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Ladies and Gentlemen:

Industry Canada Consultation Paper on the *Canada Business Corporation Act* (the CBCA)

This letter is being submitted in response to a consultation paper on the CBCA published on December 11, 2013, by Industry Canada (the **Consultation Paper**). It reflects the views of a working group made up of issuers having a combined market capitalization of more than \$80 billion (the **Working Group**). We thank you for affording us an opportunity to comment on this important topic.

The Working Group is of the view that, except for certain necessary administrative and technical amendments, the CBCA should not and must not be amended to overlap with the corporate governance framework already applicable to the Working Group as public corporations. For a number of years, Canadian Securities Administrators (the **CSA**) have brought provincial and territorial securities regulators together to share ideas and design policies, rules and regulations that are consistent across the country and ensure the smooth operation of Canada's securities market. By collaborating on policies, rules, regulations and other programs, the CSA help avoid duplication of work and streamlines the regulatory process for companies seeking to raise capital and other actors in the investment industry. The current regulatory framework offers the necessary flexibility to make efficient regulatory changes in order to address constant market evolution. The Working Group believes that the extensive regulation which already exists through the security regulators is an adequate platform and that additional regulation through the proposed amendments to the CBCA would unnecessarily complicate Canada's regulatory regime.

The members of the Working Group believe that flexibility is important when it comes to governance requirements and that governance matters should generally be left to existing securities regulators. The "comply or explain" model, implemented by the CSA, has worked very well in Canada. It has prevented a multiplication of requirements, the benefits of which have not always been validated by empirical research.¹ As mentioned in the Consultation Paper, the CBCA is not intended to prescribe how a corporation is to be run but rather to provide the basic framework and standards for the direction and control of the corporation. Such an approach ensures that the CBCA has the required flexibility to adapt to the multitude of business structures present in Canada. It is fundamentally important that the CBCA should remain "principle based" and should not become a prescriptive "rule based" statute. Detailed corporate governance disclosure requirements should continue to be dealt with in the CSA's policies, rules and regulations.

¹ See, for instance, R. Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, September 25, 2004, NYU, Law and Econ Research Paper 04-032.
[DOCSMTL: 542875116](https://www.docsmtl.com/542875116)

Generally, the Working Group notes that the lack of flexibility inherent in the rules-based proposals is unsuitable for the vast majority of CBCA incorporated corporations; notably private companies and controlled corporations. Many of the proposals, such as promotion of board diversity, shareholder approval of dilutive acquisitions and additional executive compensation disclosure, would normally only apply to public corporations, who make up a mere 0.3% of all CBCA incorporated companies.² Consequently, the distinction between what is applicable to public versus private corporations should be clarified and the drafting of rules on governance of public corporations should generally be left to the CSA.

In addition, the proposed amendments make no distinction between issuers who have controlling shareholders and issuers who do not. The Working Group notes that governance differences of controlled companies have been acknowledged by the CSAs, the TSX and also by CCGG³ and, consequently, believes that any proposed amendment must recognize this distinction and make appropriate exemptions for controlled corporations.

It is important that the CBCA not prescribe rigid rules, but rather facilitate the ability of corporations to arrange their governance structures in ways that are most appropriate to their business and allow them to adapt and evolve over time.

Moreover, the Canadian corporate law framework is the result of over a century of legal evolution and careful consideration. Such a well-developed and long-standing regime should be amended with care and duplications with securities laws should be avoided. On that note, in June 2001, *Bill S-11, An Act to amend the Canada Business Corporations Act and the Canada Cooperatives Act and to amend other Acts* was adopted in order to eliminate duplication and reduce costs for CBCA corporations, in part by eliminating duplication with existing securities legislation such as, for example, disclosure requirements applicable to proxy solicitation circulars. The Consultation Paper covers a broad range of topics, several of which are already addressed in existing securities legislation or stock exchange requirements. The Working Group strongly urges Industry Canada not to reintroduce duplication with existing securities legislation.

While the Working Group strongly believes that sound corporate governance practices are essential to the success, strength and longevity of companies, it concurrently believes that great care should be taken to consider the impact of embedding such practices within the corporate law framework.

