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DELIVERED BY EMAIL

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

Dear Sirs/Mesdames:

Re: Industry Canada – Consultation on the *Canada Business Corporations Act*

TMX Group Limited ("TMX Group") welcomes the opportunity to provide comments in respect of Industry Canada's public consultation on the *Canada Business Corporations Act* (the "CBCA Consultation").

All capitalized terms have the same meanings as defined in the CBCA Consultation or in the *Canada Business Corporations Act* ("CBCA"), unless otherwise defined in this letter.

TMX Group has a number of subsidiaries, including: TMX Equity Transfer Services Inc. ("Equity") which is a provider of corporate trust, securities transfer and registrar, and employee plan administration services for issuers; The Canadian Depository for Securities Limited ("CDS"), which is Canada's national securities depository, clearing and settlement hub; Canadian Derivatives Clearing Corporation ("CDCC") which offers clearing and settlement for derivatives transactions; Montréal Exchange ("MX"), a derivatives exchange; Natural Gas and Energy Exchange, Inc. ("NGX"), a Canadian-based exchange for trading, clearing and settling natural gas, crude oil and electricity contracts; and Toronto Stock Exchange ("TSX") and TSX Venture Exchange ("TSXV") which are exchange operators who have, on a combined basis, more than 3658 listed issuers, many of which are incorporated under the CBCA. Through MX and CDCC, TMX Group provides Canadian leadership in derivatives products, trading and clearing. TMX Group's experiences in all of these areas have been considered in providing these comments.

TMX Group is very interested in and committed to the long term success of Canada's capital markets in which a strong corporate regulatory structure and investor confidence and protection play key roles. TMX Group supports Industry Canada's consultation initiative to ensure that the CBCA remains effective, instills investor and business confidence and remains consistent with principles of transparency.

TMX Group strongly supports the harmonization of legal requirements for Canadian companies. TMX Group believes that such significant changes to the CBCA should be considered together with corresponding changes to provincial and territorial corporate statutes, as well as to statutes governing other types of corporate entities that may be publicly listed, such as real estate investment trusts and exchange traded products. Without such

concurrent considerations, there could be a negative impact from non-uniform laws, overlapping requirements and, therefore, inefficiencies. These differences could also result in confusion to investors about the nature of their rights and may lead to "forum shopping" with an ultimate potential negative impact on the Canadian capital market.

TMX Group believes that there are certain issues set out in the CBCA Consultation, discussed in more detail in Appendix A to this letter, that may be more properly suited to the administration and oversight of the Canadian Securities Administrators (the "CSA"), as these issues are directly related to existing disclosure regimes for publicly listed issuers and/or relate to publicly listed entities.

TMX Group is supportive of reducing duplicative obligations on publicly listed issuers. Where obligations affecting publicly listed entities are concerned, TMX Group strongly advocates for the harmonization of public company regulation under the umbrella of the CSA so that market participants have the same rights and receive the same quality of disclosure and, regardless of jurisdiction of incorporation, issuers are held to the same standards.

TMX Group is also supportive of close-out netting which enables the protection of derivatives market participants and promotes stability of the financial markets. If the CBCA is to be used as a means to liquidate or discontinue companies which are insolvent or which become insolvent prior to the issuance of an order, then both the CBCA, as quasi insolvency legislation, and close-out netting legislation should be reviewed and amended, as necessary, in order to reflect this practice and to ensure that there is no resulting weakening of the benefits of close-out netting. As a general matter, insolvency legislation and close-out netting legislation should be harmonized in order for the latter to be fully effective.

The Principles for Financial Market Infrastructures ("PFMI") require that the clearinghouses to which they apply be fully transparent as to the risks, fees and other material costs that clearinghouses incur by participating in the financial market infrastructure. Fine-tuning of insolvency legislation, including the CBCA if it is used for insolvency, will help clearinghouses uphold this important principle of transparency.

You will find attached as Appendix A to this letter our responses to certain of the topics set out for discussion in the CBCA Consultation.

We thank you for the opportunity to comment on the CBCA Consultation. Should you wish to discuss any of the comment with us in more details, we would be pleased to respond.

Sincerely,

Kevan Cowan
President, TSX Markets, Group Head of Equities
TMX Group

APPENDIX A

RESPONSES TO CERTAIN CBCA CONSULTATION TOPICS

I. Executive Compensation

TMX Group believes that executive compensation and shareholder review of such compensation is appropriately regulated and overseen by the CSA.

