Securities Transfer Association of Canada

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President

Via Email cbca-consultations-lcsa@ic.gc.ca

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

Re: Industry Canada, Consultation on the Canada Business Corporations Act.

Dear Sir / Madam:

The Securities Transfer Association of Canada ("STAC") welcomes the opportunity to comment upon the proposed revisions to Industry Canada - Consultation on the Canada Business Corporations Act ("CBCA").

STAC is a non-profit association of Canadian transfer agents that, among others, has the following purposes:

- To promote professional conduct and uniform procedures among its members and others;
- To study, develop, implement and encourage new and improved requirements and practices within the securities industry;
- To develop solutions to complex industry-wide problems;
- To provide a forum and to act as a representative and spokesperson for the positions and opinions of its members, and, where appropriate, its clients and the holders of securities.

STAC members act as agents for securities issuers with respect to the maintenance and administration of a company's share register; by facilitating transfers of ownership, through the distribution of entitlements (dividend and interest payments), via shareholder communications, and providing annual meeting services (including proxy tabulator and scrutineer services) for the majority of shareholder meetings held each year in Canada.

Our comments are focused on those specific topics where our experience and expertise may be of value to the discussion. Our perspectives with respect to the issues raised in the Consultation Paper are as follows.

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.

STAC appreciates the review undertaken by the committee regarding corporate governance and shareholder rights. We believe the CBCA should be amended to ensure consistency with new rules adopted by the TSX, in December of 2012[1], for the issues of: a) mandatory voting by ballot and disclosure of results; b) individual election of directors and "slate" voting; c) maximum one-year terms and annual election for directors; and d) director election by majority vote. We believe that interjurisdictional consistency is in the best interests of the market overall.

- **Mandatory voting by ballot and disclosure of results**

The TSX rules, which came into effect December 31, 2012, require disclosure of detailed results for the election of directors (TSX Company Manual, Part IV, Sec. 461.3).

> Following each meeting of security holders at which there is a vote on the election of directors, each listed issuer (a) that has not adopted a majority voting policy for the election of directors must provide notice to TSX by email to disclosure@tsx.com if a director receives a majority of "withhold" votes; and (b) must forthwith issue a news release disclosing the detailed results of the vote for the election of directors.

The issuer's scrutineer is already present at the meeting to tabulate votes under the current structure of registered and proxy holders, so any added burden related to vote tabulation is minimal.

We note that certain other issues raised in the present consultation may, if advanced, also be relevant. If the CBCA is amended to provide beneficial owners with the same rights as registered shareholders (e.g. in relation to the right to vote and the right of dissent), critical administrative implications within the current voting process must first be addressed. In order to ensure proper reconciliation and publication of voting results, a vote tabulator must have visibility of the shares voted by those entitled to vote. The same principle holds true for electronic meetings, either of the hybrid or virtual-only variety. The concerns with the current voting mechanics do hinder shareholder democracy by limiting accountability, as it is not possible to know with certainty that the votes counted are attributable to entitled shareholders.

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

The TSX rules which came into effect December 31, 2012, require directors to be elected individually (TSX Company Manual, Part IV, Sec. 461.2).

[1] http://www.tmx.com/en/news_events/news/news_releases/2012/10-04-2012_TMXGroup-Requirements.html

> Materials sent to holders of listed securities in connection with a meeting at which directors are being elected must provide for voting on each individual director.

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

The TSX rules which came into effect December 31, 2012, require directors to be elected on an annual basis (TSX Company Manual, Part IV, Sec. 461.1).

> At each annual meeting of holders of listed securities, the board of directors must permit security holders of each class or series to vote on the election of all directors to be elected by such class or series.

- **Director election by majority vote**

The TSX rules of 2012 also addressed the election of directors by a majority vote – see TSX Company Manual, Part IV, Sec. 461.3, above. According to the Canadian Coalition for Good Governance, 61% of issuers listed on the S&P/TSX Composite Index had already implemented majority voting as of the 2010 proxy season[2]. Since that time, TSX has proceeded with making majority voting for directors a requirement for all non-exempt issuers by June, 2015[3].