For the reasons stated above, the members of the Working Group strongly believe that regulatory forbearance should be exercised by Industry Canada as far as the CBCA is concerned in the area of corporate governance of public reporting issuers. Canadian reporting issuers are already subject to a fulsome, evolutionary, and mainly principle-based regime of corporate governance regulation through harmonized provincial securities legislation and rules of the Toronto Stock Exchange. We note that the House of Commons Standing Committee on Industry, Science and Technology held consultations leading up to its June 2010 report where concerns were voiced by participants with respect to executive compensation, shareholder voting and participation during a timeframe (prior to June 2010) which predates recent initiatives of the CSA and the Toronto Stock Exchange addressing most of these issues.

On the other hand, the members of the Working Group believe that the serious issue of “empty voting” as a troublesome and disruptive investment phenomenon recently experienced in Canada by TELUS Corporation should be seriously considered and addressed in the current round of CBCA reform.

The following are the specific views of the Working Group on the questions set forth in the Consultation Paper:

² See http://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/h_cl00022.html

³ See National Policy 58-201 *Corporate Governance Guidelines*, in which the CSA committed to undertaking a study, with consultation of market participants, to examine governance of controlled companies and consider whether to change how existing governance practices treat such companies. See also the TSX Notice of Approval Amendments to Part IV of the Toronto Stock Exchange Company Manual (February 13, 2014) exempting controlled corporations, under certain conditions, from the new rule mandating majority voting. Finally, see the CCGG “Policy Regarding Governance Differences of Controlled Corporations”

I. Executive Compensation

Since the release of the report of the House of Commons Standing Committee in June 2010, the issue of executive compensation has continued to attract considerable interest from provincial regulators, investors and the public. Stakeholders and others are invited to provide input on whether the provisions of the CBCA reflect corporate best practices and the interests of shareholders in this area.

Many participants of the Working Group are of the view that decisions on executive compensation should remain within the domain of directors, who are subject to fiduciary duties in the exercise of their functions. Any questions on this topic may be addressed at the annual general meeting of issuers and shareholder proposals can be used in the event that a satisfactory resolution to a given issue is not reached between shareholders and a corporation through informal dialogue. The Working Group also notes that Canada has been less subject to problematic pay practices than other jurisdictions and that imposing a remedy on a systemic basis is not the most efficient approach to preventing isolated problems. In fact, shareholder proposals are better suited in such cases.

Indeed, certain regulations with respect to executive compensation may, in many cases, be undesirable. For example, say-on-pay votes may yield misleading results because shareholders may vote “for” or “against” for different reasons and may be expressing a view not about executive pay but about corporate performance generally. Given the complexity of compensation policies, the board and its respective competition committee are best placed to create, oversee and manage such policies. This is because Compensation Committees are staffed by individuals with relevant experience in compensation matters, with access to relevant information and to external compensation consultants.

We note that say-on-pay votes, while not mandatory, have been adopted by many Canadian public corporations. As of the date of this letter more than 80% of Canada’s 60 largest publicly-traded companies embraced “say on pay”, as compared to just over 50% in 2012.⁴ The Working Group believes that there is no need to impose advisory votes on executive compensation in the CBCA. In any case, a “say on pay” voting requirement should exempt controlled companies because such a vote, as it would be decided by the controlling shareholder, could not have a practical effect and would only increase costs and complexity of the process.

Disclosure of executive compensation is currently prescribed by existing securities legislation. Indeed, information circulars of all Canadian public corporations contain extensive executive compensation disclosure as set out in *Form 51-102F6 Statement of Executive Compensation*, which was adopted by the CSA on December 31, 2008. The Working Group is of the view that the disclosure requirements in place under existing securities legislation for publicly traded companies adequately protect shareholders and the CBCA should not duplicate those standards. Since 2008, Form 51-102F6 has undergone major amendments to reflect market trends in this area. As the current disclosure required under Form 51-102F6 is already extensive, further requirements would only serve to complicate existing disclosure and dilute its impact. The Working Group believes that, as the CSA has the ability to make amendments in a timely manner, market needs are better met through the current CSA disclosure requirements than through federal regulation of this area through the CBCA. The Working Group believes that existing compensation disclosure requirements are more than adequate to ensure that shareholders are fully informed and free to make an educated choice whether or not to invest in companies based on their compensation policies.

⁴ Please see <http://www.share.ca/services/shareholder-engagement/current-engagement-topics/say-on-pay-executive-compensation/canadian-companies-that-have-adopted-a-say-on-pay/>

II. Shareholder Rights

A. Voting

Shareholder voting rights are the foundation of corporate democracy, and a transparent, accurate, efficient and accountable shareholder voting process is fundamental to good corporate governance and the maintenance of market confidence. Stakeholders and others are invited to provide input on whether the shareholder voting provisions of the CBCA adequately facilitate shareholder democracy.

