Corporate legislation should allow for the participation of shareholders in shareholder meetings by electronic means, but not permit management to limit participation to this forum alone. The advent of electronic communications technology should facilitate communication between directors, management and shareholders, not reduce it.

Accordingly, SHARE supports the adoption of subsection 132(4) of the CBCA to allow for use of electronic communications into financial institutions legislation, but does not support the adoption of subsection 132(5), which allows for shareholder meetings to be held exclusively by electronic means.

3. Shareholder Proposals

SHARE views the amendments to the shareholder proposal provisions in the CBCA as a very positive reform and a vital part of improving corporate democracy. However, institutional shareholders have experienced certain difficulties in applying this regime since the amendments were brought into force. We therefore support the proposal to introduce similar changes to the shareholder proposal provisions in financial institutions legislation, subject to the following additional modifications. We believe that these proposed modifications will make the process more equitable and efficient for both companies and shareholders.

Word limits for shareholder proposals

The CBCA permits dissident shareholder proposals to be up to 500 words in length. This represents a positive change and will benefit shareholders by providing them with more information upon which to base their voting decisions on what are often complex issues.

However, as stated by Michael Jantzi Research Associates during submissions to the Senate Committee on Banking, Trade and Commerce, and restated in the government's Regulatory Impact Analysis Statement, in the interest of fairness and a healthy corporate democracy, the corporation's response must also be limited to 500 words.

We, therefore, propose to limit the word count for management responses to dissident shareholder proposals to 500 words.

Submission deadline for shareholder proposals

Under subsection 137(5)(a) of the CBCA, a corporation may now exclude a proposal if it is filed less than 90 days "before the anniversary date of the notice of meeting that was sent to shareholders in connection with the previous annual meeting of shareholders." Industry Canada has been unwilling to provide an interpretation of subsection 137(5)(a), however its unofficial view is that the provision refers to the date on which the Notice of Meeting is issued.

The CBCA Regulatory Impact Analysis Statement noted comments that the use of the Notice of Meeting as a reference date for calculating filing deadlines would cause confusion, but anticipated that this would be avoided by s.51(z.8) of the *Canada Business Corporations Regulations, 2001* requiring corporations to provide the deadline for filing shareholder proposals for the following year in their management proxy circulars.

Since its introduction, SHARE has observed that the use of the date of the Notice of Meeting as the reference date for determining the deadline for submitting a shareholder proposal has resulted in a myriad of inconsistencies in corporate practice, and significant non-compliance with s.51(z.8) of the regulations.

First, there is consideration variation in the time afforded to shareholders to file shareholder proposals with different corporations because there is no deadline for issuing the Notice of Meeting. Neither securities nor corporate law require a corporation to issue a Notice of Meeting on a given date. Section 135 of the CBCA requires that Notices of Meeting be *sent* to shareholders not less than 21 days nor more than 50 days prior to the date of the meeting. The CBCA does not provide any deadline for *issuing* Notices of Meeting. Under securities regulation, Part IV (issuers' obligation) of national Policy 41 (shareholder communications) states that the Notice of Meeting must be *filed* along with the Meeting's record date at least 25 days before the record date. The record date must be no less than 35 days or more than 60 days prior to the date of the meeting. Therefore, the Notice of Meeting must be *filed* no less than 60 and no more than 85 days before the meeting. However, National Policy 41 does not impose a deadline for *issuing* the Notice of Meeting. Accordingly, boards of directors may issue a Notice of Meeting at any time prior to the Annual General Meeting.

This problem is compounded where a corporation changes the date of its annual general meeting. For example, BCE Inc. held its 2001 AGM on 25 April 2001. It issued its Notice of Meeting on 28 February 2001. However, its 2002 AGM was scheduled for 29 May 2002, more than one month later than the previous year. According to s.137(5)(a) of the CBCA, the deadline for filing proposals for the 2002 AGM is 90 days prior to 28 February 2001, or 180 days prior to the AGM. Taking another corporation, the 2002 AGM for Sears Canada Inc. was on 15 April 2002 and it's 2001 Notice of Meeting was issued on 5 March 2001, resulting in a filing deadline of 131 days prior to its AGM. It is our understanding that BCE Inc. refused to circulate a proposal filed by the Association de protection des épargnants et investisseurs du Québec (APIEQ) in 2002 because it was not submitted on time.

