

Calgary, Alberta
May 8, 2014

Director General
Marketplace Framework Policy Branch
Industry Canada
235 Queen Street, 10th Floor
Ottawa, Ontario
K1A 0H5

Attention: Patricia Brady

Subject: Consultation on the *Canada Business Corporations Act*

Ms. Brady,

We are writing on behalf of the Canadian Securities Administrators (CSA) in response to Industry Canada's request for comment on its consultation document (Consultation Document) on the corporate governance aspects of the *Canada Business Corporations Act* (CBCA).

The corporate governance issues identified for consideration in the Consultation Document are not unique to the areas regulated by the CBCA. Members of the CSA have undertaken or are considering initiatives in several of the areas identified in the Consultation Document. We also note that the Consultation Document makes specific references to areas where changes to the CBCA may not be necessary as a result of existing securities law requirements and areas where CBCA requirements could be reduced in reliance upon securities law requirements.

The purpose of this letter is to highlight some of the initiatives that securities regulators have undertaken on the issues under consideration in the Consultation Document and to provide a brief overview of their purpose and current status. Our main objective is to promote dialogue between Industry Canada and the CSA on issues of common interest in the respective regulatory frameworks of securities law and the CBCA. This will facilitate harmonization between corporate and securities law by reducing the risk of inconsistent and duplicative requirements being imposed on public companies¹ in Canada.

In order to minimize regulatory duplication for public companies, we recommend that your review take into account the applicability of existing or potential securities law requirements for public companies, including any stock exchange requirements. The reduction in regulatory duplication between the CBCA and securities regulation could be accomplished in appropriate circumstances by (a) avoiding the imposition of additional requirements under the CBCA in areas that are already the subject of securities regulation, (b) reducing CBCA regulation in areas that are

¹ We will use the phrase "public companies" to refer to entities that are "reporting issuers" within the meaning of securities legislation and "distributing corporations" within the meaning of the CBCA. In essence, these are entities that have issued securities to a broader range of public investors and are subject to ongoing disclosure and other corporate and securities law requirements. The corporate governance issues being considered in the Consultation Document primarily relate to public company governance, so that is the focus of this letter.

currently the subject of duplicate regulation, and/or (c) exempting public companies from CBCA requirements if they are already subject to substantively equivalent securities law requirements.

Background – The Canadian Securities Administrators

The CSA is an umbrella organization of Canada’s provincial and territorial securities regulators whose objective is to improve, coordinate and harmonize regulation of the Canadian capital markets. The CSA aims to achieve consensus on policy decisions which affect our capital markets and their participants. The CSA also aims to work collaboratively in the delivery of regulatory programs across Canada, such as the review of continuous disclosure and prospectus filings.

The CSA’s mission has three key elements:

- to provide protection to investors from unfair, improper or fraudulent practices,
- to foster fair and efficient capital markets and confidence in their integrity, and
- to reduce systemic risk.

Consultation Document

We understand that Industry Canada is reviewing the issues raised in the Consultation Document because “continuous changes and developments in the marketplace require constant monitoring to ensure that Canada’s corporate regulatory structure meets the challenges of the future” and because “to grow and thrive in the global knowledge-based economy, Canada needs a strong corporate governance framework that both reflects and facilitates the best practices of Canadian corporations.”²

The motivation for Industry Canada’s review of the CBCA is consistent with the CSA’s goal in its own policy-making initiatives: to promote a Canadian securities regulatory framework that supports investor protection and facilitates capital formation for Canadian public companies. It is important for our market participants to have confidence that Industry Canada and the CSA will coordinate their respective initiatives in order to promote regulatory harmonization for the benefit of Canadian public companies and their stakeholders.

This letter identifies securities regulatory initiatives relevant to the issues raised in the Consultation Document and, where appropriate, provides our views on whether further dialogue between Industry Canada and the CSA or its members would allow for a consistent and harmonized approach in areas of common interest.

We recognize that there is an increased risk of regulatory inconsistency as a result of this initiative, as amendments to the CBCA would apply only to public companies incorporated under the CBCA unless similar reforms are made to provincial corporate law statutes or, if appropriate, securities regulation. In our view, it is important to minimize regulatory duplication and inconsistency where securities regulators have imposed requirements on public companies and similar requirements are being contemplated or applied to companies incorporated under the CBCA.

