

Wednesday, May 15, 2014

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

Re: Industry Canada's Consultation on the *Canada Business Corporations Act*

Credit Union Central of Canada (Canadian Central) welcomes the opportunity to participate in Industry Canada's consultation to strengthen the *Canada Business Corporations Act* (CBCA) framework.

Credit Union Central of Canada is the national trade association for the Canadian credit union system. Canadian Central represents five provincial/regional Centrals and one Federation representing 326 credit unions with more than \$160.9 billion in assets and serving over 5.3 million members, outside of Quebec. Financial co-operatives owned by their members, credit unions employ more than 27,000 people and serve more than five million members. Credit unions put service ahead of profit, which is why credit unions are the only bricks-and-mortar financial institution in more than 360 communities.

Although credit unions will not be impacted directly by reforms to the CBCA, the consultation document contains sections that are of interest to financial co-operatives. Canadian Central's Credit Union Socially Responsibility Committee and National Lenders Committee have reviewed the consultation paper and have provided feedback in relation to:

- IV. Incorporation Structure for Socially Responsible Enterprises
- VIII. Arrangements under the CBCA
- IX. Corporate Social Responsibility

Our comments are the following:

1. Incorporation Structure for Socially Responsible Enterprises (SREs)

The consultation paper inquired on "*the utility of SREs in the Canadian context and the extent to which current CBCA incorporation provisions and structures facilitate the creation of SREs.*"

Social enterprises are an integral part of a successful modern social economy. At present, social enterprises operate under a range of federal and provincial statutes as co-operatives, charities, non-profits and for-profit corporations.

As co-operatives, credit unions believe that the availability of a wide variety of corporate forms helps to strengthen the overall economy and society. No one type of business structure is ideally suited to all aims or outcomes. However, the government must understand these various corporate forms and be prepared to make accommodations to ensure that companies

with different corporate structures are still able to compete fairly and satisfy the company's public purpose.

In a modern economy, this public purpose may be environmental and/or social goals, in addition to providing profits or services to owners.

Canadian Central believes that a legal structure for social enterprises – like British Columbia's Community Contribution Company under the *Business Corporations Act* and Nova Scotia's *Community Interest Companies Act* - has the potential to contribute greatly to the development of the social economy in Canada.

Creating a new legal structure for social enterprises is an attractive idea since it has the potential to provide clarity around a corporate structure that is often misunderstood. Indeed, even though credit unions are strong supporters of social enterprises, many have identified that a key challenge in financing socially-purposed businesses relate to their structure and fiduciary obligations. This lack of understanding about the structure of social enterprises has resulted in creating a certain perception – real or perceived – that lending to them creates higher risk for the credit union. Creating a framework for social enterprises will raise awareness of this type of model and enhance the ability of financial institutions to provide them with the required capital to grow and serve their communities.

As Sean Markey et al. note, in order to maximize the benefits of a new legal structure for social enterprise, "*changes [to the CBCA] should be accompanied by supportive infrastructure and promotion, without diminishing the value of social enterprises not choosing the new structure.*"¹ Indeed, should parliament adopt a new legal structure, work should not end there. Government will be expected to continually work to raise awareness of the new structure by providing educational materials to social entrepreneurs, financial institutions and other stakeholders, but also to identify champions within government to ensure that the new framework is understood and serves leaders in the social economy.²

Finally, Canadian Central is of the view that a new legal structure for the incorporation of hybrid enterprises should be accompanied by an affirmative statement to balance the principle of shareholder primacy as it has existed in traditional corporate models. To be successful, the new structure for social enterprises needs to be able to foster targets towards and be accountable for, aims that may be, or appear to be contrary to obtaining maximum financial returns for shareholders. In other words, a new hybrid model should give traditional corporations more reasons to embrace corporate social responsibility.

2. Arrangements under the CBCA

The consultation paper invited stakeholders to provide comments "*as to whether the use of arrangements under the CBCA to restructure insolvent corporations is appropriate under certain circumstances and, if so, whether additional CBCA provisions may be necessary to safeguard the interests of creditors and other stakeholders similar to those found in insolvency statutes.*"

Credit unions are, of course, creditors to CBCA companies and thus have an interest in section VIII of the consultation paper relating to arrangements under the CBCA. To date, Canadian

¹ Sean Markey et al., "Social Enterprise Legal Structure: Options and Prospects for a 'Made in Canada' Solution," May 2011, <http://www.mtroyal.ca/cs/groups/public/documents/pdf/selsreport.pdf>. (accessed May 12, 2014): 3.

² *Idid*

Central has not received reports of insolvent CBCA companies using the arrangement provisions of the CBCA to skirt the creditor protections found in the *Bankruptcy and Insolvency Act* (BIA) or the *Companies' Creditors Arrangement Act* (CCAA) That said, there are a number of recent reported examples of insolvent companies seeming to finesse the language of the CBCA and seeking to restructure without notice or appropriate consultation with stakeholders and creditors (e.g. Yellow Media Inc.). Canadian Central wishes to underline the importance of maintaining the soundness of creditor security interests and maintaining the centrality of the BIA and CCAA in dealing with corporate insolvencies. The ambiguities and loopholes in the CBCA should not facilitate regulatory arbitrage and enable insolvent companies to skirt creditor protections.

To that end, Canadian Central recommends that the government restrict the use of CBCA arrangement to plans of arrangement for solvent companies rather than insolvency workouts more generally. The government should consider statutory language providing that the CBCA may not be used if the same objectives can be achieved under the CCAA or the BIA in a manner that is more transparent and considerate of creditor interests.

3. Corporate Social Responsibility (CSR)

The consultation paper is also seeking comments “*as to whether the existing provisions of the CBCA adequately promote CSR objectives and whether additional measures to promote CSR objectives are warranted in the CBCA.*”

Although Canadian companies incorporated under the CBCA have the option of integrating social responsibility objectives in their articles of incorporation, one suggestion would be to include within the CBCA a clear statement that CSR objectives are compatible with the interest of shareholders. By doing so, directors would be at liberty to pursue these objectives without being or appearing to be in conflict with their duties under the Act.

Conclusion

Canadian Central is grateful for the opportunity of providing comments on this consultation and looks forward to working closely with Industry Canada as it works to strengthen the CBCA.

If you have any questions or comments in regard to this submission, please contact me at (416) 232-3405 or at oconnorb@cucentral.com.

Yours sincerely,



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