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Director General
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Re: Response to the request for comments Industry Canada
Consultation on the Canada Business Corporations Act

We preface this response by expressing our appreciation to Industry Canada and the Director General for undertaking this important public consultation and for the opportunity if affords the undersigned to express the hopes and concerns of our members.

The Canadian Society of Corporate Secretaries ("CSCS") is a national association representing corporate secretaries and governance professionals.

Certain of the questions raised in the consultation are vital to CSCS and our members. The consultation comes at a very opportune time. Shareholder democracy is receiving considerable attention on the part of the public and concerned regulators.

The movement to give shareholders a stronger voice in the way Canada's public companies are governed is a positive trend that benefits both investors and issuers. CSCS believes the question is not whether shareholders ought to have a voice, but rather whether that voice is being heard properly.

CSCS believes that all shareholders, registered and beneficial alike, deserve equal rights. We also believe that their votes must be counted with the same degree of care and integrity that applies to ownership and dividend rights.

Unfortunately, the current system of shareholder voting falls far short of respecting these basic principles.

Until recently the Canadian Securities Administrators ("CSA") dominated the regulatory response to the growing dysfunction in the arena of shareholder democracy. Their efforts were in some meaningful measure hampered because some of the difficult issues that lead to the dysfunction are rooted in corporate law, and not in securities law. Securities regulators have laboured to address many of the symptoms, without being able to address root causes.

The consultation paper correctly describes the influence of the Canada Business Corporations Act ("CBCA") among Canada companies, but in our view does not sufficiently emphasize the critical role the CBCA plays in the case of Canada's publicly traded companies. The CBCA governs more public companies than any other corporation statute in Canada.

Approximately 56% of the public companies in the S&P/TSX 60 Index, and 39% of the S&P/TSX Composite Index are governed by the CBCA. The percentage is even greater if federally regulated financial institutions are taken into account. While those companies are not directly regulated by the CBCA, the CBCA serves as the model for the corporate law provisions of the statutes that govern those financial institutions.

Among Canada's corporation regulators, Industry Canada plays a leading role. As the consultation paper points out, the CBCA was the progenitor of the vast majority of the provincial business

corporation laws. Industry Canada is without doubt best positioned among corporation regulators to play a truly meaningful role in the reform of corporate law in Canada.

CSCS for its part has devoted considerable time and resources to promote a fundamental reform of the rules for shareholder voting:

- In 2005 we conducted a series of forums in collaboration with the CSA in Montreal, Toronto, Calgary and Vancouver to discuss the functioning of National Instrument 54-101 on communications with beneficial shareholders.
- In 2007 we participated in a stakeholders' panel on shareholder voting at the annual conference of the Canadian Investor Relations Institute.
- We published a white paper in 2008 promoting changes to the corporation statutes to provide equal treatment for registered and beneficial shareholders.
- In 2010 we extensively reviewed and provided comments to assist in the preparation of the Davies paper on the Quality of the Shareholder Vote in Canada.
- We convened the 2011 Shareholder Democracy Summit and published an inaugural report with the Summit's findings.
- In 2012, following up on the Summit, we proposed to key stakeholders a Facilitation Program with a five year roadmap and milestones that would clear the path for reform.
- In the fall of 2013 we conducted a series of public forums on shareholder democracy along with the CSA. Open meetings were held in Montreal, Toronto, Calgary and Vancouver.
- We were invited, as an industry expert, to participate in round table public hearings convened by the Ontario Securities Commission in Toronto in January 2014, and by the Alberta Securities Commission in Calgary in March 2014.
- Most recently, also in March, we held a series of round tables in Toronto, Calgary and Vancouver to solicit the views of our members and of industry stakeholders in preparation for this response letter.

Progress made to date in addressing the well-documented challenges facing shareholder democracy, in spite of these efforts, has been painfully slow, and the modest progress that has occurred has been disappointing.

As the CSA have acknowledged, the shareholder voting system has evolved over time into a highly complex intermediated system. The CSA acknowledges the complexity inherent in the vertical dimension of the shareholder voting process. This is the dimension that allows votes and other shareholder rights to flow from the issuer at one end of the vertical process to the investor at the other end.

The degree of complexity in the vertical axis is matched by an equivalent degree of complexity in the horizontal axis.