The Working Group is of the view that the current provisions of the CBCA, which allow a shareholder or its proxy to require a ballot after a show of hands vote, are appropriate. If a provision requiring a ballot vote is introduced, it should be restricted only to non-procedural matters and not be generally applicable to controlled corporations.

The CBCA currently allows for director terms of up to three years, staggered boards and plurality of voting. However, the Toronto Stock Exchange (the **TSX**) requires all issuers listed on the TSX to annually elect directors individually. Additionally, in February 2014, the TSX introduced amendments that require each director of a TSX-listed issuer to be elected by a majority of the votes cast with respect to his or her election (the **TSX Amendments**). This effectively means TSX issuers will need to adopt a majority voting policy. Accordingly, the Working Group recommends that the CBCA not be amended to cover those matters as this would result in duplication with the TSX requirements and potential confusion. We note that the TSX Amendments appropriately recognize special governance considerations related to controlled companies and exempt them from the majority voting requirement. At the very least, any potential amendment to the CBCA to mandate majority voting should exempt controlled companies.

The Working Group is concerned that shareholder democracy is compromised in the growing number of cases where strategic investors become shareholders of a company shortly before an annual meeting only to sell their shares shortly after the annual meeting. Oftentimes, the voting preference of these shareholders does not align with the majority of shareholders, who seek to preserve long-term value. The Working Group, therefore, is of the view that requiring a minimum mandatory time of share ownership before a shareholder is allowed to vote its shares is an idea worthy of consideration and discussion.⁵

Members of the Working Group agree that the current proxy voting infrastructure suffers from several flaws and that having a reliable voting system should be a priority. Some members have commented on the consultation paper published by the CSA on August 15, 2013, *Consultation Paper 54-401 – Review of the Proxy Voting Infrastructure*. Consultation Paper 54-401 identifies a number of areas for discussion that the CSA has determined may impact the accuracy of the proxy voting infrastructure, including whether it adequately supports accurate and reliable vote counting and whether a vote confirmation system should be introduced so that shareholders can be confident that their votes have been transmitted, received and counted at shareholder meetings. The Working Group believes that the current infrastructure would benefit from improved and standardized processes and internal controls surrounding proxy voting. The Working Group is of the view that any amendment to the CBCA should be postponed until the conclusion of the CSA's consultation.

The Consultation Paper indicates that the issues of "overvoting" and "empty voting" have attracted stakeholder attention. Empty voting is a relatively recent and troublesome investment phenomenon that threatens shareholder democracy. It arises where an investor holds the right to vote on matters affecting a company, through registered ownership of shares, including borrowed shares in certain circumstances, without a corresponding economic interest in the company. Empty voting can also take the more destructive form of "negative voting". Negative voting occurs where an investor not only eliminates its economic interest in the shares

⁵ See, for instance, the following initiatives that support the importance of long-termism to corporate governance: (i) the Focusing Capital on the Long Term joint initiative between McKinsey & Company and CPPIB (see <http://www.fclt.org/en/theinitiative.html>); and (ii) the April 9, 2014 European Commission proposal to revise the Shareholder Rights Directive, with a key focus on incentivising a long-term approach by institutional investors (see proposal at http://ec.europa.eu/internal_market/company/docs/modern/cgp/shrd/140409-shrd_en.pdf).

it holds in a company, but actually establishes a negative economic exposure to a company's share price, while continuing to retain the right to vote. This situation conflicts with a fundamental assumption underlying Canada's system of corporate governance, to the effect that shareholders can be counted on to vote shares in line with genuine economic interest in the outcome of a decision.

This phenomenon was acutely experienced by TELUS Corporation in 2012, incorporated under the British Columbia Business Corporation Act which has shareholder voting provisions similar to those under the CBCA, when a New York hedge fund, Mason Capital Management LLC, attempted to exploit an opportunity to game a proposed corporate action to consolidate voting and non-voting common shares of TELUS Corporation.

