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May 15, 2014

BY EMAIL

Director General
Marketplace Framework Policy Branch
Industry Canada
235 Queen Street, 10th Floor
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Dear Sirs/Mesdames:

Consultation on the *Canada Business Corporations Act*

Thank you for the opportunity to provide comments in response to Industry Canada's Consultation on the *Canada Business Corporations Act* (the "**CBCA**").

With more than $140.8 billion in assets, the Ontario Teachers' Pension Plan ("**Teachers'**") is the largest single-profession pension plan in Canada. An independent organization, it invests the pension fund's assets and administers the pensions of 300,000 active and retired teachers in Ontario.

We support the efforts of Industry Canada and the House of Commons Standing Committee on Industry, Science and Technology (the "**Committee**") to engage with interested stakeholders on a full range of corporate governance matters, including those described in Industry Canada's Discussion Paper (the "**Discussion Paper**"), and to undertake a review of, and possible amendments to, the CBCA to modernize it and make it more compatible with today's capital markets and corporate governance best practices. It remains important to investors like us that corporate and securities laws remain responsive to our ever-changing marketplace and continue to promote shareholder democracy and engagement, including the effective exercise of fundamental shareholder rights, as well as promoting effective corporate decision-making, transparency and accountability. Such rules are also key drivers to ensuring the integrity, efficiency and accessibility of Canada's capital markets and essential to maintaining the competitiveness and attractiveness of our markets to both domestic and foreign investment.

However, we believe that the CBCA and equivalent provincial and territorial corporate statutes, which set out the basic legal and regulatory framework for Canadian corporations, are not the

most suitable venues for enshrining some of the corporate governance initiatives raised in the Discussion Paper. Accordingly, in many cases, we recommend that any proposed changes to the CBCA only be pursued after careful consultation and coordination with the relevant stakeholders, including the Canadian Securities Administrators (the "**CSA**"), the provincial and territorial securities regulatory authorities (the "**Securities Regulators**") and the Toronto Stock Exchange (the "**TSX**"), all of which are active in developing governance-related rules for Canada's capital markets, reporting issuers and investors and, in many cases, are able to more swiftly respond with rules and regulations as new developments arise, as more fully articulated below.

Teachers' has chosen to comment only on certain aspects of the Discussion Paper where it believes that its perspective as a major institutional investor in Canada may be of value. We do not repeat in detail our views on matters that we have previously commented on in publicly available sources, but have included hyperlinks to some of those materials for your reference. For convenience, the following comments are organized under the headings used in the Discussion Paper.

I. Executive Compensation

Teachers' believes that executive compensation issues, such as "say on pay" advisory votes and corporations' approaches to executive compensation, can be and are being adequately addressed by existing rules and initiatives already taken by the CSA and Securities Regulators in Canada, so that it is not necessary for them to also be dealt with in the CBCA. Canadian securities regulation already requires extensive disclosure of executive compensation.[1] Also, while "say on pay" advisory shareholder votes are currently not mandatory in Canada, they have been widely adopted by TSX-listed issuers.[2] Typical of many current governance issues, issuers' compensation practices are continuing to evolve in response to experience in the United States and other mature capital markets and the increased willingness and ability of institutional investors like us and governance advisory groups like the Canadian Coalition for Good Governance ("**CCGG**")[3] to hold boards accountable for such practices.

We make similar comments below in regard to certain other issues raised in the Discussion Paper where we believe that securities regulation and/or stock exchange rules are likely to be a more responsive and effective tool than corporate law. Unavoidably, the cycle of statutory review of the CBCA, public consultation and legislative amendment takes a considerable period of time. Securities regulators are not subject to the same constraints and are able to respond more quickly

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[1] See, for example, Form 51-102F5 *Information Circular* and Form 51-102F6 *Statement of Executive Compensation* under National Instrument 51-102 *Continuous Disclosure Obligations*.

[2] See for example, the *Governance Insights 2013* report issued by Davies Ward Phillips & Vineberg LLP ("***Governance Insights 2013***") for more information on trends and initiatives surrounding "say on pay": http://www.dwpv.com/~/media/Files/PDF/Davies-Governance-Insights-2013-English.ashx.