² Introduction to the Consultation Document.

We also recognize that the breadth of issues raised in the Consultation Document will likely necessitate a significant period of review and consideration by Industry Canada, potentially including further rounds of public consultation. As a result, we believe it is appropriate for certain important, non-controversial amendments, such as those facilitating use of the notice-and-access regime by CBCA corporations, to be adopted and implemented while Industry Canada continues to consider the more complex and/or potentially controversial issues raised in the Consultation Document.

I. Executive Compensation

The Consultation Document seeks comment on the respective roles of federal and provincial jurisdiction regarding executive compensation disclosure standards. As noted in the Consultation Document, securities regulators have developed comprehensive executive compensation disclosure requirements for Canadian public companies. Disclosure is a primary means for achieving the securities regulatory mandate of protecting investors and facilitating fair and efficient capital markets. The executive compensation disclosure requirements imposed by securities regulation support our mandate by providing investors with (a) clear and comprehensive information about the issuer's executive compensation practices, and (b) specific details about the compensation of key executives.

It appears from the Consultation Document that Industry Canada believes that securities regulators may be the appropriate authority for imposing such requirements, for ensuring compliance with disclosure obligations and for updating such requirements in the future. We believe that all public companies should be subject to the same executive compensation disclosure rules, which would not be the case if new requirements are introduced into the CBCA. In addition, new CBCA executive compensation disclosure rules would invariably have some overlap with the existing executive compensation disclosure requirements imposed by securities regulation, creating a duplicative and inefficient framework. We would therefore recommend that the CBCA not be amended to include executive compensation disclosure obligations for public companies incorporated under the CBCA.

II. Shareholder Rights

A. Voting

The Consultation Document seeks comments on a number of shareholder rights matters relating to the election of directors. We generally support the consultation being undertaken in regard to these issues as part of the modernization of the CBCA's corporate governance framework.

We note that recent reforms adopted by the Toronto Stock Exchange (TSX) for its listed issuers mandate individual director elections, the adoption of a majority voting policy, annual director elections and disclosure of voting results, whether a vote was held by ballot or show-of-hands. The TSX Venture Exchange (TSXV) also mandates individual director elections and annual director elections. In addition, securities regulation specifically exempts TSXV issuers from having to disclose detailed voting results.

The Consultation Document identifies two additional issues relating to shareholder voting rights: (a) "overvoting" of voting rights attached to corporate shares, and (b) "empty voting" by shareholders with a diminished or negative economic interest in the corporation relative to their voting interest.

Canadian securities regulators are considering the issue of overvoting as part of a broader review of the proxy voting system. The integrity of the proxy voting system is an issue fundamental to market confidence, as it is the mechanism through which shareholders exercise rights established under corporate and securities law. Since this is an issue of common interest for corporate and securities law, it would be appropriate for Industry Canada and the CSA to coordinate our analysis of, and potential solutions to, overvoting.

The CSA published a consultation paper on the proxy voting system in August 2013 seeking public comments on the vote reconciliation process and on end-to-end vote confirmation. We are currently engaging in further consultations with key stakeholders, including issuers, investors, intermediaries and service providers. We will carefully consider the feedback from these consultations before determining next steps.

We think it is appropriate for the CSA to take a primary role in addressing the issues relating to overvoting due to (a) our familiarity with the intermediated holding system, (b) our regulation of issuer communication with beneficial holders through National Instrument 54-101 *Communication with Beneficial Owners of Securities of a Reporting Issuer* (NI 54-101), and (c) the relevance of capital market transactions, such as securities lending, to overvoting concerns.

The proxy voting system is extremely complicated as a result of the many layers of intermediaries that hold shares in fungible bulk on behalf of investors to facilitate clearing and settlement. While NI 54-101 tries to address the challenge of voting in these circumstances by imposing obligations on issuers and intermediaries to send proxy-related materials and solicit voting instructions from the ultimate investor (as discussed below), it does not explicitly regulate a number of areas, including vote reconciliation and end-to-end vote confirmation, which some issuers and investors regard as significant regulatory gaps. We will be considering as part of our review of the proxy voting system whether NI 54-101 and other securities legislation need to be amended to address these areas.