We understand that TELUS Corporation will be submitting a detailed position paper on this issue, proposing the following solutions, which members of this Working Group support:

1. amending the CBCA to provide that for certain shareholder actions (shareholder proposals at Section 137 of the CBCA and shareholder requisitioned meetings at Section 143 of the CBCA), eligibility be restricted to the true beneficial owners, as opposed to registered holders (for example CDS as a front for undisclosed activist shareholders), of the prescribed minimum quantities of shares;
2. amending the CBCA to introduce a minimum holding period for shareholders requisitioning a meeting; and
3. amending the CBCA to provide the courts with the power to issue orders disqualifying some or all of a holder's shares from being voted where the holder does not have a corresponding economic interest commensurate with its voting position.

B. Shareholder and Board Communication

The ability of shareholders to communicate effectively and efficiently with both corporate management and other shareholders is integral to maintaining investor confidence and facilitating good corporate governance. Stakeholders and others are invited to provide input on whether the provisions of the CBCA could further enhance communication between shareholders and corporate management, and among shareholders themselves, and whether the provisions are consistent with technological advances.

The Working Group is of the view that allowing issuers to communicate with shareholders through electronic means, where such means are limited to electronic distribution of information and electronic or virtual shareholders meetings, may improve effectiveness and reduce costs.

The recent introduction of "notice-and-access" allows shareholder meeting materials to be posted on-line as a delivery method and was introduced by the CSA prior to the last proxy season. The Working Group strongly recommends that the CBCA be amended to facilitate notice-and-access, by providing that the consent of shareholders to the delivery by notice-and-access be not required where materials are delivered electronically in accordance with securities laws. Section 153 of the CBCA should provide an exemption from the requirement that an intermediary send a copy of proxy materials to beneficial owners where notice-and-access is used. The Working Group notes that many provincial corporate statutes do not have the same impediment to implementing notice-and-access.

However, the Working Group is of the view that any change to the CBCA that would facilitate the ability of significant shareholders (greater than 5%) to require the inclusion of alternate directors in the management proxy circular for election at a shareholder meeting would increase abusive proxy fights. A corporation's management puts significant time and resources into selecting the best board candidates, taking into consideration not only experience and skill but compatibility with other directors and with the corporate ethos. The Working Group is of the view that, over and above the current regulations, significant shareholders should be required to justify and explain the reasons why they believe their nominees are preferable to the corporation-proposed slate. In addition,

the CBCA should be amended to impose a time limit on how long shareholders must hold shares before they can propose alternate directors.

Regarding the proposed amendment to shareholder proposals to allow shareholders to more efficiently utilize the process, i.e. the deadline to submit a proposal, the Working Group also supports the idea of referencing the corporation's financial year-end rather than linking the deadline to the notice date of the previous meeting.

Finally, the Working Group disagrees with the proposed amendment to the CBCA that would prescribe a minimum period of time to speak to a proposal. Flexibility should be maintained on this issue. The chair of the meeting should retain the discretion to limit or extend the time for individual comments or questions. Moreover, the chair should have the discretion to decide to end debate if he or she considers it necessary for the proper execution of the shareholder meeting.

C. Board Accountability

The accountability of boards of directors is fundamental to good corporate governance. Directors are elected by shareholders to manage and supervise the business of the corporation in its best interest. Shareholders must have the ability to ensure board accountability and meaningfully evaluate board performance. Stakeholders and others are invited to provide input on whether the provisions of the CBCA adequately balance the respective roles of boards and shareholders and enable shareholders to require appropriate levels of accountability from boards.

The Working Group is of the view that the CSA is better suited to impose disclosure rules on public corporations. More importantly, "comply or explain" disclosure requirements have worked well in improving best practices in Canada.

The practice of separating the role of the CEO and Chair of the Board is common and is widely accepted as a good governance practice in Canada despite it not being a legal requirement. The Canadian Spencer Stuart Board Index 2013, for example, found that a significant majority of leading Canadian issuers separated the role of board chair and CEO in 2013.⁶ The Working Group is of the view that the market pressure to adopt these governance standards is influencing Canadian public corporations and there is no need to amend the CBCA to reflect this trend. In addition, while split roles may be beneficial in some circumstances, they may not be in others, depending on the particular profile of the company.⁷ Moreover, Canadian public issuers are required to disclose to shareholders whether they separate the roles of CEO and Chair of the Board, whether they have a lead independent director in the absence of an independent chair, and, if they have neither, what the board does to provide leadership to its independent directors. These disclosure requirements force an issuer to address this governance practice.