[3] See: CCGG's Executive Compensation Principles (January 2013) at http://www.ccgg.ca/site/ccgg/assets/pdf/ccgg_publication_-_2013_executive_compensation_principles.pdf and CCGG's Model Say on Pay Advisory Resolution and Policy (September 2010) at http://www.ccgg.ca/site/ccgg/assets/pdf/model_policy_on_say_on_pay.pdf. Most TSX-listed issuers that have adopted "say on pay" practices are voluntarily adhering to CCGG's recommended forms, and holding say on pay votes annually.

to developments in the marketplace. In fact, they have done so in connection with a number of the issues identified in the Discussion Paper.

Teachers' believes that it is often of critical importance to address issues of corporate governance in a timely manner, particularly since Canada is not isolated from other markets and should not be perceived to fall behind what are regarded as best practices elsewhere. Even if initial responses to such issues by Securities Regulators may not always appear complete or effective, the process of changing Canadian securities and stock exchange rules and policies is sufficiently flexible that it is usually possible for regulators to learn from experience and for their initiatives to continue to evolve in response to changes in the market and in the thinking of investors and other interested stakeholders.

From a theoretical perspective, it would sometimes be possible to criticize *ad hoc* interventions by securities regulators into matters of corporate law. However, given the inevitable overlap of corporate law with securities regulation, it is more important that reasonable consistency be maintained between the two. Experience has shown that when inconsistencies have developed between the CBCA and Canadian securities regulatory provisions, it is often slower and more difficult to amend the CBCA in a timely way to address such problems. There has been a commendable recognition in the past by Parliament and Industry Canada of this problem.[4] Teachers' believes that it is crucial, in order to maintain the status of the CBCA as a leading corporate statute in Canada, to endeavour to ensure its continuing compatibility with Canadian securities regulation.

Furthermore, the CBCA must take into account that the majority of CBCA corporations are closely held. Governance principles that are appropriate for distributing corporations are usually not relevant or practical for private issuers. Securities regulation and stock exchange rules, which deal with issuers of publicly-traded securities, whether they are corporations or non-corporate entities, are often a better "fit" with promoting good governance in public markets.

II. Shareholder Rights

A. Voting

Notwithstanding that the TSX has recently announced amendments to the TSX Manual that will mandate majority voting for directors of TSX-listed issuers,[5] Teachers' believes that it would be

[4] The 2001 amendments to the CBCA had as one of their primary purposes "to eliminate duplication and reduce costs – in part by eliminating duplication with provincial securities legislation" (http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?lang=E&ls=S11&Parl=37&Ses=1&source=Bills_Senate_Government). In furtherance of that goal, a number of specific requirements were moved to the Regulations: "The reason for this amendment is to allow government to respond more quickly to a changing environment without having to go to Parliament to make statutory changes of this nature, *e.g.*, time periods. Where the prescribed requirements have been transferred to the regulations, they remained the same except where they were changed to harmonize with provincial requirements." (http://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs01381.html).

[5] The amendments to Part IV of the TSX Manual were announced on February 13, 2014 and will become effective on June 30, 2014. See http://tmx.complinet.com/en/display/display_viewall.html?rbid=2072&element_id=859&record_id=1009&filtered_tag=.

appropriate to amend the provisions of the CBCA to provide for parallel reforms for the election of directors of distributing corporations at uncontested meetings. In particular, although the TSX rules already require *annual* elections with votes being cast for each *individual* director, and the most recent TSX amendments will require that a board of directors accept the resignation of a director who has failed to receive a majority of votes in his or her favour except in "exceptional circumstances", Teachers' considers that it is desirable to enshrine these key elements of majority voting as requirements for CBCA distributing corporations requiring directors who fail to garner majority support to resign, and for boards to accept that resignation except in truly exceptional circumstances.

We also believe the CBCA should define what constitutes such exceptional circumstances, if majority voting is to be effective in achieving the desired results and binding upon boards. Teachers' supports the position of CCGG[6] and other institutional investors and investor advocacy groups that the only exceptional circumstances entitling a board to reject a director's resignation should be where the resignation(s) would result in a failed board rendering it unable to conduct business. A "failed board" or "failed election" occurs when an insufficient number of directors or directors that satisfy the applicable independence requirements under securities laws are elected to satisfy the quorum or independence standards, respectively, under applicable laws. Alternatively, we can concede that in rare cases, the retention of one or more rejected directors for a limited period of time may be required in order for the board to discharge its duties.[7] The latter exception, if enshrined in legislation or regulations, should be strictly limited, since in most circumstances, even if the director is a nominee of a shareholder or other stakeholder which has a contractual right to put forward a nominee, nothing precludes a replacement nominee from being selected by the contracting parties in place of the director who failed to attain a majority of votes.

