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Director General
Marketplace Framework Policy Branch
Industry Canada
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Submitted via Email: cbca-consultations-lcsa@ic.gc.ca

**Re: Response to Industry Canada's Consultation on the *Canada Business Corporations Act*** ("CBCA")

May 14, 2014

Dear Director General,

BlackRock, Inc. ("we" or "BlackRock") welcomes the opportunity to comment on Industry Canada's Consultation on the *Canada Business Corporations Act* (the "Consultation Paper").

BlackRock is committed to engaging with companies and voting proxies in the best long-term economic interests of its clients. Our Corporate Governance and Responsible Investment ("CGRI") team comprises 20 professionals dedicated to proxy voting and company engagement in six offices around the globe. Additionally, approximately 40 senior investment professionals across our global offices oversee and guide the work of the CGRI team. BlackRock votes at approximately 15,000 shareholder meetings annually, across 90 countries, in accordance with our internally-developed proxy voting guidelines, which are publicly available and can be found on www.blackrock.com/corporate/en-us/about-us/responsible-investment.

BlackRock Asset Management Canada Limited ("BlackRock Canada"), an indirect wholly-owned subsidiary of BlackRock, is registered as a portfolio manager, investment fund manager and exempt market dealer in all the jurisdictions of Canada and as a commodity trading manager in Ontario. BlackRock's CGRI team votes at approximately 650 shareholder meetings in Canada annually. BlackRock Canada is a member of the Canadian Coalition for Good Governance ("CCGG"), a group of 47 institutional investors with nearly CAD $2 trillion assets under management that is dedicated in part to promoting good governance practices in Canadian public companies. As of December 31, 2013, BlackRock Canada had assets under management of approximately CAD $140 billion.

Our views herein pertain to equity ownership in publicly listed companies and may not apply to privately held companies which are also incorporated under the CBCA. We note that several of the issues on which Industry Canada is soliciting feedback, including but not limited to issues raised in the Consultation Paper under the headings of "Shareholder Rights" and "Diversity of Corporate Boards and Management", are currently being addressed or focused on by Canadian

securities regulators and/or quasi-regulatory bodies[1]. While BlackRock welcomes efforts to ensure the CBCA remains a well-functioning statute, we respectfully encourage Industry Canada to coordinate with bodies such as the Canadian Securities Administrators, Toronto Stock Exchange ("TSX") and the Ministry of Government Services (Ontario) to ensure consistency of approach on issues such as these which intersect with the governance interests of various regulatory stakeholders in Canada.

In this letter, we provide our views on the following issues identified by Industry Canada staff as requiring additional review at this time in the respective sections of the Consultation Paper:

I. Executive Compensation
- shareholder advisory votes on compensation packages

II. Shareholder Rights

A. Voting
- mandatory voting by ballot at shareholder meetings and disclosure of results by public companies
- individual election of directors and "slate" voting
- maximum one-year terms and annual elections for directors
- director election by majority vote

B. Shareholder and Board Communication
- access to proxy circular by "significant" shareholders (more than 5-percent ownership)
- equal treatment of shareholders in proxy process, irrespective of shareholder privacy concerns

C. Board Accountability
- roles of the Chief Executive Officer (CEO) and the Chair of the Board
- shareholder approval of significantly dilutive acquisitions
- disclosure of the board's understanding of social and environmental matters on corporate operations

III. Securities Transfers and Other Corporate Governance Issues
- Canadian residency requirements for CBCA directors

VII. Diversity of Corporate Boards and Management

[1] Toronto Stock Exchange Mandates Majority Voting to Further Enhance Corporate Governance http://www.tmx.com/en/news_events/news/news_releases/2014/02-13-2014_TMXGroup-MajorityVotingMandate.html;

CSA Consultation Paper 54-401 – *Review of the Proxy Voting Infrastructure*, August 15, 2013. http://www.osc.gov.on.ca/documents/en/Securities-Category5/csa_20130815_54-401_proxy-voting.pdf;