The Working Group believes the introduction of an arbitration process is not necessary to ensure access to the oppression remedy because the CBCA oppression remedy already gives wide discretionary powers to the courts. Indeed, mediation is often pursued by judges across Canada in adjudicating oppression litigation. Ontario, for example, provides for mandatory mediation in civil actions commenced in Toronto and Ottawa, including actions brought under the oppression remedy.

With respect to shareholder approval of dilutive acquisitions, the Working Group notes that for TSX listed issuers, the TSX Company Manual already requires approval of an acquisition where the number of securities issued in payment of the purchase price for an acquisition exceeds 25% of the number of issued securities of the listed issuer.

⁶ *Canadian Spencer Stuart Board Index 2013 : Trends and Practices of Leading Canadian Companies* (18th ed) at page 49.

⁷ See, in this respect, "The Separation of Chair and CEO Roles" in the Harvard Corporate Law Forum, <https://blogs.law.harvard.edu/corpgov/2011/09/01/separation-of-chair-and-ceo-roles/>. See also "Splitting the CEO and Chairman Roles – Yes or No?" in the *Corporate Board*, volume 33, number 197, November/December 2012.

On the subject of social and environmental matters, the Working Group notes that the CSA has already published guidelines on disclosure requirements relating to environmental matters in CSA Staff Notice 51-333 *Environmental Reporting Guidance*, dated October 27, 2010. The purpose of such notice is to provide guidance to reporting issuers on existing continuous disclosure requirements relating to environmental matters under securities legislation. It is intended to assist issuers in: (i) determining what information about environmental matters needs to be disclosed, and (ii) enhancing or supplementing their disclosure regarding environmental matters, as necessary. As a result of such existing regulation, there is no need for the CBCA to be amended to account for social and environmental matters.

With respect to the shareholder approval of dilutive acquisitions and social and environmental matters, duplication in the CBCA would not provide any added benefit to shareholders of publicly traded corporations and may create confusion.

III. Securities Transfers and Other Corporate Governance Issues

Submissions are invited as to the continued relevance of CBCA provisions related to securities transfers and insider trading, given the overlapping regulatory jurisdictions between the CBCA and provincial laws in these areas. Comments are also sought on the operation of CBCA provisions related to director residency, trust indentures and proportionate liability.

A. Trust Indentures

In 2001, the CBCA was amended to delete the definition of “distribution to the public” and the related exemption power of the CBCA Director to determine that a security is not or was not part of a “distribution to the public”. However, this term is still used in sub-section 82(2) of the Act and, indeed, is determinative of the application of Part VIII to a trust indenture. Section 82(2) states that: “This Part applies to a trust indenture if the debt obligations issued or to be issued under the trust indenture are part of a distribution to the public.”

The Working Group is concerned that the removal of the definition of “distribution to the public” has created a lack of definitional certainty with the potential to cause problems in the application of Part VIII of the Act, particularly in certain types of cross-border debt offerings. For example, for those Canadian issuers without access to cross-border shelf prospectuses or registration statements, it has been common to offer debt securities (e.g., Series A Notes) in US private placements subject to a post-closing obligation to effect an exchange offer of registered debt securities of a separate series (e.g., Series B Notes, that are identical to the Series A Notes in all other respects) in order to provide purchasers with a liquid security and mitigate the liquidity pricing discount that would otherwise apply (these are commonly known as “A/B exchange offers”).

The discretionary exemption provided for in section 82(3) of the CBCA may only be granted by the Director in the above example if the securities are subject to the provisions of the US Trust Indentures Act of 1940 (the 1940 Act). However, the 1940 Act only applies to an indenture if the debt securities are registered with the SEC.

The effect of this is that the Director cannot grant an exemption under section 82(3) for the trust indenture in respect of the issuance of the Series A Notes in the above example, but only in respect of the Series B Notes. In the absence of the definition of “distribution to the public”, issuers are left with uncertainty as to whether Part VIII of the CBCA applies to the trust indenture under which the Series A Notes are issued.

Further, in the context of an offering structured as an A/B exchange it is not practical to comply with the requirements of both Part VIII of the CBCA and the 1940 Act. For example, section 84 of the CBCA requires the appointment of a Canadian trustee or co-trustee. The 1940 Act requires the appointment of a licensed US trust company as indenture trustee. The Working Group notes that it is oftentimes difficult to get potential unaffiliated (and even affiliated) Canadian and US co-trustees comfortable with their respective obligations and legal compliance issues under a co-trusteed trust indenture.