In general, harmonization of the CBCA with the TSX Company Manual will add coherence to the regulatory environment and provide clarity and consistency for issuers and investors alike.

Proxy Voting Mechanics: Over-voting & empty voting

Over-voting and empty voting, and the direct impact the two have on shareholder democracy and corporate governance, arise in part due to the high level of intermediation and opacity in the indirect securities holding system in Canada, and the processes and practices that have evolved and adapted as a result. By resolving the problem of over-voting, it should be feasible to move towards a more streamed-lined process utilizing electronic delivery of shareholder materials to substantially reduce the (30 to 40 day) window between Record Date and Meeting Date, which at present enables empty voting to take place.

- **Over-voting**

In August, 2013, the Canadian Securities Administrators ("CSA") requested comments on Consultation Paper 54-401 - *Review of the Proxy Voting Infrastructure.* National Instrument (NI) 54-101 and NI 54-101CP, its companion policy, govern all aspects associated with the communication with beneficial owners by a reporting issuer, including the obligation on intermediaries to reconcile their voting files and the establishment of, and notifications regarding, meeting and record dates. The processes outlined in NI 54-101 which channel information, materials, and requests for confirmation through layers of intermediaries remain largely paper driven. Over-voting is a documented problem in Canada, as

[2] Shareholder Democracy Study, June 2011. http://www.ccgg.ca/site/ccgg/assets/pdf/Shareholder_Democracy_Study_June_2011.pdf

[3] The Amendments require each director of a TSX listed issuer, other than a listed issuer that is majority controlled (as defined below), to be elected by a majority of the votes cast with respect to his or her election other than at contested meetings (the "**Majority Voting Requirement**"). An issuer must adopt a majority voting policy (a "**Policy**") if it does not otherwise satisfy the Majority Voting Requirement in a manner acceptable to TSX, for example, by applicable statutes, articles, by-laws or other similar instruments. http://tmx.complinet.com/en/display/display_viewall.html?rbid=2072&element_id=859&record_id=1009&filtered_tag

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discussed in detail in our response[4] to the CSA consultation. STAC recommends that Industry Canada collaborate with the CSA towards the common goal of a transparent, accurate, efficient and accountable shareholder voting process that encourages further automation and electronic processing.

STAC is of the opinion that full reconciliation of record date mailing files by intermediaries (a process which balances a shareholder's entitlement to vote with the number of shares held) along with providing missing or incomplete omnibus proxy documentation prior to tabulation are the critical first steps to correct current problems with the proxy system. This is commonly referred to as 'pre-reconciliation'. STAC believe that each of the following will substantially reduce the risk of over-voting.

CBCA issuers should be able to rely on the voting process under 54-101: the process must be accurate; and ensure that voting forms are only issued to those beneficial owners entitled to vote as of the record date and that votes returned must not exceed the appropriate omnibus authority to vote. The opaqueness of the market reduces the effective ability of the tabulator to ensure that each beneficial owner was entitled to vote and that the vote was properly counted. Unless each intermediary's ledger positions, not just the position with the depository, are reconciled to the beneficial ownership data prior to the creation of mailing files, the integrity of any given vote is brought into question.

The indirect and largely confidential intermediated system in Canada requires those involved in the voting process to channel information, materials, and requests for confirmation through several layers of intermediaries. The ability of the issuer or their agent to clearly track the delegation of the legal authority to vote through the tiers of ownership to the intermediary submitting their client votes is often compromised and significantly decreases the integrity of the process. STAC has long been a proponent that more transparency of ownership, at least at record date, would rectify many voting discrepancies. The NOBO/OBO system is foundational in the North American market but its lack of transparency is an area of increasing concern for many issuers and investors. There have been several proposals made previously to address these concerns. These have included designating every investor as of record date a NOBO solely for the purpose of the AGM; the use of unique identifiers in place of beneficial owner names; and use of segregated nominee accounts for OBOs rather than comingling with NOBO holdings. These proposals would make the voting process more efficient and would provide greater integrity in the system while simultaneously protecting OBO confidentiality.