Proposed OSC Amendments to Form 58-101F1 *Corporate Governance Disclosure* of National Instrument 58-101 *Disclosure of Corporate Governance Practices*: Proposed Disclosure Requirements Regarding the Representation of Women on Boards and in Senior Management http://www.osc.gov.on.ca/en/SecuritiesLaw_ni_20140116_58-101_pro-amd-f1.htm

I. Executive Compensation

- *Shareholder advisory votes on compensation packages*

BlackRock does not believe that mandated shareholder advisory votes on executive compensation ("advisory votes") would contribute meaningfully to shareholders' rights in Canada. We believe strongly that boards are responsible for ensuring that executive compensation is aligned with company performance relative to peers. Therefore, we conduct an annual pay-for-performance evaluation for each company in our clients' portfolios. In our experience, most Canadian boards do a good job of managing compensation most of the time.

Where we observe a disconnect between pay and performance relative to peers, we believe it is most effective for shareholders to express concern by withholding votes from compensation committee members. We believe that compensation committees are in the best position to make compensation decisions and should maintain significant flexibility in administering compensation programs, given their knowledge of the wealth profiles of the executives they seek to incentivize, the appropriate performance measure for the company, and other issues unique to the company. We believe that compensation committee members should be held directly accountable for these decisions.

We note that some proponents of advisory votes believe that the votes may lead to more meaningful engagement between boards and shareholders regarding executive compensation. We believe that, in the event of questions or concerns regarding an observed pay-for-performance disconnect at the company, investors are best served by engaging directly with compensation committee members. Our experience with advisory votes in other markets is that these votes often cause distraction for investors and for issuers; advisory votes can lead to unproductive engagement that is narrowly focused on executive compensation at the expense of other, more value-oriented issues. As a result, we question whether an advisory vote adds value to the engagement process.

We recognize that there is support amongst some investors, including groups of which BlackRock is a member, for such a vote. If this view prevails, we would prefer the advisory vote to be a best practice recommendation rather than set in corporate law. If experience leads to the conclusion that the advisory vote has not had the desired effect, best practice guidelines can be changed more readily than corporate law.

II. Shareholder Rights

A. Voting

- *Mandatory voting by ballot at shareholder meetings and disclosure of results by public companies*

BlackRock supports mandatory voting by ballot at shareholder meetings and the disclosure of results by public companies. Proxy voting is an essential form of communication between shareholders and companies' boards of directors, who serve as agents on behalf of

shareholders – indeed, it is a fundamental component of our corporate governance engagement program through which we seek to protect and enhance the economic value of the companies in which BlackRock invests on behalf of clients. As such, we believe it is imperative that boards receive a detailed record of shareholder voting results in order to better understand the views of shareholders, and that boards disclose these results publicly in order to allow shareholders to hold companies accountable.

- *Individual election of directors and "slate" voting*

The election of directors is one of the most important corporate governance decisions we make as a shareholder. Directors serve a critical role in representing our interests in the boardroom, and the vote on directors is our primary tool to ensure accountability to shareholder interests. Generally, our starting position is to be supportive of boards in their oversight efforts on our behalf. However, boards can, and occasionally do, fail in their duty to protect shareholder interests. These failures may reflect action or inaction of the entire board, but more often we see failures that we attribute to a specific committee of the board or an individual director.

Unfortunately, the election of directors by slate provides for an "all or none" choice where shareholders can either support an entire slate or withhold support from an entire slate; investors do not have the ability to support or oppose individual directors despite their desire to do so. We strongly prefer to voice any concerns regarding individual directors by voting against these specific directors. In our view, the slate voting mechanism allows directors to avoid individual accountability and prevents shareholders from providing specific and meaningful feedback via their proxy vote. Furthermore, we have not identified any tangible benefits to slate voting.

- *Maximum one-year terms and annual elections for directors*

A classified board of directors is one that is divided into classes (generally three), each of which is elected on a staggered schedule (generally for three years). At each annual meeting, only a single class of directors is subject to re-election (generally one-third of the entire board).