In practice, this means that shareholders of different corporations have significantly different periods of time to file shareholder proposals. A corporation may limit the period for filing proposals by changing the date on which its Notice of Meeting is issued by its board of directors or the date of the meeting itself. As long as there is variability in when the Notice of Meeting may be issued, the rights of shareholders with respect to filing shareholder proposals will vary each year and according to the corporation in which the shares are held. Using the Annual General Meeting as the reference date for calculating deadlines would eliminate this problem.

The use of the date of the Notice of Meeting runs contrary to the government's objective to harmonize corporate legislation across Canada and North America. The CBCA's reference date is inconsistent with the date imposed in all other North American jurisdictions. Other Canadian jurisdictions use the date of the previous year's annual general meeting of shareholders. The SEC uses the date of the company's proxy statement released to shareholders in connection with the previous year's annual meeting as its reference date. In that case, the SEC has addressed similar concerns about variations in filing deadlines by requiring that corporations provide a reasonable time to file proposals where the meeting date has changed by more than 30 days.

Second, we have observed significant non-compliance with the reporting requirement under s.51(z.8) of the CBCA regulations. Our review of proxy circular issued in 2002 subsequent to the CBCA amendments coming into force indicate that 47 out of the 109 federally-registered corporations on the S&P/TSX index of companies did not provide the filing deadline for shareholder proposals in the subsequent year as required by s.51(z.8) of the regulations (A list of non-compliant companies is available upon request.) An additional 13 companies provided dates that were either earlier or later than the filing deadline determined using the date on which the Notice of Meeting was issued as the reference date. In other words, different interpretations of s.137(5)(a) yielded different deadlines for different companies either benefiting or prejudicing shareholders. Enforcing this provision after the fact is of no help to shareholders seeking to file shareholder proposals and it should not be the responsibility of shareholders to bear any costs associated with enforcement of corporate non-compliance in this regard.

Several other reasons exist for rejecting the use of the Notice of Meeting as the reference date determining the filing deadline for a shareholder proposal:

(1) Some companies do not issue a separate Notice of Meeting, or do not post it on SEDAR (e.g. Sun Life Financial Services of Canada Inc.), making it difficult for shareholders, especially those not acquainted with the Canadian system, to find the reference date or to independently confirm the filing deadline for shareholder proposals in the subsequent year. SHARE has received calls from a number of American institutional investors for assistance in this regard. The Notice of Meeting is only circulated to shareholders by mail or on SEDAR. The date of the AGM is more commonly known and readily available through the company's website and media reporting.

(2) In some instances, federally incorporated corporations do not post Notices of Meeting on SEDAR in both official languages. This is prejudicial to French or English-speaking shareholders in any given instance. For example, a survey of all corporations listed on SEDAR whose names start with the letter "B" revealed the following corporations that had Notices of Meeting posted in only one official language: BacTech Environment Corporation, Ballard Power Systems Inc., BCY LifeSciences Ltd., Bennett Environmental Inc., Big Horn Resources Ltd., Biomira Inc., Bioniche Life Sciences Inc., Biophage Pharma Inc., Bitech Petroleum Corporation, Blackhorn Gold Mines Ltd., BlackRock Ventures Inc., Blackstrap Hospitality Corporation, Book4golf.com Corporation, BPO Properties Ltd., Brascade Resources Inc., Breakwater Resources Ltd., British Controlled Oilfields Ltd., Brookfield Homes, Brookfield Properties Corporation, Burnstand Inc.

Using the Annual General Meeting as the reference date for calculating the deadline for filing shareholder proposals removes any potential confusion, harmonizes reference dates with other jurisdictions in Canada, and removes any potential for prejudice against certain shareholders.

If, as some suggest, the purpose of adopting the Notice of Meeting as the reference date is to increase the amount of time available to corporations to consider proposals before the annual general meeting, we submit that this objective would be better achieved by increasing the number of dates before the annual general meeting that proposal must be filed.

Finally, we hope that the Department of Finance will address the problem of calculating filing deadlines for new companies that have not issued a Notice of Meeting in a preceding year (e.g. successor companies to Canadian Pacific Railway in 2002). Currently, there is no way to calculate filing deadlines in such situations. We note that this problem will exist regardless of which reference date is used. SEC Rule 14a-8 addresses this situation by requiring corporations to provide a "reasonable time" for shareholders to file proposals in such instances.