While many speak about the alleged dangers and risks of failed boards and failed elections in the context of mandated majority voting, Teachers' believes that these concerns have been greatly exaggerated. While of course theoretically possible, failed elections rarely, if ever, arise in reality. In fact, we are not aware of a single instance of majority voting resulting in a failed board in Canada or the United States rendering a board unable to discharge its duties.

In conjunction with statutory amendments to mandate majority voting for directors of distributing corporations, Teachers' would also support related changes in the CBCA to eliminate "staggered" terms of office for directors of distributing corporations, so that each director faces re-election at each annual meeting for a maximum term of one year.

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[6] See CCGG's Majority Voting Policy (March 2011) at http://www.ccgg.ca/site/ccgg/assets/pdf/2011_MV_Policy.pdf.

[7] See, for example, CCGG's August 2013 comment letter to the NASDAQ at http://www.ccgg.ca/site/ccgg/assets/pdf/submission_to_nasdaq_on_august_21,_2013.pdf, where CCGG supported the U.S. Council of Institutional Investors' (CII) submissions to the NASDAQ and various other U.S. exchanges in 2013 requesting that they adopt majority voting listing standards in uncontested elections, and further advocated that the "extraordinary circumstances" in which it would be permissible for a director's resignation to be rejected by a board after having received a majority of withhold votes, should be limited to cases where the director's continuing service is necessary *only* to maintain compliance with securities regulations, avoid a violation of a contractual provision, or to avoid a violation of state law or the company's constating documents.

Teachers' shares the concerns that have been expressed in regard to such problems with the current voting system as "over-voting" and "empty voting", but believes these are merely symptoms of much larger systemic problems with the proxy voting infrastructure as it currently exists.[8] These problems were most recently outlined in a *CSA Consultation Paper 54-101 Review of the Proxy Voting Infrastructure*.[9] Teachers' and six other major Canadian pension plans have submitted a detailed comment letter to the CSA in response to its consultation paper and have been actively engaged with the CSA and the Securities Regulators concerning the identified problems in an effort to develop workable solutions.[10] Among other issues, the proxy voting system suffers from systemic issues that continue to compromise its integrity, including inadequate and inconsistent intermediary practices relating to the reconciliation of voting entitlements leading to "over-reporting" (where an intermediary's records show more voting entitlements than are reflected in its CDS account) and "over-voting" (where the same share may be voted more than once), the absence of an end-to-end vote confirmation system to verify when beneficial holders' voting instructions have been received and recorded, and the lack of independent auditing procedures to ensure the accountability and integrity in the operation of the proxy voting system. As these issues are currently being examined by the CSA and Securities Regulators in consultation with the relevant stakeholders, Teachers' believes that it would be a mistake for the CBCA to attempt to address them in isolation. It would be preferable if solutions were pursued by Industry Canada in cooperation with the CSA, the Securities Regulators and other stakeholders.

B. Shareholder and Board Communication

Teachers' believes that in order to permit meaningful shareholder participation at meetings of distributing corporations, it is important that physical meetings continue to be held. While there is nothing objectionable in shareholders being permitted to voluntarily participate by electronic means, an issuer should not be able to hold an entirely "virtual" meeting. We also believe that the provisions of the CBCA concerning the distribution of materials to shareholders are out of step with Canadian securities laws and the corresponding provisions of the provincial and territorial corporate statutes that facilitate communication of corporations' annual proxy materials and financial reports through electronic means, such as through postings on company websites, as contemplated by the "notice and access" provisions introduced under National Instrument 54-101 *Communication with Beneficial Owners of Securities of a Reporting Issuer*. Accordingly, we support modernizing the CBCA provisions to permit electronic delivery of such materials to shareholders, similar to the approach under the *Business Corporations Act* (Ontario).

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[8] These problems, including the complexities of and lack of transparency, consistency and accountability within the voting system, have been extensively reviewed in the paper *The Quality of the Shareholder Vote in Canada* prepared by Davies Ward Phillips & Vineberg LLP at http://www.dwpv.com/cites/shareholder voting/index.htm.