We believe that classification of the board dilutes shareholders' rights to promptly evaluate a board's performance and limits shareholder selection of their representatives. By not having the mechanism to immediately address concerns we may have with any specific director, we may be required to register our concerns through our vote on the directors who are subject to election that year. Furthermore, where boards are classified, director entrenchment is more likely, because review of board service generally only occurs every three years. We therefore believe that each individual director should be subject to election annually.

- *Director election by majority vote*

Consistent with our stated views on the importance of the election of directors, BlackRock generally supports the concept of director election by majority vote. We note that the ability to elect directors individually is a prerequisite for majority voting to be an effective tool.
In our view, one of the key requirements for meaningful board elections is the right to elect directors by majority rule of the total votes cast in uncontested elections. As such, we believe

that the implementation of required majority voting would significantly improve shareholders' rights by strengthening shareholders' primary tool for electing their representatives in the boardroom. Majority voting standards assist in ensuring that directors who are not broadly supported by shareholders are not elected to serve as their representatives. We do not believe that the use of a plurality vote standard in uncontested elections results in a meaningful election, because directors can be assured re-election regardless of the number of votes each director receives in the election.

We note that the TSX recently announced that it has received notice of approval from the Ontario Securities Commission ("OSC") to proceed with amendments to the TSX Company Manual, mandating TSX issuers adopt majority voting. According to the TSX, the amendments in part require that each director of a TSX-listed issuer, other than of a majority controlled issuer, be elected by a majority of the votes cast with respect to his or her election other than at contested meetings. Any director who is not elected by at least a majority must immediately tender his or her resignation to the board of directors, which will determine whether or not to accept the resignation within 90 days after the shareholder meeting. The rule states that the board shall accept the resignation absent exceptional circumstances, and requires the issuer to promptly issue a news release with the board's decision. If the board determines not to accept a resignation, the news release must fully state the reasons for that decision.

We support these amendments mandating that TSX issuers adopt majority voting, and broadly agree with the parameters of the rule. For example, we agree that majority voting is not appropriate in all circumstances such as in the context of a contested election. We also recognize that there may be situations in which a board could reasonably conclude that accepting the resignation of a director who failed to receive majority support of shareholders is not in the best interest of the company or the shareholders. For example, a board might temporarily reject a resignation in order to provide the time required to reconstitute and reorganize the board, or to otherwise ensure that the resignation of a director does not impair the effective independent oversight of the company. In such situations, we believe it is important for the board to clearly explain the reasons for that conclusion to shareholders so that shareholders can understand the situation and, if necessary, engage in a constructive discussion with the board. We note that requiring such a public explanation will also ensure that boards undertake a thoughtful review of the voting outcome and do not reject the will of shareholders absent special circumstances.

B. Shareholder and Board Communication

- *Access to proxy circular by "significant" shareholders (more than 5-percent ownership)*

We believe that long-term shareholders should have the opportunity, when necessary and under reasonable conditions, to nominate individuals to stand for election to the boards of the companies whose shares they own and to have those nominees included on the company's proxy card. This right is commonly referred to as "proxy access". In our view, securing a right of shareholders to nominate directors without engaging in a control contest can enhance shareholders' ability to participate meaningfully in the director election process, stimulate board

attention to shareholder interests, and provide shareholders an effective means of directing that attention where it is lacking.

Proxy access mechanisms should provide shareholders with assurances that the mechanism will not be subject to abuse by short term or opportunistic investors, investors without a substantial investment in the company, or investors seeking to take control of the board. As such, we would suggest requiring a multi-year holding period before allowing an investor to make use of proxy access. We believe that the proposed threshold of five percent of outstanding shares is within a reasonable range for proxy access, and that an adjustment to this threshold may be appropriate depending on the company's market capitalization. We would also suggest that a maximum of 15-25% of board seats should be subject to proxy access. In our view, shareholders seeking to replace more than 25% of board members in any one election cycle should utilize the current proxy contest mechanisms because a shareholder seeking to pursue such a substantial change in the control of the board should expend their own resources, rather than being able to leverage a shareholder access mechanism which requires expending the issuer's resources, thus imposing the costs on all shareholders.