The administrative review process for shareholder proposals

An efficient and effective mechanism for dealing with shareholder proposals requires a quick and inexpensive arbitral mechanism to mediate disputes between shareholders and management in cases where management refuses to circulate a shareholder proposal. The federal government elected not to introduce a dispute resolution mechanism into the CBCA, however the Corporate Law Policy Directorate has subsequently commissioned a report on administrative review options, which was completed on 25 July 2002. Comments with respect to that report were submitted to the Corporate Law Policy Directorate in 2002 and are available upon request.

Presently, a shareholder must resort to the courts and bear the associated financial burden in order to dispute a company's refusal to circulate a dissident shareholder proposal. In practice, this has limited the ability of shareholders to exercise their rights and to participate fully in corporate governance.

SHARE recommends the inclusion of an ad-hoc administrative review system to deal with such disputes at minimal cost and with maximum effectiveness. One possible model to apply in this context comes from the existing dispute resolution system under the *North American Free Trade Agreement*, which is familiar to investors throughout North America. It is recommended that the system be structured as follows:

- The dispute resolution system will operate through ad-hoc panels constituted to deal with disputes as they arise on a case-by-case basis.
- The Minister will maintain a roster of twenty individuals to sit on such panels who are independent, impartial and qualified.
- Each panel will be compromised of three individuals.
- When management refuses a shareholder proposal, the shareholder will immediately submit a request to Industry Canada for a panel.
- The shareholder and management will be given 7 days to each appoint an individual of their choice to the panel. These two individuals may but do not need to be selected from the Minister's roster.
- The two panelists selected by the respective parties will then be required to select the third individual within 7 days who will also chair the panel. Again, this individual does not need to be

selected from the Minister's roster. In the event that a third individual cannot be agreed upon, the Minister will assign a third individual from the Minister's roster.

- The panel will be authorized to receive written and/or oral submissions from the parties and provide a written decision within 15 days from the date on which the panel is fully constituted. In the event the panel is not unanimous in its decision, the written report may include a written dissent.
- The onus will first rest on management to prove why the proposal should be excluded.
- Parties must comply with the ruling subject to a right of appeal to a court in the appropriate jurisdiction.

In addition, the law is unclear about who carries the burden to prove that a shareholder proposal does or does not fall under one of the grounds for exclusion under s.137(5) of the CBCA. In the absence of any administrative arbitral mechanism, it is critical that financial institutions legislation explicitly provide that the burden rests on management to prove why a shareholder proposal should be excluded. Imposing a reverse onus on shareholders is unfair because it requires that the shareholder anticipate the reasons of the corporation for excluding the shareholder proposal. While management is required to provide reasons at the time they refuse to circulate the shareholder proposals, this does not prevent management from raising additional reasons once they get to court. Putting the burden of proof on the shareholder requires that the shareholder satisfy the court that the proposal does not fall under a ground of exclusion before having full knowledge of management's case. Placing the burden on management is also consistent with the position taken by the United States under question 7 of Rule 14a-8 (Proposals of Security Holders) contained in the *General Rules and Regulations promulgated under the Securities Exchange Act of 1934.*

In conclusion, SHARE finds that the issues raised above represent significant constraints on the effective and efficient application of the existing CBCA shareholder proposal rules, ultimately undermining their intended effect to "enhance shareholders' rights by liberalizing the mechanisms through which persons may notify a corporation of any matter they propose to raise at an annual meeting of shareholders." (CBCA Regulatory Impact Analysis Statement, p.3) SHARE supports the adoption of the CBCA shareholder proposal provisions into financial institutions legislation along with these additional improvements. We trust that the Minister of Finance will make the necessary amendments to the current CBCA regime when incorporating it into financial institutions legislation.

4. Beneficial Shareholders

SHARE strongly endorses the proposal to grant beneficial owners of financial institutions the rights currently afforded to beneficial shareholders under the CBCA, specifically in the context of making proposals to be considered at shareholders' meetings. However, we take this opportunity to address a number of problems with the CBCA framework and additional concerns arising from the introduction of the disclosure regime under the Canadian Securities Administrators' National Instrument 54-101.

Beneficial Ownership in the context of shareholder proposal provisions

Our first concern relates to the ownership arrangement of equities by institutional investors, specifically pension plans. Pursuant to subsection 137(1) of the CBCA, beneficial shareholders, such as pension plans, now have the right to file shareholder proposals with federally incorporated companies. Unfortunately, this right has been confounded by the absence of an adequate definition of "beneficial shareholder" and the requirement imposed by subsection 137(1.4) that a person submitting a proposal must provide proof of beneficial ownership upon request by the corporation.