[9] See *CSA Consultation Paper 54-101 Review of the Proxy Voting Infrastructure* at http://www.osc.gov.on.ca/documents/en/Securities-Category5/csa_20130815_54-401_proxy-voting.pdf.

[10] See Teachers' joint submission letter to the Securities Regulators dated November 13, 2013 at http://www.otpp.com/documents/10179/56409/-/1f1c006d-4508-4fe0-a578-ce177bba8b6b/Letter+to+CSA+-+Proxy+Voting+-+Final-Nov13.pdf.

Consistent with comments made by CCGG to the Committee and reported on in the Committee's June 2010 *Report of the Standing Committee on Industry, Science and Technology*, Teachers' also supports the proposal that the CBCA be amended to permit any registered or beneficial shareholder holding at least 3% of a corporation's shares to propose alternative nominees for up to 25% of the board (comparable to Rule 14a11 and Rule 14a-8 initially adopted by the Securities and Exchange Commission ("**SEC**") and by-laws amendments proposed by shareholders or voluntarily adopted by issuers to facilitate nomination procedures and proxy access in the United States)[11] that would have to be included in the management proxy circular at no cost to the nominating shareholder (or a shareholder's reasonable costs incurred in doing so would have to be reimbursed by the corporation). We believe this right should be available to any shareholder irrespective of how long that shareholder has held its investment.

Teachers' also supports that the CBCA should explicitly provide that a shareholder submitting a proposal under section 137 be given a reasonable period of time to speak to the proposal at the annual meeting. In regard to shareholder proposal rights under the CBCA, we believe that Industry Canada should reconsider the deadline by which a shareholder must submit a proposal to reference the date of the last annual meeting itself, rather than referencing the anniversary date of the notice date for the prior annual meeting. We are also supportive of reducing the deadline by which proposals must be submitted from 90 days to, for example, 75 days, as the 90-day time period can impede shareholders' ability to make legitimate use of the shareholder proposal right. A further impediment to the shareholder proposal right under the CBCA is the 500 word limit fixed under the CBCA Regulations. A shareholder's ability to effectively convey its proposal within 500 words so as to ensure that both the receiving corporation and the remaining shareholders are adequately informed of the key elements, can be very difficult, if not impossible in some circumstances. We would also highlight that management is not similarly constrained by any word limitations in responding to a shareholder proposal in its management proxy circular. Recognizing the desire to balance the important shareholder proposal right with corporations' and other shareholders' desire to be able to manage and digest the content of proposals, we would support an increase of the 500 word limit to a range of 1,000 to 1,250 words.

Finally, although the Discussion Paper does not seek consultation on the existing right of a 5%-plus shareholder to requisition a meeting under section 143 of the CBCA, Teachers' believes that it is important to emphasize that the requisition right is a critical shareholder right that should be maintained in the CBCA. If Industry Canada undertakes a review of the requisition right, Teachers' would recommend that consideration be given to clarifying ambiguities in section 143

[11] On August 25, 2010, the SEC adopted final rules to the *Securities Exchange Act of 1934* to (i) permit one or more shareholders having met certain conditions holding at least 3% of the total voting power of the issuer to nominate candidates for up to 25% of the full board directly in an issuer's proxy materials (Rule 14a-11) and (ii) to remove the restriction for an issuer to exclude from its proxy materials shareholder proposals made pursuant to Rule 14a-8 to amend constating documents to facilitate nomination procedures implementing proxy access or disclosures relating to nominations (under Rule 14a-8(i)(8)). While the U.S. Court of Appeals for the District of Columbia subsequently vacated Rule 14a-11 in 2011, proxy access continues to be facilitated on an issuer-by-issuer basis through shareholder proposals and voluntary steps taken by issuers to amend their by-laws pursuant to Rule 14a-8 to permit shareholders holding at least 3% of the voting power to nominate 20-25% of the board in the issuer's proxy materials.

that have been highlighted in recent judicial decisions,[12] which have resulted in it being a less effective shareholder remedy than we believe was intended. Among other things, we would support amending the CBCA to: (a) specify the scope of information (and only that information) which a shareholder is required to include in a requisition in order for it to be valid, which should be limited to only that information reasonably necessary to understand the "business to be transacted" at the meeting; (b) clarify that the requisition right is available to both registered shareholders and beneficial shareholders (similar to the shareholder proposal right); and (c) require directors of the corporation to not only call a meeting within 21 days, but also to *hold* the meeting, within a fixed period of time from the date of the requisition (*e.g.* within 90 to 100 days). We would *not* be supportive of an increase in the percentage of shares required to be held by a shareholder in order to exercise the requisition right, and nor would we support any other amendments that would limit the availability of this right.