We note that the risk of over-voting cannot be specifically resolved via amendments to the CBCA. STAC members submit that it is reasonable for CBCA issuers and their meeting tabulator to be provided with a reconciled list of all holders (registered & beneficial) entitled to vote as of a record date. Shareholders entitled to vote as of record date should not only be able to vote at a meeting but should also be properly recognized so their votes may be validated by the tabulator and directly confirmed in the final voting results. STAC recommends that Industry Canada collaborate with the CSA to improve the relevant mechanisms within NI 54-101 to address this voting entitlement concern.

- **Empty voting**

The risk of empty voting is predominantly driven by the length of time between the record date for voting entitlement and the meeting date (generally 30 to 40 days in Canada). This time period increases the likelihood that parties entitled to vote as of the record date may no longer hold an economic interest in the relevant shares at the time of the meeting (e.g., due to selling, securities loans, etc.). One relatively simple answer to allay concerns over empty voting is to reduce this period of time, and we note that those

[4] https://www.osc.gov.on.ca/en/com_20131113_54-401_staofcan.pdf

markets (such as the UK, France and Australia) with a much shorter period of time between record date and meeting date report significantly less concern with empty voting.

Notwithstanding the foregoing, STAC appreciates that a record date is set in order to accommodate the administration of the proxy voting process through the complexities of the NOBO/OBO structure. A seemingly simple change to address one concern would likely result in unintended consequences unless efficiencies are created in the process. In STAC's view, resolving the issue of pre-reconciliation is an essential prerequisite to improving efficiency in the proxy voting process as it will reduce the incidence of overvoting errors. Additionally, through increased adoption of electronic communications between market participants the time required to administer the voting process will be reduced.

However, as proxy material must cascade down to the beneficial owner and, beneficial owners' votes passed back via intermediaries, time constraints would remain a relevant and important consideration.

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.

- **Electronic meetings for public companies**

STAC recommend that the CBCA allow electronic meetings, primarily as a supplement to enhance shareholder engagement. Experience to date from this new form electronic meetings strongly suggests hybrid meetings are preferable to virtual-only meetings, as they still provide for face-to-face communications between investors and management while allowing for greater shareholder participation by those unable to attend a meeting in person due to distance or other logistics.

Several considerations need to be addressed before issuers can effectively offer a full service electronic meeting, especially in the case of virtual-only meetings. First, technical constraints exist for operating a meeting in a virtual environment. All investors wishing to receive electronic communications will need to have web access to the meeting portal, provide an email address and consent to receiving notice of the meeting materials not only from the intermediary but also to the meeting organizer and tabulator. We suggest that the CBCA work with other Canadian regulators and stakeholders to agree on mechanisms to improve electronic communications and move closer to an environment where this becomes the default mechanism for shareholders. Subject to appropriate privacy law protections, this should include consideration of an 'opt-out' approach to e-communications where the investor's email is known, rather than 'opt-in'; preserving the right to require paper communications while addressing the reduced participation inherently created by requiring active consent.

It is also necessary to address a substantial gap in the e-communications arrangements for NOBOs. At present, the consent given by investors to their intermediaries is not generally considered to flow through to also authorize the issuer or their transfer agent to use e-communication with that investor e.g. for NOBO mailings. Thus the issuer is required to send paper proxy materials to a NOBO that has consented to their intermediary communicating electronically, adding unnecessary cost and inefficiency. We

recommend that specific legislative support is necessary to deem that consent to the intermediary also authorizes the issuer or their agent.