The CBCA amendments did not include a definition of "beneficial shareholder", which has resulted in problems for shareholders seeking to file proposals. Section 2 of the CBCA defines "beneficial ownership" to include "ownership through any trustee, legal representative, agent or other intermediary", which has been found to be inadequate.

Some custodians have questioned who the beneficial owner is for the purpose of issuing a statement of proof of beneficial ownership as required by s.137(4) of the CBCA. In at least one instance, a custodian has questioned whether the institutional investor requesting a statement of beneficial ownership is the beneficial owner of the shares. There is no question that the investor is the recipient of the beneficial interest in the shares (e.g. they receive dividends and sometimes the ability to vote proxies), however the custodian challenges whether the institutional investor owns the underlying property interest in the shares. Accordingly, even if the custodian could act on behalf of the registered shareholder in issuing the statement of proof of beneficial ownership, they refuse to do so because the Act does not provide an adequate definition of what constitutes a "beneficial shareholder" for the purposes of the Act.

The United States' Securities Exchange Commission has overcome this problem by providing an expansive definition of "beneficial ownership" under Rule 13d-3 of the *Securities Exchange Act of 1934* adopted under Rule 14 dealing with shareholder proposals (copy attached). Interestingly, British Columbia's new *Business Corporations Act* (not in force), which allows beneficial shareholders to submit proposals, does not require production of statements of proof of beneficial ownership at all.

Statements of proof of beneficial ownership

The second problem is identifying the appropriate party to issue a statement of proof of beneficial ownership under subsection 137(1.4) and to get them to issue it. In practice, obtaining a written statement of proof of beneficial ownership requires that the institutional invest request a statement from the registered owner stating that the institutional investor is the beneficial owner of the shares. However, the registered shareholder is CDS and CDS has indicated that it has no authority or capacity to issue such a statement. Our recent experience has demonstrated that custodians, who are the most able to provide such proof, will not do so because they are not the "registered shareholder" and the CBCA does not authorize them to issue such statements. Accordingly, it has proven very difficult, and in some instances impossible, for a beneficial shareholder to obtain the requisite statement of proof of beneficial ownership.

Based on the above experiences, we recommend that any amendments to financial institutions legislation modify the CBCA provision respecting beneficial shareholders as follows:

a) Include a clearer and more expansive definition of "beneficial ownership" akin to Rule 13d-3 of the *Securities Exchange Act of 1934.*
b) Insert a provision permitting the custodian to issue a statement of proof of beneficial ownership on behalf of the registered shareholder when the beneficial shareholder requests a statement of proof of beneficial ownership.

Harmonization with National Instrument 54-101

We also take this opportunity to address certain issues arising from the proposal to harmonize financial institutions legislation with Nation Instrument 54-101 introduced by the Canadian Securities Administrators.

SHARE strongly supports any initiative to enhance disclosure of information to beneficial shareholders and to support enhanced communication between beneficial shareholders. Similarly, we endorse efforts to harmonize regimes that favour more equitable treatment of beneficial owners. Our position is in line with the rights of shareholders identified in the *OECD Principles on Corporate Governance*, namely:

> "Shareholders should have the opportunity to participate effectively and vote in general shareholder meetings and should be…furnished with sufficient and timely information concerning the date, location and agenda of general meetings, as well as full and timely information regarding the issues to be decided at the meeting."
>
> "All shareholders of the same class should be treated equally. ... Processes and procedures for general shareholder meetings should allow for equitable treatment of all shareholders. Company procedures should not make it unduly difficult or expensive to cast votes." (OECD, *Principles of Corporate Governance* (Paris, 1999), sections I ("Rights of Shareholders") & II ("Equitable Treatment of Shareholders"))

NI54-101 was intended to create an equitable and efficient framework for access to corporate information by non-registered and registered shareholders, however many problems have been identified with the new rule. SHARE is concerned about any attempts to harmonize financial institutions legislation with NI54-101 without first addressing these problems.

NI54-101 makes three significant changes to the existing regime under NP41 with respect to accessing corporate documentation:

1) As of September 1, 2002, lists of the names, addresses and shareholdings of beneficial owners of the reporting issuer's securities that do not object to this disclosure (non objecting beneficial owners or NOBOs) are to be made available to issuers and third parties on request.
2) Issuers no longer are responsible for the costs of delivery of proxy-related materials to beneficial owners of the issuer's securities that do object to disclosure of their names, addresses and shareholders (objecting beneficial owners or OBOs). (Under NP41, issuers paid for delivery to all shareholders, whether they were registered shareholders or held their securities through an intermediary.)
3) Unless implementation is delayed (an advisory committee is to consider this issue), for meetings after September 1, 2004, issuers may choose to send proxy-related materials to their Canadian NOBOs directly. Material will continue to go to OBOs and US-based NOBOs indirectly through intermediaries, as under the old regime.