C. Board Accountability

Teachers' supports amending the CBCA to require that the roles of Chief Executive Officer and Chair of a board of a distributing corporation (and only a distributing corporation) be held by separate individuals. The need for a distributing corporation's board to be independent of management is critical to effective corporate decision-making and the board's supervision of the management and affairs of a corporation. While Canadian securities laws already require that distributing corporations have a board composed of a majority of independent directors, we believe that in the absence of an independent Chair, such requirements remain inadequate. We also believe that requiring distributing corporations to separate the roles of CEO and Chair is consistent with the practice already adopted by many TSX-listed issuers.[13] With respect to truly majority controlled distributing corporations (*i.e.* corporations where one or more persons acting jointly or in concert own more than 50% of the corporation's outstanding equity, as opposed to corporations where a person or joint actors may hold more than 50% voting control but not have corresponding control over the outstanding equity), we would be willing to concede that such distributing corporations may have legitimate reasons for not separating the role of Chair and CEO or otherwise not having a truly independent Chair. In those limited circumstances, we would therefore propose that such majority controlled distributing corporations may be exempted from separating the role of Chair and CEO, provided that the corporation has an independent Lead Director.

With respect to dilutive acquisition transactions, Teachers' believes that the current TSX rules adequately address these types of transactions by requiring a distributing corporation listed on the TSX to seek shareholder approval in instances where the number of securities issued or issuable in payment of a purchase price for an acquisition exceeds 25% of the outstanding shares of the company.[14] Accordingly, we do not believe that it is necessary for the CBCA to also deal with this issue which is primarily only of concern for distributing corporations. Similarly,

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[12] See, for example, *Wells* v. *Bioniche Life Sciences Inc.*, 2013 ONSC 4871 and *Marks v. Intrinsyc Software International Inc.*, 2013 ONSC 727.

[13] See, for example, Davies' *Governance Insights 2013* at http://www.dwpv.com/~/media/Files/PDF/Davies-Governance-Insights-2013-English.ashx.

[14] See subsection 611(c) of the TSX Manual.

Teachers' considers that disclosure of the social and environmental impact of corporate activities is more appropriately dealt with by securities regulation than in the CBCA (see our related comment on corporate social responsibility in IX below).

III. Securities Transfers and Other Corporate Governance Issues

Insider Trading

We agree that the CBCA, as a framework statute, is not well-suited for the regulation of insider trading. Insider trading and the reporting thereof, together with criminal and civil remedies for violation of these requirements, are already adequately regulated under existing Canadian securities laws and stock exchange rules. Accordingly, other than amendments to the CBCA that foster the continued regulation of insider trading pursuant to existing securities laws, we do not believe it is necessary to incorporate additional insider trading requirements or remedies in the CBCA.

Canadian Residency Requirements for CBCA Directors

Teachers' believes that Canadian representation on boards of CBCA corporations is of no direct relevance to the quality of such boards, which is a far more important consideration from the standpoint of investors. Furthermore, the requirement of subsection 114(3) of the CBCA that at least 25% of the directors present at a meeting be resident Canadians may often be a more onerous constraint than the parallel requirement under subsection 105(3) regarding the composition of the board.

We therefore support amendments to the CBCA that would eliminate the Canadian residency requirements in respect of both a board's composition and quorum. In the alternative, if Industry Canada determines that some residency requirement should be retained in respect of the boards of CBCA companies, we would support reducing the Canadian residency requirement applicable to the composition of boards in subsection 105(3) of the CBCA from 25% to 10%, and wholly eliminating the Canadian residency requirements for purposes of determining quorum under subsection 114(3).

V. Corporate Transparency

Identifying the beneficial owners of a corporation's securities is primarily relevant to the reform of the proxy voting system. As noted under Part II.A. above, Teachers' believes that such reform is best approached through coordinated efforts including the CSA, Securities Regulators and the various stakeholders concerned with the functioning of the system.