- *Equal treatment of shareholders in proxy process, irrespective of shareholder privacy concerns*

Canada does not currently have a standardized proxy voting entitlement, distribution and processing system. A troubling result of the lack of standardization is the differing treatment of investors who do not reveal their identity to issuers (Objecting Beneficial Owners, "OBOs") and investors who have made their identity known to issuers (Non-Objecting Beneficial Owners, "NOBOs").

Under National Instrument 54-101 – *Communication with Beneficial Owners of Securities of a Reporting Issuer* ("NI 54-101"), Canadian issuers bear the cost of distributing proxy materials to NOBOs. Issuers contact NOBOs in whatever manner the issuer deems appropriate (methods include fax, email and mail), whereas OBOs are generally contacted through their custodians via an established intermediary, such as Broadridge, around which many investors have well-tested controls. We believe that investors would benefit from the establishment of a standardized proxy voting processing system that takes into account the global scope of many investors' shareholdings and that utilizes established intermediaries which are better positioned to implement such a standardized system.

We would support allowing temporary access to the identity of OBOs to issuers and official tabulators if this access would improve the reliability and accuracy of proxy voting while minimizing the possibility of proprietary trading data being released. However, beneficial owner information should be disclosed only at the level of the entity holding the vote authority. Many investment managers hold delegated vote authority over the assets in their clients' accounts; it would not be appropriate to require disclosure of the client's identity when the client has delegated vote authority to their investment manager.

Investors have a legitimate privacy interest in their identity and holdings. Although the current OBO/NOBO system provides OBOs with certain privacy benefits, we do not believe that it has

been entirely successful for Canadian investors as a whole, as noted in our responses herein. However, in our view, requiring full disclosure of the identity of institutional investors –who may determine to forgo or outsource to an agent their proxy voting and corporate governance engagement activities, or whose positions in a security may have market-moving influence – would be inappropriate. It is vital that any reform of the NOBO/OBO system incorporate relevant privacy provisions and constraints on the use of the data in order to protect fund investors from the risk that competitor funds might exploit another's trading information to the detriment of investors. In addition, regulations permitting temporary access to the identity of OBOs would need to impose restrictions on the use of beneficial ownership data by third parties receiving such information in order to prevent abuse.

C. Board Accountability

- *Roles of the Chief Executive Officer (CEO) and the Chair of the Board*

We believe that independent leadership is important in the board room. National Policy 58-201 – *Corporate Governance Guidelines* states at Section 3.2 that:

> The chair of the board should be an independent director. Where this is not appropriate, an independent director should be appointed to act as 'lead director'. However, either an independent chair or an independent lead director should act as the effective leader of the board and ensure that the board's agenda will enable it to successfully carry out its duties.

We therefore generally consider the designation of an independent lead director as an acceptable alternative to an independent chair if the independent lead director meets this definition. Where a company does not have an independent chair or an independent lead director that meet these criteria, we generally support the separation of Chair and CEO roles.

- *Shareholder approval of significantly dilutive acquisitions*

Shareholders should be able to vote on matters that are material to the protection of their investment including, but not limited to, changes to the purpose of the business and the capital structure. To the extent an acquisition fundamentally alters the strategy or purpose of the business, shareholders should have the right to vote on said acquisition, regardless of the company's chosen financing mechanism or the associated equity dilution level. This notwithstanding, we support a requirement for shareholder approval for acquisitions paid for in whole or in part by the issuance of new shares, and believe that 20-25% is a reasonable dilution threshold above which shareholder approval should be required.