On the horizontal axis we find at each layer of the vertical axis numbers of stakeholders who have similar roles. In certain cases collaboration among roles has resulted in some form of integration in the processes applied at that layer. For instance, transfer agents in Canada collaborate as members of the Securities Transfer Association of Canada (“STAC”). At the intermediary level there is similar industry collaboration in the Investment Industry Association of Canada (“IIAC”). There are similar associations at most of the horizontal layers; for instance the Canadian Coalition for Good Governance (“CCGA”) for institutional investors; and the CSA for securities regulators.

It is quite apparent that there are gaps in the collaboration initiatives that already exist that militate against meaningful progress. To mention one of most important gaps, at the regulatory level, there does not appear to be sufficient engagement between the CSA and their regulatory counterparts on the corporate law side, and in particular with Industry Canada.

It is for that reason that the present consultation on the part of Industry Canada, and in particular the issues canvassed in the consultation paper, is so very important.

Any attempt to address the serious shortcomings of the current processes requires a "holistic/comprehensive" approach.

The comprehensive approach that CSCS advocates is one that addresses not only the vertical dimension of complexity, but also its horizontal axis. CSCS believes that anything less will fail to lead to significant improvements in the process.

CSCS advocates a comprehensive approach to reform with the following salient features:

- Fundamental reform of both corporate and securities law rules relating to shareholder voting:
  - Securities and corporate regulators both fully engaged and committed to the reform process.
  - Registered and beneficial shareholders enjoying the same voting and participation rights.
- Elimination of the OBO/NOBO distinction:
  - Restoring the issuer's right to know the identity of its shareholders.
  - New rules for nominee holders that respect the investor's right to maintain privacy in relation to holdings and voting, while also respecting the issuer's right to know its shareholder.
- Complete dematerialization of the voting process:
  - Entirely digital end-to-end processes.
  - Normalized data flows for shareholder security positions as of the record date including voting and participation entitlement;
- Auditable data trails coupled with effective processes and controls to ensure respect for the integrity of the voting process.
- A specific roadmap for reform with defined milestones and a reasonable horizon for completion.

CSCS acknowledges that the challenge presented by the approach we advocate is substantial. It is important for stakeholders to bear in mind however that the ultimate objective is a very modest one: to ensure that shareholders receive equal treatment and that their votes are counted with the same degree of integrity that applies to other shareholder rights like dividends.

Canada is not the only country experiencing challenges when it comes to shareholder voting. We could seize the opportunity to be the first country to tackle the issue in a straightforward and intelligent way to deliver effective reform, as well as industry-leading processes.

Regulators, who coexist in horizontal silos similar to other stakeholders, have a key role, perhaps the key role to play. It is unfortunate that the regulators have yet to come together on this issue.

Industry Canada, the CSA, and the Bank of Canada have a responsibility to lead the way by establishing a meaningful and committed collaboration to address shareholder democracy concerns.

Effective shareholder voting is one of the cornerstones of effective governance and healthy capital markets. Industry Canada speaks of the CBCA as a "marketplace framework law". That description is perfectly fitting. The CBCA is the foundation of shareholder rights. Any other regulatory initiative that attempts to address perceived issues with shareholder democracy will of necessity be layered over and above the corporation statute. To the extent that the foundation is wanting, the ultimate structure will also be wanting.

Against that backdrop, we have the following observations in response to the consultation paper.

The consultation asks a number of important questions. We are limiting our response to the issues that are important to our members, and we address them in order of importance.

Shareholder rights - Voting, and Participation

The most important question that needs to be addressed is the definition of "shareholder".

The CBCA defines a shareholder narrowly as the person whose interest in the issuer's shares is recorded on the register required to be maintained by a corporation under the Act.

That notion of a "registered shareholder" works well for the vast majority of corporations governed by the CBCA. In the case of many of Canada's most important public companies, that definition disenfranchises the overwhelming majority of shareholders.

The pace and volume of transactions in the securities markets long ago outstripped the usefulness of the share register.

Since the advent of the depository system and the Canadian Depository for Securities, dating back to 1970, the book-based system has increasingly replaced the register as the source record for shareholder entitlements. Shareholders who hold their shares through CDS via market intermediaries and custodians are "beneficial shareholders" as opposed to "registered shareholders". Today, in the case of some issuers, registered shareholders make up a very small minority. In some cases, more than 99% of the issuer's shareholders are beneficial shareholders.

Over time, the CBCA has been amended in recognition of the important role that beneficial shareholders play in the modern public company. For instance, beneficial shareholders now have the right to submit shareholder proposals.

That process of enfranchisement has been slow in coming, and fails to extend all shareholder rights to beneficial shareholders.