A further issue is the shareholder's right to privacy as some level of disclosure would be required to recognize and validate voters and their holdings online to facilitate voting and addressing the meeting with questions or to participate in a ballot or poll during the meeting. We suggest that further discussion between stakeholders should take place to agree the most effective mechanism to achieve this. An option would be to provide a NOBO-only status for all beneficial owners on Record Date or alternatively, assign an identifiable control number that would identify the financial intermediary and the client holdings as of record date. Again, this makes pre-reconciliation a necessity for the voting process.

- **Facilitation of "Notice & Access" provisions under the CBCA**

Most CBCA-incorporated issuers did not elect Notice & Access ("N&A") in 2013, citing that the CBCA did not specifically allow for N&A and in fact that certain provisions of the CBCA prevent issuers from using N&A due to the requirement for explicit shareholder consent to receive specified documents electronically (including notice of meeting, form of proxy, information circular, and annual financial statements). STAC considers it anomalous that CBCA-incorporated issuers are unable to benefit from the N&A arrangements and recommend that the CBCA be amended to explicitly allow for it.

Another area that should be addressed is the availability of email addresses and implied consent, as discussed in the previous section. The CBCA revision should address the need for shareholder consent, as noted above, to electronic communication to be passed from intermediary to the transfer agent/issuer. Under NI 54-101, a notice package can be sent by mail or, if prior consent has been obtained, electronically. Implied consent for electronic delivery would make the "Notice" communications more efficient and timely, and result in cost savings for the issuer.

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

STAC understands the issues raised by the committee and the policy goal of ensuring that all shareholders are treated equally. However, we have a concern that an appropriate balance be retained between the principle of equal treatment of shareholders and the consequential costs and burden imposed on issuers.

In our view, the provisions of NI 54-101 achieve a reasonable balance in this regard by permitting an investor to choose to have direct communications with the issuer (NOBO) or electing to receive materials indirectly through their intermediary (OBO). NI 54-101 provides the shareholder a choice without imposing greater costs on the issuer resulting from an OBO election.

At present, beneficial owners have the right to receive communications and vote through their intermediary. In theory, if all intermediary ledger positions were fully reconciled with the beneficial ownership files, then the Omnibus Proxy could cascade down from the registered holder (CDS) to the intermediary and on to the beneficial owner. The beneficial owners would receive a proxy form rather than a Vote Instruction Form ("VIF"). In fact, the STAC Protocol[5] contemplates an issuer using this approach for NOBO mailings through the transfer agent. STAC refers to this as an "Omnibus Legal Proxy", which is a proxy signed by the management nominee in favour of the investors on the NOBO list. This proxy form allows the NOBO to either vote via proxy or attend the meeting in person. Most

[5] http://www.stac.ca/Public/PublicShowFile.aspx?fileID=220

importantly, this process allocates the shares specifically to each NOBO; where a NOBO elects not to provide a vote instruction or proxy, the allocation remains intact and available should the holder wish to attend the meeting in person. By contrast, in the indirect process, shares related to an unvoted VIF remain in the fungible pool and can be reallocated to cover over-votes by other shareholders who return their voting instructions for more than the number of shares to which they are entitled.

By utilizing the Omnibus Legal Proxy, the issuer's transfer agent, who has been appointed to communicate directly with NOBOs, may treat shareholders equally since the transfer agent uses the same voting system for both NOBOs and registered holders. The Omnibus Legal Proxy is described in detail in the Davies report under s.27.6.6[6].

Industry Canada might also consider other options to balance between shareholder equality and choice and the burden imposed on issuers. For example, this balance could be achieved by deeming all beneficial owners to be NOBO as of a record date for a shareholder meeting; or all OBOs, alternatively, be recorded in a depository subaccount, in a registered nominee name, or identified via a unique account ID such that issuers could undertake direct communications to all investors without infringing on the privacy of OBOs. Of course, any approach should also be compatible with, and incorporated into, NI 54-101.

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 the provincial laws in these cases.