- *Disclosure of the board's understanding of social and environmental matters on corporate operations*

We believe that well-managed companies will deal effectively with the social, ethical and environmental ("SEE") aspects of their businesses. BlackRock expects companies to identify and report on the key, business-specific SEE risks and opportunities and to explain how these are managed. This explanation should make clear how the approach taken by the company best

serves the interests of shareholders and protects and enhances the long-term economic value of the company. The key performance indicators in relation to SEE matters should also be disclosed and performance against them discussed, along with any peer group benchmarking and verification processes in place. This helps shareholders assess how well management is dealing with the SEE aspects of the business. Any global standards adopted should also be disclosed and discussed in this context. We expect investee companies to comply, at a minimum, with the laws and regulations of the jurisdictions in which they operate. They should explain how they manage situations where such laws or regulations are contradictory or ambiguous. Given that the field of sustainability reporting is rapidly evolving, we suggest that corporate law should require disclosure of material SEE matters but leave the detail of what should be disclosed to securities regulators and others whose recommendations can adapt over time to reflect current best practice.

III. Securities Transfers and Other Corporate Governance Issues

- *Canadian residency requirements for CBCA directors*

We respectfully oppose Canadian residency requirements for CBCA directors based on the principle that we oppose arbitrary restrictions on the pool of directors from which shareholders can choose their representatives. We believe that nominating committees should consider director candidates based in part on their skills, experience and expected contribution to the success of the company. We encourage boards to routinely refresh their membership to ensure that new viewpoints are included in the boardroom and to ensure that board composition appropriately reflects current and anticipated needs of the company.

VII. Diversity of Corporate Boards and Management

Greater boardroom and senior management diversity needs to be understood as a challenge associated with changing corporate culture. The importance of greater diversity must be acknowledged and accepted before it can yield tangible and sustainable results. As such, we strongly support the use of voluntary initiatives to address the issue of diversity and of gender imbalance in the composition of corporate boards. The voluntary approach could be strengthened by including principles on boardroom diversity in the CBCA, requiring disclosure of the board's policy on diversity in the context of its composition objectives, encouraging higher board turnover by considering director term limits and/or age limits, widening the candidate pool by encouraging the board of directors and executive recruitment firms to expand their search for candidates without previous board experience, and by encouraging investor engagement on the progress of diversity initiatives. We expect that doing so would lead to greater diversity of backgrounds, experience and gender.

We believe that a formal appointment process is key to achieving more diverse boards. One straightforward approach, which we have found is not a standard practice in all companies, is the creation of an objective 'job description' prior to the identification of a preferred candidate. The job description should be drawn up for each board or senior management appointment, and should identify the expectations of the appointee in terms of skills, experience and contribution to the success of the company. This neutral framework enables the subsequent recruitment

process to proceed with less bias and may result in the identification of candidates who would not otherwise have been considered.

We also believe it would be helpful for the report of the nominating committee to include a discussion of the company's policy on diversity and how it was taken into account in any appointments made during the period. It should also discuss its own composition in the context of the policy and any diversity objectives the board and/or management is working towards in the near term. To the extent it has been unable to meet these objectives, the company should discuss any obstacles encountered. In doing so, we believe this should help both identify any industry-specific, structural or fundamental impediments to achieving diverse corporate leadership which may need to be dealt with by policy makers and otherwise inform the broader societal discussion regarding diversity in the corporate context.

While the debate on female representation in corporations has primarily concentrated on boardrooms in recent years, we believe the more important priority is the development of a sustainable pipeline of female candidates for executive positions, as the chain of professional development for board members generally includes experience in senior management. We recommend that boards seek to better understand gender representation at each level of their organization, and also to understand the initiatives taken by management to address any gender imbalances. In doing so, an organization may identify varying levels of gender diversity across different working groups or tiers of management, which can help them to tailor their gender diversity policies in order to better redress any diagnosed imbalances. Given that the gender imbalance at senior management positions is a long-term structural challenge that, in some cases, may require a significant period of time to address, we recommend that initial efforts focus on encouraging companies to understand the significance of gender diversity, both at the executive level as well as at the boardroom level.

BlackRock appreciates the opportunity to address and comment on the issues raised by this Consultation Paper. We are prepared to assist Industry Canada in any way we can, and welcome continued dialogue on these important issues. Please contact us if you have any comments or questions regarding BlackRock's view.

Yours faithfully,

Zachary M. Oleksiuk
Vice President
Head of Americas Corporate Governance and Responsible Investment

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