Among the many concerns identified, the following are the most problematic from our perspective:

- In order to obtain corporate information from the issuer, NOBO's give up their right to refuse consent for the disclosure of information to issuers or third parties.

- Intermediaries are not required to deliver materials to beneficial owners unless either the issuer or the beneficial owner agrees to pay for the delivery.
- There is no deeming provision in NP54-101. Beneficial shareholders that do not declare their status as a NOBO or an OBO in response to an intermediaries' request for instructions required by NI54-101 will likely be deemed OBOs given that privacy legislation prevents and intermediary from disclosing personal information about the beneficial shareholder absent express consent from the client. Many beneficial shareholders are likely to be unaware of the implications of not responding, including not receiving corporate information or having to pay for such information.
- OBOs who are not willing to pay for the receipt of proxy-related materials are disenfranchised from exercising their rights which undermines corporate democracy and reduces the ability of the market to discipline corporate governance practices. As has been observed, proxy returns in Canada are low and already and the new instrument as currently drafted will only exacerbate this problem.
- After September 1, 2004, voting confidentiality will be lost because issuers may choose to have NOBO votes go directly, on a disclosed basis, to the issuer.
- The requirement to inform beneficial owners of take-over bids and other events where notices were required to be delivered to registered holders has been dropped. Beneficial owners are left to rely on a possible common law fiduciary duty on the part of the intermediary to inform its clients of these corporate events. However, a fiduciary relationship does not exist in all cases and may not extend this far.
- Increasing disharmony with other regimes in Canada and the United States. For example, NI54-101 defers to provincial securities legislation that varies across the country. The instrument also disrupts the existing integrated cross-border delivery system where SEC rules require issuers to pay for delivery of proxy-related materials to both NOBOs and OBOs, and could potentially lead to a dismantling of other cross-border arrangements such as the Multi-Jurisdictional Disclosure System.

In the context of the CBCA provisions, NI54-101 coupled with s.153 of the CBCA could effectively relieve intermediaries from the fiduciary responsibility of voting proxies for OBOs. Section 153 of the CBCA as amended in November 2001 prohibits intermediaries from voting shares of a corporation where they are only the registered shareholder unless the intermediary immediately sends a copy of all corporate information received (i.e. notices of meeting, financial statements, management proxy circulars, dissident proxy circulars and other documents other than the form of proxy) to the beneficial owner and obtains written voting instructions. Where the issuer and OBO refuse to pay for delivery of corporate information, the intermediary would presumably be under no obligation to send the information to the OBO. Without receipt of the information, the OBO would not provide written consent and the intermediary would not vote the shares. The solution is to amend NI54-101, not s.153 of the CBCA which is sound policy. If anything, s.153 should be strengthened to require intermediaries to make best efforts to obtain voting instructions from their beneficial shareholder clients.

Amending financial services legislation to accommodate NI54-101 would also result in further discord between corporate and securities policies across the country. Intermediaries would have to treat corporate information received from financial institutions differently than those for other public issuers incorporated under provincial and federal corporate laws. Different regimes would also further complicate the current system for delivery of the corporate information through ADP Investor Communications – ADP IC.

Therefore, SHARE recommends that the current framework for the provision of corporate documentation to shareholders under financial services and corporate legislation should not be amended. Rather, the Department of Finance should work with the CSA to make changes necessary to NP54-101 to make it consistent with its stated purpose. We believe that these changes to NP54-101, will create a compatible and seamless regime with the existing Canadian corporate and financial services legislation.

III. Modernizing Governance Practices

1. Harmonization/Streamlining

The Department of Finance's proposal calls for maintaining an integrated and comprehensive legislative framework for financial institutions in areas such as proxies, prospectuses, and insider trading and reporting.

As with all efforts to harmonize legislative and regulatory regimes, the aim is to enhance efficiencies by avoiding regulatory duplication while ensuring that standards are harmonized upwards to the highest common denominator.