There are many results of this dichotomous treatment of shareholders. Beneficial shareholders don't have the right to name proxies, they don't have the right to attend and vote at meetings. The process for enfranchising beneficial shareholders, absent reforms in the corporation statute, is indirect, unnecessarily convoluted, and confusing.

Other unintended consequences penalize issuers.

Public companies no longer have a reliable means of identifying their shareholders. The current intermediated holding system that dominates the ownership of Canadian public companies is often opaque to issuers when it matters most. The OBO/NOBO system that exists under securities regulation shields beneficial shareholders from view. To date CSCS has yet to hear a cogent and compelling argument for maintaining that enforced opacity. Often support for the OBO/NOBO system is a proxy for dysfunction in the voting process. For instance, institutional shareholders who find themselves as NOBOS also have found their ability to vote their shares compromised. They therefore opt for OBO status so they can vote, not because they have an interest in protecting their anonymity.

For shareholders who do wish to veil their holdings behind nominees, the right should exist as it does for other entitlements, for instance real estate holdings. The nominee holder is akin to a privacy fence or a walled estate. The cost of establishing and maintaining that fence or wall ought to be borne by the shareholder who feels the need for it, not by the public. The current OBO/NOBO system is similar to having the municipality build all fences and walls at public expense. The result would be, and is in the case of shares of public companies, a proliferation of fences and walls that insulates issuers from their shareholders needlessly. An issuer ought to have the right to know who its shareholders are, to know if a shareholder has voted or not in a contested election so that the issuer can take steps "to get the vote out". If a given shareholder is a nominee, that nominee ought to be wholly-owned by the ultimate beneficial shareholder and not operate as a commingled dark pool for large numbers of holders. CSCS is in favour of private fences not public ones.

Some of the bi-products of the current opaque system are votes that disappear before they can be counted; shareholders voting when they are not entitled to, leading to so-called "over-voting"; and ultimately "empty voting" when the voting right is stripped from the economic right.

Resolving some of these issues requires enfranchising beneficial shareholders.

But it is not a simple task.

Enfranchising beneficial shareholders supposes that an underlying process exists that is capable of identifying beneficial shareholders accurately when the time comes for them to exercise their rights. Typically that time will be as of a record date for a shareholder entitlement event.

In our public comments to the CSA we have advocated the dematerialization of the entire shareholder democracy process. Only end-to-end digital processes leveraging computing platforms will be able to support the kind of real-time, accurate, decentralized, distributed, record-keeping system necessary for dealing reliably and efficiently with the

entitlements and rights of beneficial shareholders. Of necessity, that initial first step will require action on the part of all agents and intermediaries who play a role in the processes that link shareholders to issuers.

It is clear that Industry Canada cannot address much less resolve these problems by acting unilaterally in isolation. No more so than any other regulatory authority has succeeded in doing in the past few decades.

Nevertheless, there are certainly some concrete steps that Industry Canada can take, and that it should take immediately and with vigor:

- Open a meaningful and effective ongoing dialogue with the CSA so that corporate law reform dovetails with securities law reform in all areas of overlap, and particularly in the areas vital to shareholder democracy.
- Eliminate from the CBCA rules that are already comprehensively addressed under provincial laws:
    - Rules on the holding and transfer of shares.
    - Proxy solicitation and the content of information circulars.
    - Insider reporting.
    - Regulation of take-over bids and issuer bids.
- To the extent that the federal regulator perceives a need that federally regulated corporations have that is not adequately addressed under provincial securities laws regulations…
    - Explore collaboration as a first recourse.
    - Failing collaboration, limit the provisions in the CBCA so that the additional or different requirements dovetail with existing provincial rules to the extent possible.

The approach we advocate will have a number of significant advantages for all stakeholders:

- For Industry Canada, the ability to focus its policy and regulatory resources on its core mission and competency which is corporate law, and the rights of corporations and their shareholders.
    - For instance, among the topics mentioned in the consultation paper, the following matters currently being addressed by securities regulators, are perhaps best addressed by Industry Canada in the CBCA:
        - Mandatory voting by ballot at shareholder meetings.
        - Individual election of directors and "slate" voting.
        - Maximum one-year terms and annual elections for directors.
        - Director election by majority vote. In this latter case, majority voting for CBCA issuers is accomplished currently indirectly by the adoption of by-laws or governance policies. This is because the CBCA is seen by many as imposing a plurality standard. The plurality standard makes sense to the extent that otherwise a corporation might find itself without a functioning board of directors. Yet the manner of director elections remains at its core a corporate law issue. Securities regulations that address the issue of majority voting can only do so obliquely, whereas Industry Canada is able to address the issue directly.
        - Some of the foregoing initiatives are already widespread among Canadian public companies governed by the CBCA and the CSCS and its members support them in similar proportions.
- For issuers governed by the CBCA and its federal sister statutes governing financial institutions, eliminating obstacles in the CBCA that prevent issuers from taking the benefit of key reforms in other areas. Notice and Access is a clear example that comes to mind. CBCA regulated issuers were for the most part prevented from taking advantage of this important reform as a result of conflicting provisions in the CBCA.
- Shareholders of CBCA corporations will benefit as a result of being fully enfranchised rather than having their rights as shareholders filtered and attenuated unnecessarily by the intermediated holding structure.
- The CSA will benefit from the collaboration of Industry Canada when the source of the regulatory concern rests in the realm of corporate law more properly than securities law. For instance, enfranchising beneficial shareholders is more logically, effectively, and simply accomplished through the reform of the corporation statute.

If the approach we advocate were to be followed by Industry Canada in pursuing the reform of the CBCA, it would be relatively simple to determine which of the questions raised in the consultation ought to be pursued in the realm of CBCA reform, and which of the questions ought to be left to other regulatory bodies:

Question	Regulatory Venue
Mandatory voting by ballot	CBCA
Individual election of directors	CBCA
Slate voting	CBCA
One-year terms for directors	CBCA
Annual election of directors	CBCA
Majority voting	CBCA
Rights of beneficial shareholders	CBCA
Transparency of shareholdings to issuers	CBCA
Executive compensation	CSA
Say on Pay	CSA
Notice and Access	CSA
Proxy solicitation rules	CSA
Access to the proxy circular	CSA
Shareholder proposals	CBCA
Rights of stakeholders including CSR	CBCA
Role of the CEO	CBCA
Role of the Board chair	CBCA
Access to oppression remedy	CBCA
Shareholder approval of dilutive transactions	CBCA
Securities transfers	Provincial statutes
Insider trading provisions	CSA
Residency requirements for directors	CBCA
Trust indentures	Shared jurisdiction
Liability for disclosure	CSA
Corporate transparency	CBCA
Corporate records	Shared jurisdiction

Incorporation Structure for Socially Responsible Enterprises

A concern was raised by one of our members during our March round tables. The view in some quarters is that the emergence of the benefit corporation in the United States is "a U.S. solution to a U.S. problem".

CBCA directors owe their duty or care, and their fiduciary duty, to the corporation, whereas U.S. directors owe their fiduciary duty to the company's shareholders. The Supreme Court of Canada has interpreted the CBCA in a way that makes it clear that directors of CBCA corporations are justified in taking the interests of other stakeholders, and not merely the interests of shareholders, into account in determining where the best interests of the corporation lie.

Those who promote the advancement of corporate social responsibility in Canada are making headway that eludes others in the U.S. because of the clarity of the CBCA on this important question and of the jurisprudence of our courts, including our highest court.

The concern they express is that adopting the U.S. solution here risks undoing the advances that have been made in corporate social responsibility if the existence of a special benefit corporation gives rise to a perception that, absent a special status charter, corporate social responsibility is no longer a relevant concern for directors of CBCA corporations.

CSCS supports this view and therefore does not support the creation of an incorporation structure for socially responsible enterprises.

Next Steps

On a final note to underscore the urgency for all Canadian regulators to address CSCS's concerns related to shareholder democracy processes, we wish to draw Industry Canada's attention to some troubling statistics on the incidence of unresolved shareholder vote over-reporting situations that occur at shareholder meetings. At the CSCS

2013 annual governance conference in Halifax, Computershare provided statistics that showed a 17.02% incidence for 2011, 22.70% for 2012 and 25.71% for 2013.

These statistics are truly a cause for concern and they reveal a troubling and worrisome trend.

To the extent that Industry Canada truly subscribes to the view expressed in the consultation paper that "shareholder voting rights are the foundation of corporate democracy, and that a transparent, accurate, efficient and accountable shareholder voting process is fundamental to good corporate governance and the maintenance of market confidence" there are compelling reasons for Industry Canada to act with urgency and vigor to address the concerns expressed in these comments.

We fundamentally disagree with the characterization in the consultation paper that the establishment of a level playing field for registered and beneficial shareholders is an "administrative or technical matter". Rather it is a matter of the first importance and a critical concern that goes to the heart of modern corporate law.

Yours truly,

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Chairman of the Board

Lynn Beauregard
President