CSA oversight is particularly important in this respect. TMX Group believes that having a regulatory body monitor compliance with executive compensation disclosure is an effective and efficient way of addressing disclosure, as opposed to requiring the involvement of the courts to enforce compliance.

II. Shareholder Rights

A. Voting

Mandatory voting by ballot at shareholder meetings and disclosure of results by public companies

In the experience of Equity, if the outcome based on proxy votes tabulated before a meeting will not be changed by the securities represented in person at the meeting, it is unnecessary to require mandatory voting by ballot at security holder meetings.

TMX Group supports the public disclosure of security holder meeting results for non-venture issuers (as such term is defined in National Instrument 51-102 – *Continuous Disclosure Obligations*), as is currently required under securities law.

Individual elections and "slate" voting

TMX Group is supportive of individual director elections since they allow security holders to show support or disapproval for individuals. Please refer to the amendments to Part IV of the TSX Company Manual that took effect on December 31, 2012 (the "TSX Director Election Amendments") requiring TSX listed issuers to, among other things, elect directors individually. With respect to TSXV listed issuers, individual director elections have been a longstanding requirement under TSXV policies. If the CBCA were to mandate individual elections, we believe that it would be important for the legislation to be consistent with the existing regime which has been closely considered and subject to public comment.

Maximum one-year terms and annual elections for directors

TMX Group is supportive of annual elections for directors. The TSX Director Election Amendments require TSX listed issuers to, among other things, elect directors annually. With respect to TSXV listed issuers, the requirement to elect directors annually has been a longstanding requirement under TSXV policies. If the CBCA were to mandate annual elections, we believe that it would be important for the legislation to be consistent with the existing regime which has been closely considered and subject to public comment.

Director election by majority vote

TMX Group strongly supports the implementation of majority voting for TSX listed issuers as a way to improve corporate governance standards in Canada by providing a meaningful way for security holders to hold individual directors accountable. TMX Group believes that, at the senior market level, majority voting will enhance transparency and improve the governance dialogue between issuers, security holders and other stakeholders. Please refer to the amendments to Part IV of the TSX Company Manual published on February 13, 2014 with an effective date of June 30, 2014 (the "TSX Majority Voting Amendments") requiring TSX listed issuers to implement majority voting.

TSXV does not currently require majority voting. The prevalence amongst TSXV listed issuers of concentrated share positions and low shareholder participation at annual general meetings limit the utility of majority voting for TSXV listed issuers. Furthermore, TSXV has not had the same investor demand to adopt majority voting. TMX Group does not currently believe that the cost-benefit analysis is weighted towards adopting majority voting for TSXV listed issuers.

If the CBCA were to mandate majority voting, we believe that it would be important for the legislation to be consistent with this existing regime which has been closely considered and subject to public comment. We also believe that it would be important for the legislation to provide a mechanism to address the issue of failed elections and vacuums in terms of experience or independence caused by the resignation of directors who did not receive majority support.

"Overvoting" of voting rights attached to corporate shares

CDS is the registered security-holder for the vast majority of Canadian securities and, as such, is most often the entity to which the right to vote enures. CDS does not hold these securities for its own account but, rather, on behalf of its participants. Further, where timing or other factors result in the need for the registered holder of the securities to act, CDS acts only on the instructions of its participants in voting situations.

If it is decided to amend the CBCA to give beneficial security holders privileges equivalent to those of registered security holders, TMX Group supports the inclusion of clear guidelines as to what will constitute unequivocal evidence of a beneficial owner's ownership of the securities and proof of continued ownership until completion of the matter at hand.

To the extent that changes or amendments to the CBCA are determined to be advisable, TMX Group supports the principle that beneficial shareholders should neither be disenfranchised, nor receive undue benefit from, the voting rights that attach to their holdings. TMX Group has previously stated that it supports a voting confirmation system which would enable the reconciliation of votes and the elimination of vote-counting irregularities.

"Empty voting" by shareholders without an economic interest in the corporation

As noted above, CDS acts on behalf of, and on the instruction of, its participants. In the vast majority of cases, the processes detailed in National Instrument 54-101 – *Communication with Beneficial Shareholders* govern how CDS interacts with securities issuers, financial institutions and intermediaries. Historically, CDS has not taken a position with respect to the issue of empty voting for several reasons: (i) CDS holds its participants' securities positions in bulk form, so there is no practical method for CDS to ascertain whether a beneficial holder (who could be a client of a customer of a CDS participant and, thus, far beyond CDS's reach) has or maintains an economic interest in shares of an issuer on an ongoing basis; (ii) where CDS's holdings are held in a non-certificated position with a Canadian transfer agent, the balance of securities held is reconciled nightly with the transfer agent; and (iii) CDS's participant rules currently provide that issuers may request a declaration from participants and from their customers; however, such a request may only be made in certain circumstances and does not constitute a control mechanism vis-à-vis a beneficial holder's economic interest in securities held by CDS.