With respect to the harmonization of policies regarding proxies, the Canadian Securities Administrators recently introduced NI84-106 for comment, which would require greater disclosure of proxy votes by investment manager intermediaries to beneficial shareholders. In the context of prospectuses, there is an ongoing national debate over the appropriate disclosure regime for Canadian public issuers with the securities commissions of Ontario and British Columbia presenting strikingly different models.

Efforts to harmonize or streamline the financial institutions' regime by providing exemptions from federal requirements should not diminish the degree of disclosure or the existing rights of shareholders in any jurisdiction. Providing exemptions in cases "where there is a consistency between federal and provincial rules in particular area [sic]" is insufficient. The Canadian corporate and securities regulatory landscape is made up of a plethora of regulatory frameworks that all profess to uphold the same policy objectives of enhancing market efficiency and investor protection. Yet, the rules of each jurisdiction lack adequate uniformity. Focusing solely on the consistency of policy objectives in deciding whether to provide a federal exemption is insufficient. The specific rules and technical requirements must be evaluated to ensure that they are equal to or better than those of the federal regime.

For example, securities legislation in several provinces permits securities firms to decline to deliver proxy materials to their clients if neither the issuer nor the client has agreed to pay the delivery costs. In other provinces there is no equivalent provision. NI54-101 will require issuers to pay for delivery of corporate information for NOBOs only. The CBCA requires intermediaries to provide copies of proxy materials to their clients and obtain written instructions before voting proxies. All of these regimes profess to support the same policy objectives, but the technical requirements in each case are different with significantly different implications for issuers and shareholders.

Where harmonization is sought, the highest standards of investor protection and corporate disclosure should be applied. In the implementation of the CBCA amendments to federal shareholder proposal rules, the federal government greatly improved the balance between the rights of shareholders and management. These reforms must not be compromised in the pursuit of harmonizing standards. Rather, they represent the bar that financial institutions legislation must meet.

2. Technical Requirements to Regulations

The transference of technical qualitative and quantitative requirements from legislation to regulations provides government with the ability to respond more quickly to economic and market circumstances. However, this is tempered by concerns that locating technical requirements in regulation makes them more susceptible to amendment without appropriate notice to and consultation with stakeholders.

SHARE generally opposes proposals to prescribe technical requirements in regulation, however this must be assessed on a case-by-case basis. We therefore await a draft of the legislation and regulations before providing comment. As with the CBCA, we encourage the Department of Finance to release draft regulations at the same time as any draft legislative amendments are released for public comment, especially if the intention is to prescribe a majority of technical requirements in the regulations, as was the case with the CBCA amendments in 2001.

IV. Other Governance Proposals

While the Department of Finance's consultation paper on corporate governance of financial institutions does not address the firm-related aspects of corporate governance, we believe that these areas merit some attention, especially in light of the government's attention to the issue in its throne speech and the consultations recently initiated by Industry Canada with regards to the CBCA. With the federal government considering bringing forward amendments to the CBCA with respect to issues such as director, audit committee and auditor independence, it would seem appropriate for the Department of Finance to address these issues at this time in the context of its other proposed corporate governance reforms. We, therefore, take this opportunity to make some brief comments on these issues with the hope that further opportunity will be provided for more detailed submissions.

On the issue of director independence, institutional investors are concerned with who constitutes an independent director and the minimum number of independent directors required. The *Bank Act* applies the unique term "affiliated" as a proxy for "independent". The term is defined under s.162.1 of the Act and the *Affiliated Persons (Banks) Regulations* (SOR/92-325). Table 2 (see below) compares the criteria for determining whether a director is affiliated against the criteria for director independence detailed in the new New York Stock Exchange (NYSE) standards for director independence (recently submitted to the SEC for approval) and the Council of Institutional Investors' (CII's) governance standards, which represents American institutional investors with more than two trillion dollars in assets.
As Table 2 demonstrates, the *Bank Act*'s criteria for determining whether a director is "affiliated" are generally weaker than those of the NYSE and CII with some exceptions. Furthermore, only one-third of a bank's directors must be unaffiliated compared with a majority of directors in the case of the NYSE's standards, and two-thirds of directors in the case of the CII's standards, that must be independent (see Table 1 below). Also notable is the Act's weaker standard with respect to the number of independent directors required on the bank's audit committee compared with similar standards for companies under the NYSE's rule and CII's policy (see Table 1 below).
The selection of the NYSE and CII standards as a basis for comparison with the *Bank Act* is not made arbitrarily. In its 2003 proxy circular to bank shareholders, the Royal Bank of Canada contends:

> "With respect to the Bank's governance procedures as compared with the New York Stock Exchange existing and proposed listing standards, the Bank is generally in compliance with these standards and, in particular, is in compliance with the requirement that the majority of directors be "independent." It has been determined that for these purposes "independent" shall mean

> "unaffiliated" as established in the Bank Act (Canada). Annually each director is required to complete a Director's Certificate Respecting Affiliated Persons, certifying whether or not for purposes of the Affiliated Persons (Bank) Regulations they are "affiliated" or "unaffiliated." Based on current certificates, all directors standing for election on February 25, 2003, with the exception of the Chairman and Chief Executive Officer, Mr. Comper, are independent."

Reflecting on Tables 1 and 2, this statement to shareholders is debatable, and arguably misleading. It also serves to highlight the need for Canadian governance standards to achieve uniformity with the higher standards of American exchanges and the expectations of institutional shareholders. This will go some way to enhancing investor confidence while avoiding what is already a complex regulatory environment with respect to corporate governance.

Finally, we encourage the Department of Finance to expand this discussion of corporate governance to address a number of additional issues, namely stakeholder relations provisions that were debated during the CBCA consultations leading up to the 2001 amendments, and that are under further consideration as part of the legislation's five-year review in 2007. The OECD *Principles on Corporate Governance* issued in 1999 (now under fast-track review) state that a

> "…corporate governance framework should recognize the rights of stakeholders as established by law and encourage active co-operation between corporations and stakeholders in creating wealth, jobs, and the sustainability of financially sound enterprises. … The corporate governance framework should permit performance-enhancing mechanisms for stakeholder participation. … Where stakeholders participate in the corporate governance process, they should have access to relevant information."

The current review of corporate governance aspects of financial institutions legislation offers a timely opportunity to address these internationally-endorsed principles with respect to corporate-stakeholder relations. The financial industry and Department of Finance have been leaders in this area with the production of Public Accountability Statements, however the OECD Principles go further and so should the law governing Canadian financial institutions.

SHARE recommends that the Department of Finance seize this timely opportunity to incorporate a broader discussion of corporate governance reforms into the present consultation process.

Thank you for the opportunity to provide comments on the Department of Finance's consultation paper. We look forward to further participation in this process as your review proceeds.

Yours very truly,

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Director of Law & Policy

TABLE 1: BOARD AND COMMITTEE INDEPENDENCE

DEGREE OF INDEPENDENCE	NYSE	COUNCIL OF INSTITUTIONAL INVESTORS	BANK ACT	COMMENTS
Board	A majority of the board must be independent.	At least two-thirds of directors should be independent. (Core Policy 2)	No more than two thirds of the directors may be persons affiliated with the Bank. (s.163)	*Bank Act* sets a lower independence threshold.
Audit Committee	Listed company must have an audit committee composed of at least three independent directors.	Companies should have audit, nominating and compensation committees. All members of these committees should be independent. (Core Policy 4)	Must consist of at least three directors a majority of which are unaffiliated. (s.194)	*Bank Act*'s sets a lower independence threshold..

TABLE 2: INDEPENDENCE CRITERIA FOR DIRECTORS

INDEPENDENCE CRITERIA	NYSE	COUNCIL OF INSTITUTIONAL INVESTORS	BANK ACT (Def'n of "affiliated")	COMMENTS
General principle	For a director to be deemed "independent", the board must affirmatively determine the director has no material relationship with the listed company either directly or as a partner, shareholder or officer of an organization that has a relationship with the company.	Someone whose only nontrivial professional, familial or financial connection to the corporation, its chairman, CEO or any other executive officer is his or her own directorship.	Significant or sufficient commercial, business or financial relationship with the bank or with an affiliate construed as being material to the director and can reasonably be expected to affect the exercise of the director's best judgment. (s.162.1)	The *Bank Act* applies a materiality threshold as does the NYSE, but it imposes an additional subjective element, namely, the relationship having to affect the director's best judgment.
Business or financial relationship	Receives, or whose immediate family member receives, more than $100,000 per year in direct compensation from the listed company, other than director and committee fees and pension or other forms of deferred compensation for prior services (provided such compensation is not contingent in any way on continued service) within the past five years.	Is, or in the past five years has been, an employee or owner of a firm that is one of the corporation's or its affiliate's paid advisers or consultants. Has, or in the past five years has had, a personal services contract with the corporation, its chairman, CEO or other executive officer or any affiliate of the corporation.	Significant or sufficient commercial, business or financial relationship with the bank or with an affiliate construed as being material to the director and can reasonably be expected to affect the exercise of the director's best judgment. (s.162.1)	The *Bank Act* applies a subjective, principles-based standard without any quantitative or temporal thresholds.
Officer or employee	Receives, or whose immediate family member	Is, or in the past five years has been, employed by the	Officer or employee of the bank or of an affiliate of the	The *Bank Act* standard does not provide any quantitative