- **The potential removal of the CBCA provisions relating to Securities Transfers**

STAC are supportive of amendments to the CBCA which adopt the principles enshrined in the model Uniform Securities Transfer Act[7] ("USTA") and provide consistency in the Canadian regulatory environment. We note one particular aspect of the USTA that will require additional accommodation in the CBCA, in relation to uncertificated securities. STAC recommends that complementary changes be introduced to the CBCA to enable issuers to take advantage of the uncertificated securities provisions of the USTA, including specific board requirements in the CBCA governing the issuance of uncertificated shares.

A number of international markets including the U.S. encourage, or require, uncertificated issues, something a CBCA issuer may consider. In North America, a significant number of Canadian issuers are inter-listed in the U.S., where the Depository Trust Company ("DTC") continues to promote dematerialization of the U.S. listed securities industry. We understand that the New York Stock Exchange and NASDAQ are jointly preparing proposed changes to listing rules which would require that all new listings be fully uncertificated (Statement only) for registered holders. We expect the proposed rules to be filed with the SEC during calendar Q2 2014; followed by a public comment period. The effective date of the rule change could be as early as Q3 2014. We do expect that exemptions will be provided for foreign issuers where the issuer's local law requires the issuance of certificates. This review of the CBCA provides an important opportunity to proactively address extraterritorial regulatory changes which will impact Canadian issuers. STAC considers it critical to facilitate Canadian issuers'

[6] http://www.dwpv.com/Sites/shareholdervoting/media/The-Quality-of-the-Shareholder-Vote-in-Canada.pdf

[7] www.ulcc.ca

participation in this industry development in order to benefit from the efficiencies and cost savings of uncertificated securities.

V. Corporate Transparency (ATML)

Stakeholders and other 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.

- **Improve access to accurate and timely information, by competent authorities such as law enforcement and tax authorizes, on beneficial ownership of corporations, including possibly through the establishment of a central repository of corporations incorporated under the CBCA**

STAC understands Industry Canada's interest in this very important topic and welcome the opportunity to participate on future reviews.

As Industry Canada continues to develop its position on this topic, it will be necessary to consider where the appropriate burden of identification of beneficial owners rests: the intermediary; the issuer or the investor themselves. The OBO structure in particular would make any requirement on an issuer to investigate and report beneficial ownership extremely burdensome if not impossible. It will also be necessary to consider how any repository of beneficial ownership would be held and updated.

STAC members are aware that this is a topic of increasing international debate, including through the G-8. We are happy to discuss the issue in more detail with Industry Canada as the Canadian proposals develop, and to offer our expertise on the operational and structural implications.

X. Administrative and Technical Matters

Stakeholders and others are invited to provide submissions on any of these matters and the adequacy of the existing CBCA provisions referred to above, as well as any suggestions for amendments and what such amendments might entail.

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

STAC's comments on this issue are offering from our perspective as transfer agents considering the operational implications, rather than commenting on the underlying principles. The lack of direct visibility of share ownership would prevent an issuer or an independent third party from monitoring the period of time that shares are held and determining entitlement to exercise the right of dissent, where that right is determined by length of ownership, for any investor that is not a directly registered shareholder. Only the investor's intermediary would be in a position to determine how long shares have been held. We would pose the question whether a statement from the intermediary is sufficiently independent verification for the purposes of determining entitlement; however suggest that this principle is best determined by the regulators, issuers, and other corporate governance stakeholders.

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)?

If stakeholders and regulators agree that beneficial owners should legally be entitled to the same rights as registered shareholders in certain areas, then the proxy voting infrastructure issues, as discussed in Section II, need to be adequately resolved first. In our view, from an administrative perspective, it is not feasible, in the current environment, to determine ownership entitlement with sufficient certainty and integrity, without addressing the underlying issues such as inadequate reconciliation and accounting for use of securities in securities lending and other arrangements.

We would be glad to discuss these comments and provide additional feedback as Industry Canada continues its efforts to revise the Canada Business Corporations Act.

Yours truly,

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