B. Shareholder and Board Communication

Electronic meetings for public companies

TMX Group is supportive of enabling electronic security holder meetings for public companies. Facilitating electronic security holder meetings may increase access to meetings, as well as reduce costs for issuers.

Facilitation of "notice and access" provisions under the CBCA

TMX Group believes that permitting companies incorporated under the CBCA to fully avail themselves of "notice and access" for all security holder meeting materials, annual financial statements and MD&A is beneficial and cost-effective. In facilitating the use of this mechanism, the ability of intermediaries to rely on "notice and access" should also be taken into consideration.

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

In late 2013, TMX Group was pleased to have the opportunity to comment on CSA Consultation Paper 54-401 – *Review of the Proxy Voting Infrastructure*, as well as to participate in the CSA's roundtable on the topic. It is our understanding that certain members of the CSA have announced further consultations on this complex and important issue in 2014. We encourage Industry Canada to coordinate closely with the CSA on any proposed amendments or action that could affect Canada's proxy voting infrastructure to ensure that Industry Canada has the benefit of the in-depth consultation and public feedback received by the CSA in this respect.

TMX Group submits that, while there may be legitimate policy reasons for piercing the veil of privacy where security holders are concerned, federal and provincial privacy legislation, and recent jurisprudence from the British Columbia Court of Appeal[1], currently supports Canada's indirect share-holding system. TMX Group believes that any prospective amendments to the CBCA should be aligned as closely as possible with similar legislation so as to avoid conflict and confusion as between jurisdictions and provide clarity, at least in respect of CBCA entities, respecting with whom an issuer may deal in the context of the rights attached to securities.[2]

C. Board Accountability

Shareholder approval of significantly dilutive acquisitions

TMX Group agrees that there are certain transactions that are highly dilutive in nature that benefit from security holder approval as a way of ensuring fairness. The costs of requiring security holder meetings in order to obtain this approval can, however, be burdensome to issuers. TSX and TSXV permit issuers to obtain written consent for these types of transactions as a way to promote security holder protection while balancing cost concerns.

The exchanges monitor whether issuers are in compliance with the requirement for security holder approval of transactions that are subject to such requirements and can impose conditions on issuers who are not in compliance. To the extent that changes to the CBCA in this respect are deemed appropriate, we would welcome a dialogue on how and by whom compliance with this requirement will be monitored and enforced. As well, we believe it is useful to consider what the consequence would be for failure to obtain security holder approval on a transaction and whether security holders would need to bring an oppression remedy suit against the company for failure to seek shareholder approval.

Disclosure of the board's understanding of social and environmental matters on corporate operations

TMX Group believes that disclosure relating to corporate governance issues is appropriately dealt with under National Instrument 58-101 – *Disclosure of Corporate Governance Practices* ("NI 58-101") and that any additional social and environmental impact disclosure requirements would benefit from being developed through consultation by the CSA and public stakeholders. TMX Group reiterates its belief in the importance of CSA oversight as an effective and efficient way of enforcing disclosure obligations.

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[1] *TELUS Corporation v. Mason Capital Management LLC,* 2012 BCCA 403 at para. 37 et seq.
[2] Canada Business Corporations Act, R.S.C., 1985, c. C-44, s. 51(1).

III. Securities Transfers and Other Corporate Governance Issues

The potential removal of the CBCA provisions relating to securities transfers

TMX Group has long a been a proponent of the dematerialization of securities and, in that light, suggests that sections of the CBCA requiring a CBCA issuer to provide a security certificate be examined to consider their removal since such requirements are direct impediments to dematerialization of securities, increase costs to issuers and may decrease efficiency in the Canadian market.

Insider-trading provisions in the CBCA

TMX Group supports the harmonization of legal obligations, especially complex and important provisions such as insider trading restrictions, across Canada and across applicable legislation.

V. Corporate Transparency

Disclosure by nominee shareholders of information on the individuals for whom they are acting

TMX Group wishes to note that the indirect holding system in Canada – whereby CDS is the registered shareholder for approximately 95% of outstanding securities in the Canadian market – and the infrastructure which supports it, is explicitly premised on the idea that securities are held in nominee names to facilitate transfers between parties. As noted, CDS holds securities on behalf of its participants, each of which may hold on behalf of beneficial holders or other financial institutions, and requirements imposed on CDS to collate, manage and disclose beneficial security holder information would fundamentally alter the nature of Canada's indirect securities holding system.

