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To: The Expert Panel on Securities Regulation in Canada  
Ottawa, ON  
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From: Prof. Cynthia A. Williams  
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Consultation Item 1: Objectives of a Common Securities Regulator

As the Expert Panel is considering various issues of institutional and regulatory design, I would like to suggest that the issue of the information requirements necessary and optimal to support the capital markets be a focus of concern and possible further research. I am a lawyer and law professor who trained and practiced in the United States, and who is now on the faculty of Osgoode Hall Law School as the inaugural Osler Chair in Business Law. My areas of expertise are corporate law and securities, with a particular emphasis on the corporate social relationship. I have done comparative studies of the capital markets in the United Kingdom and the United States, as well as work on the expanded information requirements of the modern capital markets in the European Union and the United Kingdom. It is in light of that research that I submit these views.

As a general matter, in addition to the important investor protection goals of securities regulation, I suggest that the focus of capital market regulation should be on creating capital market conditions that encourage long-term value creation within Canada's companies, and the intelligent allocation of capital to companies likely to deliver needed innovation and growth in the future. Among other institutional design requirements, the objective of intelligent long-term capital allocation requires clear, informative disclosure by companies of their financial results and their evaluation of and management of future risks and opportunities. Emerging best practice in both the European Union and the United Kingdom recognizes that future risks and opportunities include significant social and environmental risks and opportunities. As a result of institutional investor pressures and new regulatory requirements (the Accounts Modernization Directive of the European Union, Directive 2003/51/EC of the European Parliament and of the Council, June 18, 2003), companies in the EU and UK are now required to discuss future risks and opportunities, including from social and environmental matters, in their annual reports. For Canada to require similar information would bring its disclosure



requirements in line with emerging best practice in the developed capital markets and in line with the expectations of global institutional investors.

The information requirements of the United Kingdom are particularly apt, I suggest, as a model for Canada. Those requirements, in the context of a unitary regulator using a risk-based approach to regulation and emerging principles-based regulation, support the markets in London, one of the world's most competitive capital markets. In 2006, as part of a comprehensive overhaul of its Company Law, the U.K. enacted the Business Review requirement, not only to implement the Accounts Modernization Directive of the E.U., but also so that shareholders could evaluate the extent to which directors of companies in the U.K. were acting consistent with their statutory fiduciary duties, also enacted as part of the Company Law reform. Directors' fiduciary duties in the U.K. are now stated as follows:

Section 172: A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members [shareholders] as a whole, and in doing so have regard (amongst other matters) to—

- (a) the likely consequences of any decision in the long term,
- (b) the interests of the company's employees,
- (c) the need to foster the company's business relationships with suppliers, customers and others,
- (d) the impact of the company's operations on the community and the environment,
- (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
- (f) the need to act fairly as between members of the company.

As members of the Expert Panel will no doubt appreciate, this articulation of directors' fiduciary duties in the U.K. is quite consistent with the articulation of Canadian directors' fiduciary duties by the Supreme Court of Canada in *Peoples' Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68, [2004] 3 SCR 461, para. 42. Recognizing that there is some ambiguity at the moment about how the Court will reconcile these general fiduciary duties with the directors' duties in a takeover context, I still suggest that the information requirements in Canada should similarly permit shareholders to evaluate how directors of Canadian companies are meeting their fiduciary duties as set out in *Peoples' Department Store v. Wise*. In some important Canadian industries, such as mining, or oil and gas extraction, shareholders should also have specific information on companies' subsidiaries' social and environmental relationships, and the risks and opportunities from those relationships, since much of these companies' production will be outside of Canada through operating subsidiaries. This information is necessary for investors to be able to gauge their financial risks from specific investments within these industries, and also to promote the allocation of capital to companies best positioned to mitigate these risks.

Thank you for your consideration of these views. I would be happy to provide the Expert Panel with any further information on these matters that could be of value.