To the extent that the Discussion Paper raises issues that have nothing to do with the relationship between corporations and investors, such as access to investor information for purposes of law enforcement or tax collection, Teachers' believes that these are not matters of corporate law or securities regulation and have no place in considering reforms to the CBCA. Parallel issues arise in relation to other kinds of financial and personal information and they are best addressed in a more comprehensive way under other legal frameworks, where the necessary balance between rights to privacy and effective law enforcement can be addressed.

VI. Corporate Governance and Combating Bribery and Corruption

Similarly, Teachers' regards measures aimed at combating bribery of foreign public officials and other corrupt practices in international transactions as a matter that should be addressed, and is being addressed, through the *Corruption of Foreign Public Officials Act* and similar legislation. It is not a matter of corporate law and does not belong in the CBCA, any more than other illegal or harmful activities by corporations, such as bid-rigging or polluting the environment, need to be addressed in the CBCA, as opposed to the *Competition Act* or environmental protection legislation. In Teachers' view, record-keeping requirements under the CBCA are and should be primarily for the benefit of investors of the corporation, and not to indirectly serve other objectives such as the creation or preservation of evidence for law enforcement or similar purposes.

VII. Diversity of Corporate Boards and Management

Securities regulators have recently been active in exploring issues of board diversity. Most recently, the Ontario Securities Commission (the "**OSC**") published proposed amendments to its existing corporate governance disclosure requirements under National Instrument 58-101 *Disclosure of Corporate Governance Practices*, which would require TSX-listed companies and other non-venture issuers to annually disclose, among other things, director term limits, the representation of women on boards and in executive officer positions (including the number and proportion of women in those roles), and whether the issuer has adopted a policy (and, if so, the objectives and key provisions of that policy) on the representation of women on boards.[15] Teachers' has been supportive of such initiatives.[16] We believe that this is another area where the relative flexibility and responsiveness resulting from the continued dialogue among Securities Regulators, issuers, the investment community and other stakeholders is best suited to developing approaches that will effectively encourage greater diversity in corporate management. If the issue were also addressed in the CBCA, there is a risk of duplication of efforts and inconsistent approaches. Furthermore, as we have noted, the longer time-frame within which corporate law evolves is not best suited to responding to evolving issues of this kind.

IX. Corporate Social Responsibility

Teachers' considers that encouraging corporate social responsibility is just one aspect of risk management and effective governance for issuers and responsible investing by shareholders. For example, in making our investment decisions, we evaluate investments having regard to a broad range of financial and non-financial factors, including various risks associated with environmental, political, social and governance issues. However, we believe corporate social

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[15] See the *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* at http://www.osc.gov.on.ca/documents/en/Securities-Category5/ni_20140116_58-101_pro-amd-f1.pdf.

[16] See Teachers' response to OSC Staff Consultation Paper 58-401 at http://www.otpp.com/documents/10179/56409/-/1236bbd8-f425-4f6f-9d87-5f2550999882/OTPP+Response+to+Consultation%20Paper+58-401.pdf.

responsibility and similar risk management issues are matters that should be addressed primarily through disclosure requirements, an area that is and continues to be thoroughly covered by rules and guidance established by the CSA, the Securities Regulators and the TSX, rather than under the CBCA.[17]

The disclosure of items relating to the range of issues identified in the Discussion Paper as typically included under the rubric of "corporate social responsibility", including environmental, human rights, consumer interests and other issues, both deters issuers from entering into practices contrary to good corporate social responsibility, such as bribery arrangements or harmful environmental practices, as well as ensures that investors receive sufficient information about social and environmental impacts to make informed investment decisions. Although the range of corporate social responsibility issues is broad, Canadian securities laws provide extensive rules and guidance as to the creation of policies to integrate corporate social responsibility issues into governance structures and oversight, as well as to compel the disclosure of information surrounding all of these issues where they are material.[18] Accordingly, we do not believe this is an area that is necessary to address, or should be addressed, under corporate law.

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[17] For example, many public issuers, particularly in the resource industries, have established board committees to address issues of corporate social responsibility. Securities Regulators monitor on an ongoing basis the quality of issuer disclosure on their efforts to improve social, environmental and other practices.