With respect to empty voting, Canadian securities regulators are concerned that empty voting can compromise the basic premise of shareholder democracy (*i.e.*, that shareholders have an aligned economic interest in the shares that they vote). We are currently considering reforms to our early warning disclosure regime that would provide greater transparency on the practice of empty voting. Securities regulators also have the ability to apply their public interest jurisdiction in appropriate circumstances. We continue to monitor developments on the incidence and impact of empty voting. We are supportive of Industry Canada's review of empty voting, including the extent to which empty voting undermines the shareholder voting requirements of the CBCA and the potential solutions that could be enacted through amendments to the CBCA. Since empty voting is another area of intersection between corporate and securities law, we believe it would be appropriate for Industry Canada and the CSA to coordinate their analysis and policy development in this area.

B. Shareholder and Board Communication

The Consultation Document seeks comment on a number of issues relating to communications between shareholders, issuers and their boards. This is an area where securities regulators have taken a leadership role and that we are continuing to assess as technological and market developments evolve.

The CSA's initiatives in this area focus on facilitating communication between issuers and beneficial owners, primarily for the purpose of proxy voting, by requiring delivery of materials from

the issuer to beneficial owners and voting instructions from beneficial owners to the meeting tabulator. This is accomplished through NI 54-101 and its predecessor, National Policy Statement 41.

NI 54-101 permits beneficial owners to maintain anonymity from issuers and other parties by choosing to be Objecting Beneficial Owners (OBOs). However, an issuer is only required to pay for delivery of materials to Non-objecting Beneficial Owners and to the intermediaries through which OBOs hold their securities. An issuer is not required to pay the intermediaries to forward such materials to their OBO clients.

The Consultation Document refers to concerns that privacy laws may be impacting the ability of issuers to send proxy-related materials directly to beneficial owners. It is not clear to us whether the concern is with the effectiveness of the framework for delivery of proxy-related materials set out in NI 54-101, or whether the concern is that issuers are not obligated to pay or reimburse intermediaries for forwarding materials to their OBO clients. Therefore, in addition to the privacy concerns identified in the Consultation Document, an additional issue for consideration is the risk of substantive disharmony between NI 54-101 and any potential reforms to the CBCA in relation to delivery of proxy-related materials to beneficial owners. Accordingly, we strongly believe that any amendments to the CBCA on this issue should only be made after coordinated consultation with the CSA.

We have also recently made amendments to NI 54-101 that would permit issuers to use notice-and-access as an alternative to the traditional paper delivery of a full set of meeting materials. As noted in the Consultation Document, there is currently a concern that CBCA issuers may not be able to take advantage of notice-and-access provisions in securities legislation due to a risk of conflict with CBCA provisions requiring delivery of certain paper documents to shareholders (unless express prior shareholder consent is obtained). This denies such issuers the benefit of a cost-effective mechanism for delivering materials to investors. Therefore, we strongly support amending the CBCA to facilitate notice-and-access for CBCA corporations.

C. Board Accountability

The Consultation Document sets out a number of issues relating to board accountability under the CBCA that have been addressed by securities regulators in the context of public companies.

Industry Canada is considering whether the CBCA should be amended to mandate separation of the roles of the CEO and the Chair of the board of directors. The CSA has developed best practice guidelines for boards of directors, as set out in National Policy 58-201 *Corporate Governance Guidelines* (Governance Guidelines). The Governance Guidelines are not mandated and public companies are only required to disclose whether they comply with them or explain why they do not. In the Governance Guidelines, we recommend that the Chair be an independent director or that an independent “lead director” be appointed. The definition of independence for this purpose precludes a director from being an employee or executive officer of the issuer. Any reforms mandating separation of the roles of CEO and Chair would go beyond the Governance Guidelines but would not be inconsistent with them.

Industry Canada is also considering whether to amend the CBCA to require shareholder approval for acquisitions involving share issuances that would result in the acquirer’s shareholders being diluted by more than 25%. We agree there is a significant risk of dilution to existing shareholder interests when shares are used as currency for an acquisition. As a result, the TSX has amended the TSX Company Manual to mandate shareholder approval if the dilution of existing

shareholders' interests is in excess of 25%. We believe that this is an appropriate response to the dilution risk and takes into account the difference between issuers listed on the TSX and the TSXV. We also note that this issue is dealt with by the TSX as part of a complex regime addressing a number of dilution concerns through specific requirements and, where appropriate, the exercise of discretion by the TSX. We would therefore recommend that the CBCA not be amended to address this issue.