In light of the above, the Working Group believes it is appropriate to retain Part VIII of the CBCA. However, it recommends that the Act be amended to include a definition of “distribution to the public” or refer to a definition that can be included in the regulations. Further, it urges that the Director’s exemptive authority be restored to determine that a security is not or was not part of a distribution to the public if he is satisfied that it would not prejudice any security holder of the corporation.

B. Other Matters

The Working Group is of the view that all proposed amendments that would eliminate overlapping regulatory jurisdictions between the CBCA and provincial legislation are advisable.

Regarding insider trading, the Working Group agrees that provincial legislation already offers an efficient civil remedies framework. In addition, the *Criminal Code of Canada* provides sanctions against insider trading. While the provisions of the CBCA relating to insider trading apply also to trading in securities of a private company, they are much less relevant for private corporations.

IV. Incorporation Structure for Socially Responsible Enterprises

Submissions are invited on the utility of socially responsible enterprises (SREs) in the Canadian context and the extent to which current CBCA incorporation provisions and structures facilitate the creation of SREs.

The Working Group is of the view that facilitating the creation of SREs is generally advisable but would need more information on the proposed scope of such concept to comment further.

V. Corporate Transparency

Stakeholders and others are invited to make submissions regarding whether, and how, the availability of beneficial ownership information to competent authorities, the existence of bearer shares and the disclosure of nominee shareholder information should, and could, be addressed in the CBCA.

On November, 2013, some members of the Working Group provided comments to the CSA in response to questions raised by the CSA in the *Consultation Paper 54-401 Review of the Proxy Voting Infrastructure*. The Working Group believes that the CSA should reconsider the OBO/NOBO distinction. The market inefficiencies resulting from the OBO/NOBO distinction impose an unnecessary requirement (and cost) on public corporations in their dissemination of proxy materials. The elimination of such a distinction would allow for the creation of a centralized shareholder registry, which would increase transparency and certainty in the voting process.

VI. Corporate Governance and Combating Bribery and Corruption

Stakeholders and others are invited to provide input as to the adequacy of existing CBCA provisions on corporate records, accounting standards and audits to combat bribery in international transactions.

The members of the Working Group support initiatives to combat bribery in national or international transactions. However, the Working Group would advise against any amendments to the CBCA that would overlap with the current provisions of the *Corruption of Foreign Public Officials Act (Canada)*, as such overlap may generate confusion.

VII. Diversity of Corporate Boards and Management

Stakeholders and others are invited to comment as to whether new measures to promote diversity within corporate boards should be included in the CBCA and what such measures might entail.

The Ontario Securities Commission recently undertook a consultation regarding gender diversity on corporate boards and in senior management of public issuers. On July 30, 2013, the *OSC Staff Consultation Paper 58-401 Disclosure Requirements Regarding Women on Boards and in Senior Management* was published for comments. The focus of the Consultation Paper was on advancing the representation of women on boards and in senior management. On September 26, 2013, some members of the Working Group submitted comments to the Ontario Securities Commission. The Working Group generally supports the Ontario Securities Commission's initiative but believes that diversity should be defined more broadly and not focus only on gender diversity.

On January 16, 2014, the Ontario Securities Commission also proposed local amendments to Form 58-101F1 of *National Instrument 58-101 Disclosure of Corporate Governance Practices*. The proposed amendments would require TSX-listed issuers (and other non-venture issuers) to provide disclosure regarding the following matters on an annual basis: (i) director term limits, (ii) policies regarding the representation of women on the board, (iii) the board's or nominating committee's consideration of the representation of women in the director identification and selection processes, (iv) the issuer's consideration of the representation of women in executive officer positions when making executive officer appointments, (v) targets regarding the representation of women on the board and in executive officer positions, and (vi) the number of women on the board and in executive officer positions.

The Working Group is of the view that amending the CBCA to include measures to promote diversity on corporate boards and in senior management is not necessary at this stage since the Ontario Securities Commission is taking steps to implement disclosure requirements for public corporations. In addition, the legislation of such measures in the CBCA would be unduly restrictive and would impede shareholders' ability to elect the most qualified directors, thereby compromising the flexibility of the statute. Finally, the implementation of diversity initiatives through the CSAs is preferable to implementation under the CBCA because the adoption of these initiatives by existing securities regulators would ensure that they apply to provincially incorporated issuers as well as to those incorporated under the CBCA.