INDEPENDENCE CRITERIA	NYSE	COUNCIL OF INSTITUTIONAL INVESTORS	BANK ACT (Def'n of "affiliated")	COMMENTS
	receives, more than $100,000 per year in direct compensation from the listed company, other than director and committee fees and pension or other forms of deferred compensation for prior services (provided such compensation is not contingent in any way on continued service) within the past five years.	corporation or an affiliate in an executive capacity.	bank.	or temporal thresholds.
Interlocks	A director who is employed, or whose immediate family member is employed, as an executive officer of another company where any of the listed company's present executives serves on that company's compensation committee within five years after the end of such service or the end of the employment relationship.	Is, or in the past five years has been, part of an interlocking directorate in which the CEO or other executive officer of the corporation serves on the board of another corporation that employs the director.		*Bank Act* is silent.
Investment			Substantial investment in an affiliate of the bank.	*Bank Act* is stronger.
Borrower			Significant borrower in respect of the bank.	*Bank Act* is stronger.

INDEPENDENCE CRITERIA	**NYSE**	**COUNCIL OF INSTITUTIONAL INVESTORS**	**BANK ACT (Def'n of "affiliated")**	**COMMENTS**
Control of borrowing entities			Controls one or more entities of which the total indebtedness to the bank or to an affiliate would cause those entities, if treated as a single entity, to be a significant borrower.	*Bank Act* is stronger.
Borrower not in good standing			Has a loan that is not in good standing from the bank or from an affiliate of the bank or is a director, an officer or an employee of, or a person who controls, an entity that has a loan that is not in good standing from the bank or from an affiliate of the bank.	*Bank Act* is stronger.
Supplier/Customer	Executive director or employee, or whose immediate family is an executive officer, of another company (A) that accounts for at least 2% or $1 million, whichever is *greater,* of the listed company's consolidated revenues, or (B) for which the listed company accounts for at least 2% or $1 million,	Is, or in the past five years has been, employed by a significant customer or supplier.	Officer or employee of an entity that is a significant borrower in respect of the bank. Provides goods or services to the bank, or is a partner or an employee in a partnership that provides goods or services to the bank or an officer or employee of, or a person	The *Bank Act* has a higher dollar threshold and lower temporal threshold.

INDEPENDENCE CRITERIA	NYSE	COUNCIL OF INSTITUTIONAL INVESTORS	BANK ACT (Def'n of "affiliated")	COMMENTS
	whichever is *greater*, of such other company's consolidated gross revenues at anytime during the past five years.		who has a substantial investment in, a body corporate that provides goods or services to the bank, if the total annual billings to the bank in respect of the goods and services provided exceeds ten per cent of the total annual billings of the person, partnership or body corporate, as the case may be.	
Family	Five year "cooling-off" period for immediate family members of employees.[1]	Is, or in the past five years has been, a relative of an executive of the corporation or one of its affiliates.	The spouse or common-law partner of a person described in any of the above contexts.	*Bank Act* has no cooling-off period, although the range of familial relationships is broader.
Third sector		Is, or in the past five years has been, an employee, officer or director of a foundation, university or other non-profit organization that receives significant grants or endowments from the corporation or one of its		*Bank Act* is silent.

[1] The NYSE defines "immediate family" as including "a person's spouse, parents, children, siblings, mothers-in-law and fathers-in-law, sons and daughters-in-law, brothers and sisters-in-law, and anyone (other than employees) who shares such person's home."

INDEPENDENCE CRITERIA	NYSE	COUNCIL OF INSTITUTIONAL INVESTORS	BANK ACT (Def'n of "affiliated")	COMMENTS
		affiliates.		
Related to firm's auditor	Affiliated with or employed by, or whose immediate family member[1] is affiliated with or employed in a professional capacity by, a present or former auditor of the company is not "independent" until five years after the end of either the affiliation or the auditing relationship.			*Bank Act* is silent.