The Consultation Document also addresses the issue of mandating disclosure for public companies of the board's understanding of the impact of social and environmental matters on the corporation's operations. We note that there are existing continuous disclosure requirements in securities law that require disclosure of material environmental and social matters for public companies. We have provided guidance in CSA Staff Notice 51-333 *Environmental Reporting Guidance* on how these securities law disclosure requirements specifically apply to environmental matters.

III. Securities Transfers and Other Corporate Governance Issues

Industry Canada is contemplating the removal of insider trading prohibitions in the CBCA on the basis of reliance on provincial securities law prohibitions on insider trading. We are generally supportive of this proposal, as it reduces duplication between corporate and securities law while placing appropriate reliance on enforcement by securities regulators.

IV. Corporate Transparency

Industry Canada is consulting on several transparency initiatives. We are generally supportive of initiatives to increase transparency of ownership for enforcement purposes. We would urge Industry Canada to include securities regulatory authorities among the enforcement authorities that are provided with access to corporate ownership information. This would address one of the key obstacles faced by securities regulators in investigating fraud and compliance violations.

V. Diversity of Corporate Boards and Management

Industry Canada is seeking comment on whether to amend the CBCA to adopt measures to increase women's representation on boards. In January 2014, the Ontario Securities Commission proposed for public comment local amendments to the disclosure requirements of the Governance Guidelines that would require TSX-listed issuers to provide "comply or explain" disclosure regarding policies on women's representation on the board and other related matters. A number of other members of the CSA are supportive of this initiative in principle. We encourage further dialogue between Industry Canada and the CSA regarding any potential amendments to increase women's representation on boards.

VI. Administrative and Technical Matters

Industry Canada is seeking comment on potential reforms to proxy solicitation as part of the "Administrative and Technical Matters" section of the Consultation Document. This is an area of significant overlap with securities law, and is also of increasing relevance to capital markets as increased shareholder activism results in an increase in proxy contests. In addition, securities regulators have in the past harmonized their solicitation requirements with reforms to the CBCA.

Securities legislation imposes an obligation on management and shareholder dissidents of public companies to provide information circulars to shareholders from whom they are soliciting proxies.

Securities legislation has carve-outs from the obligation to provide an information circular by dissidents similar to those provided under the CBCA.

One of the key carve-outs from our regulatory regime permits a dissident to solicit proxies from not more than 15 persons without providing an information circular to solicited shareholders. We believe that this carve-out strikes a balance between reducing the risks and costs of soliciting proxies in a proxy contest while maintaining the general requirement for an information circular to accompany solicitations.

Industry Canada is considering whether to raise the 15-person threshold below which a dissident can solicit proxies without the need to send a dissident's proxy circular. It is not clear to us whether there is a need for any such change. We are not aware of any concerns raised about this threshold being too restrictive and would recommend that any changes (a) be based on evidence that the current threshold insufficiently supports shareholder communication by dissidents, and (b) take into account the impact of a broadening of the carve-out on all relevant stakeholders. We encourage further dialogue between Industry Canada and the CSA so as to ensure we continue to have a harmonized approach to proxy solicitation in Canada.

Conclusion

We appreciate the opportunity to comment on the Consultation Document. We share your commitment to ensuring that the regulatory framework for Canadian public companies continues to meet the needs of a rapidly changing marketplace. We look forward to engaging with you further regarding issues of mutual interest. Please do not hesitate to contact us if you or your staff have any questions or need further information regarding this submission.

Yours very truly,



William S. Rice, Q.C.
Chair, *Canadian Securities Administrators*
Chair and Chief Executive Officer, *Alberta Securities Commission*

cc: Brenda M. Leong, Chair and Chief Executive Officer, *British Columbia Securities Commission*
Donald G. Murray, Chair, *The Manitoba Securities Commission*
Peter Klohn, Chair, *Financial and Consumer Services Commission of New Brunswick*
Don Boyles, Deputy Superintendent of Securities, *Service Newfoundland and Labrador*
Gary MacDougall, Superintendent of Securities, *Department of Justice, Northwest Territories Securities Office*
Sarah P. Bradley, Chair, *Nova Scotia Securities Commission* and Vice-Chair, *Canadian Securities Administrators*
Louis Arki, Superintendent of Securities and Director of the Legal Registries Division, *Department of Justice, Government of Nunavut*
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