[18] See, for example: National Policy 58-201 – *Corporate Governance Guidelines* provides for the integration and promotion of corporate social responsibility ("**CSR**") into governance structures, such as through board mandates, committee charters and written codes of conduct and ethics (also resulting in many issuers establishing specific risk committees to address CSR issues that pose significant risks to their business); National Instrument 58-101 ("**NI 58-101**") and Form 58-101F1 – *Corporate Governance Disclosure* thereunder requires extensive disclosure about board mandates, codes of conduct, governance structures and issues related to promoting and managing CSR issues and their oversight, and monitoring compliance with practices and codes and how boards/committees encourage and promote cultures of ethical business conduct; OSC Staff Notice 51-720 – *Issuer Guide for Companies Operating in Emerging Markets* provides specific guidance for emerging market issuers to address their organizational structures and policies and to disclose CSR issues, such as language and cultural differences and political, legal and regulatory risks; Form 51-102F5 – *Information Circular* under National Instrument 51-102 – *Continuous Disclosure Obligations* ("**NI 51-102**") includes disclosure requirements for various risk factors, including CSR issues, relevant to executive compensation; Form 51-102F2 – *Annual Information Forms* under NI 51-102 requires disclosure of the content and implementation of specific policies that relate to governance structures and processes and issuers' relationships with the environment, health, the communities in which they operate, and other CSR issues and risks relevant to the business; Form 51-102F1 – *Management's Discussion and Analysis* under NI 51-102 similarly prescribes disclosure about different commitments, events, risks and uncertainties facing issuers, including those relating to CSR; and OSC Staff Notice 51-333 – *Environmental Reporting Guidance* addresses the disclosure of CSR issues as summarized in the OSC's prior 2009 Corporate Sustainability Reporting Initiative, providing specific disclosure guidance on certain CSR, including environmental disclosures in particular.

X. Administrative and Technical Matters

D. Should there be a time limit on how long shareholders must hold shares before they can exercise the right of dissent?

In Teachers' view, no "hold period" should be introduced into the CBCA before shareholders can exercise rights of dissent. In general, the courts have consistently rejected arguments that shareholders should not be entitled to exercise corporate rights and remedies because they had "bought into" the corporate conduct of which they complained.[19] Teachers' believes that it is neither possible nor desirable to draw an arbitrary distinction between "long-term" investors and "short-term" ones, in order to relegate the latter to second-class status.

G. Should the CBCA more fully recognize beneficial owners of shares by giving them more of the rights of registered shareholders (*e.g.* the right to vote, the right of dissent)?

Teachers' supports enhancing the ability of beneficial owners of shares to utilize shareholder rights under the CBCA. However, this issue is closely related to reforming the proxy system and is best addressed within that broader context (see Part II.A. above), rather than by considering in isolation or on a piecemeal basis whether a particular shareholder right or remedy might be extended to beneficial owners as well as registered holders.

I. Should the threshold exception in the CBCA be raised so that a person is permitted to solicit proxies, other than by or on behalf of the management of the corporation, without sending a dissident's proxy circular if the total number of shareholders whose proxies are solicited is more than fifteen?

Teachers' believes that the current provisions of the CBCA strike a reasonable balance, on the whole, in enabling dissident shareholders to communicate with other shareholders and engage in limited solicitation without being required to send a dissident's proxy circular. However, there may never be a perfect solution to balancing the interests of management with those of dissidents. This is an area which continues to evolve and, as with some of the other issues discussed above, Teachers' considers that it would not be desirable for differences to emerge between the CBCA and the general approach taken by Securities Regulators in Canada. Therefore, Teachers' would suggest that consideration be given to whether the CBCA should simply adopt an approach that defers to the provisions of Canadian securities laws in effect from time to time, as the CBCA does in regard to other aspects of proxy solicitation.[20]

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[19] See, for example, *Ford Motor Co. of Canada* v. *Ontario Municipal Employees Retirement Board* (2006), 79 O.R. (3d) 81 (C.A.).

[20] See, for example, Part 7 of the *Canada Business Corporations Regulations, 2001*, as amended.

Thank you again for this opportunity to comment on the issues identified in the Discussion Paper. Should you have any questions, please do not hesitate to contact me at *greg_harnish@otpp.com* or (416) 730-6361.

Yours sincerely,

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