VIII. Arrangements Under the CBCA

Comments are invited 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.

The Working Group believes that courts that have permitted the use of arrangements for insolvent companies have historically taken into consideration the interest of all stakeholders. Given there is no broad debate or discontent with the law as it currently stands, additional CBCA provisions are not necessary under such circumstances.

IX. Corporate Social Responsibility

Stakeholders and others are invited to submit comments as to whether the existing provisions of the CBCA adequately promote corporate social responsibility (CSR) objectives and whether additional measures to promote CSR objectives are warranted in the CBCA.

The Working Group is of the view that flexibility in this field is very important since CSR objectives change with the constant evolution of our society. In order to maintain the flexibility to change CSR objectives to respond to new social needs, such matters should not be entrenched in statutes such as the CBCA.

X. Administrative and Technical Matters

The Working Group generally agrees with the proposed administrative and technical CBCA amendments.

In particular, the Working Group supports the proposition to impose a time limit on how long shareholders must hold shares before they can exercise the right of dissent.

However, the Working Group disagrees with the proposition to raise the number of shareholders whose proxies may be solicited, other than by or on behalf of the management of the corporation, without sending a dissident's proxy circular, because such change could increase abusive proxy contests. The past few years have seen an increase in the frequency of high-profile proxy contests, resulting from the rise in institutional share ownership of public companies, the presence of activist hedge fund investors and the greater willingness of shareholders to challenge boards and management on governance and performance matters. Canada is already one of the friendliest jurisdictions for proxy contests. The Working Group believes that any facilitation measures to promote such proxy contests are undesirable. In addition, if the threshold is raised, the risk of unlawful selective disclosure and insider trading would be higher since more people would be informed of potential proxy fights. Accordingly, the current threshold should be maintained in the CBCA.

Other Considerations

In addition to the above comments, the Working Group wishes to put forward the following proposals:

1. Industry Canada should consider including anti-takeover bid provisions in the CBCA, similar to those adopted in the corporate statutes of more than 30 states in the United States. In the United States, many statutes specifically authorize boards to consider the effects of any action on various stakeholders and include: restrictions on the right of a hostile bidder to vote the acquired shares, limitation on rights to combine assets, and the disgorgement of profits made upon acquiring shares without the approval of the Board of directors of the target. In this field, the Québec government has recently put out a report which envisages numerous reforms to allow our corporations to be on a level playing field with US corporations. The report notes that, "several studies show that the presence of measures that make hostile takeovers more difficult eventually led to transactions concluded at higher prices."⁸ Given the significant impact that hostile takeover bids (both successful and not) have on target companies, the Working Group believes that regulation in this area merits consideration. Inspiration in this regard may be taken from the abovementioned report.
2. Section 157 of the CBCA should be amended to allow a corporation to deny a shareholder request to examine a subsidiary's financial statements where the value of the assets, the revenues and the income of the subsidiary is not material when compared with the value of the assets, revenue and income of the parent company. A materiality threshold may be set out, as is done specifically in the case of the Québec Business Corporations Act (the **QBCA**) under Section 228, which provides for a 10% materiality threshold. The Working Group believes that Section 157 should also be amended to protect issuers against shareholder requests for financial information of subsidiaries where such requests are made for an improper purpose (i.e. for a purpose unrelated to the shareholder's status as a shareholder). Specifically, shareholders should be required, in the form of a signed affidavit, to confirm that the shareholder does not intend to use the information for an improper purpose. It should be noted that the proposed amendment described in this paragraph would introduce a concept of "improper purpose" similar to the one found under the corporate law of Delaware, being one of the jurisdictions having the most influence in matters of corporate law in North America.⁹
3. The Working Group notes that there is a lack of clarity in the interplay between Paragraphs 26(3)(b) and 182(1)(c) of the Act. Specifically, Paragraph 26(3)(b) allows a corporation to reduce its stated capital for a class or series of shares in certain cases where the corporation *issues* shares pursuant to an

⁸ "The Maintenance and Development of Head Offices in Québec", *The Task Force on the Protection of Québec Businesses* (February 2014) at page 31. Please see http://www.groupe.finances.gouv.qc.ca/GTPEQ/Documents/Rapport_ENG_GTPEQ.pdf

⁹ See Subsection 220(b) of the *Delaware General Corporation Law* (Title 8, Chapter 1 of the *Delaware Code*).

amalgamation agreement under Subsection 182(1) in certain non-arm's length transactions. However, Paragraph 182(1)(c) specifies that the amalgamation agreement must set out the manner in which shares of the amalgamating corporation are to be *converted*. The discrepancy between an issuance as contemplated by Paragraph 26(3)(b) and a conversion as contemplated by Paragraph 182(1)(c) results in confusion as to whether certain non-arm's length amalgamating corporations can benefit from Paragraph 26(3)(b) to reduce their stated capital. In contrast to the CBCA, there is no such confusion under the OBCA as both corresponding provisions, being Paragraphs 24(3)(b) and 175(1)(b), use the concept of shares being issued.

4. Similarly to Subsection 38(2) of the OBCA, Subsection 43(2) of the CBCA should be amended to clarify that a corporation may add all or part of the value of shares it issues in payment of a dividend to its applicable stated capital account. Prior to 2006, the language of Subsection 38(2) of the OBCA was substantively similar to Subsection 43(2) of the CBCA. However the provision was amended to expressly contemplate the ability of a corporation to reduce the balance of a stated capital account by partially accounting for shares it issues as dividends. The Working Group believes that the spirit and intent of Subsection 43(2) of the CBCA is equivalent to Subsection 38(2) of the OBCA and that the provision should be amended accordingly.
5. A provision similar to that of Sections 458 and 459 of the QBCA and Section 229 of the BC Business Corporations Act should be added to the CBCA to allow a judge of the Superior Court to correct mistakes and legal consequences of mistakes. Mistakes include omission, defect, defect of form, error or irregularity that has occurred in the conduct of the affairs of the corporation resulting in a breach of a provision of the governing legislation, the articles or by-laws of the corporation or of a corporate decision.
6. Similar to Section 86 of the QBCA, Subsection 30(1) of the CBCA should be amended to permit a corporation, upon acquiring shares of its parent, to hold these shares for a short period of time. The Working Group notes that, since 2001, the CBCA has allowed, through regulation, subsidiary corporations to acquire the shares of their parent corporation for very limited purposes and believes that an extension of this right to generally allow subsidiaries to temporarily hold their parents' shares would decrease transaction costs and have beneficial tax consequences.
7. Subsection 265.1(4) of the CBCA should be amended to allow for an alternative to the requirement that a court authorize the cancellation of a corporation's articles if such cancellation could be prejudicial to the rights of the corporation's shareholders. For example, similar to Section 266 of the QBCA, the provision could be amended to allow a corporation's directors to forego court approval where the cancellation is authorized by resolution of all the shareholders whose rights would be affected by the cancellation, including shareholders not otherwise entitled to vote. Such a provision would facilitate corporate reorganization and decrease the burden on the court system.
8. The CBCA should be amended to include a provision, similar to Section 128 of the QBCA, which states that: if no quorum exists for the purpose of voting on a resolution to approve a contract or transaction only because a director is not permitted by the act to be present during deliberations, the other directors present are deemed to constitute a quorum for the purpose of voting on the resolution. The Working Group believes that such a provision would help resolve deadlock situations resulting from conflicts of interest while preserving the ability of the corporation to conduct business freely and in shareholders' best interests.
9. The CBCA should be amended to include a provision, similar to Section 129 of the QBCA, which, in cases where all directors are required by the act to abstain from voting on a contract or transaction, would allow the contract or transaction to be approved solely by an ordinary resolution of the shareholders of the corporation. Similarly to the proposal mentioned directly above, the Working Group believes that such a provision would help resolve deadlock situations resulting from conflicts of interests.

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10. The CBCA should be amended to include a provision, similar to Section 217 of the QBCA, which creates a simplified regime for corporations with a sole shareholder. The addition of such a provision more accurately reflects commercial reality and would decrease the administrative burden on corporations with numerous wholly-owned subsidiaries.

Conclusion

In short, the Working Group believes that amendments to the CBCA that would eliminate overlapping regulatory jurisdictions between the CBCA and provincial legislation, as well as those amendments that are purely technical in nature are advisable but the Working Group urges Industry Canada not to impose governance requirements that are not supported by empirical research or to reintroduce duplication with existing securities legislation or the TSX requirements.

Thank you for allowing us to comment on this subject.

Yours truly,

(s) Norton Rose Fulbright Canada LLP