VII. Diversity of Corporate Boards and Management

TMX Group is supportive of the OSC initiative regarding proposed amendments to Form 58-101F1 of NI 58-101 relating to gender diversity disclosure for publicly listed non-venture issuers. TMX Group believes that diversity issues are appropriately dealt with under NI 58-101 and that the "comply or explain" model is well suited to this type of disclosure. TSX reiterates its belief that these disclosure requirements are best overseen by securities regulators who have the required resources and expertise to effectively and efficiently implement and enforce compliance with them.

VIII. Arrangements under the CBCA

As set out in Part VIII of the Consultation Paper, corporations experiencing financial difficulty are increasingly petitioning for an arrangement (which may ultimately include liquidation) under the CBCA instead of applying for arrangements with their creditors pursuant to the *Companies' Creditors Arrangement* Act ("CCAA") or making an assignment in bankruptcy or a proposal in accordance with the *Bankruptcy and Insolvency Act* ("BIA"). The TMX Group does not express an opinion on this trend, however, due to the importance of close-out netting in protecting derivatives market participants and in promoting financial market stability, if liquidation and dissolution of insolvent companies under the CBCA continues to be permitted, TMX Group encourages a review of insolvency and close-out netting legislation to ensure that there is no resulting weakening of the benefits of close-out netting as a result of using the CBCA in this way.

The following are two examples of where a review of close-out netting or insolvency legislation may be warranted if the CBCA continues to be used as described above.

<u>Example 1</u>

The first example concerns an issue which relates to close-out netting legislation. Section 13.1 of the *Payment Clearing and Settlement Act* ("PCSA"), set out below, is one of two key provisions which support close-out netting rights in Canada, however, it is not clearly applicable to an insolvency-type proceeding under the CBCA:

> 13.1 (1) Nothing in any law relating to bankruptcy or insolvency or in any order of a court made in respect of the administration of a reorganization, arrangement or receivership involving insolvency, including in any foreign law or order of a foreign court, has the effect of
>
> (a) preventing a securities and derivatives clearing house from
>
> (i) if it is a party to a netting agreement, terminating the agreement and determining a net termination value or net settlement amount in accordance with the provisions of the agreement, with the party entitled to the value or amount becoming a creditor of the party owing the value or amount for that value or amount, or
>
> (ii) acting in accordance with any of its rules that provide the basis on which payment and delivery obligations are calculated, netted and settled; or
>
> (b) interfering with the rights or remedies of a securities and derivatives clearing house in respect of any collateral that has been granted to it as security for the performance of an obligation incurred in respect of the clearing and settlement services provided by the securities and derivatives clearing house. [emphasis added]

An application for dissolution or liquidation under the CBCA does not clearly fall within the words "reorganization, arrangement or receivership involving insolvency." As a result, there is ambiguity as to whether close-out netting could be applied by certain clearinghouses where a company has petitioned for an arrangement (which may ultimately include liquidation) under the CBCA.

Example 2

The second example concerns the need to harmonize and update insolvency legislation, including the CBCA, if it is to be maintained as a basis for insolvency-type petitions.

Once proceedings have been initiated pursuant to the terms of the BIA, there is an automatic stay of proceedings such that no creditor has any remedy against the insolvent person, nor shall commence nor continue any proceedings for the recovery of a claim provable in bankruptcy[3]. In addition, in the case of a proposal, no person may terminate an agreement with the debtor by reason of the insolvency of the debtor[4].

Section 69.6(2) of the BIA provides an important exception: no stay provided by the BIA affects a regulatory body's investigation (for example, a proceeding concerning the termination of clearing member status or status as an approved participant of an exchange) in respect of an insolvent person or an action, suit or proceeding that is taken in respect of the insolvent person by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

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[3] Sections 69 and 69.1 to 69.4 of the BIA.

[4] Section 65.1 of the BIA.

A "regulatory body" is defined as a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of the BIA.

Section 103.1 of the *Bankruptcy and Insolvency General Rules* provides that a stock exchange that is regulated by an Act of Parliament or of the legislature of a province is prescribed as a regulatory body for the purposes of the BIA.

MX is a derivatives exchange and not a stock exchange. In our view, it should be included in this provision as a derivatives exchange (see also housekeeping change proposed below). We are also of the view that clearinghouses should be included in the definition of "regulatory body" and that references to the PCSA would be warranted as well. The CCAA contains analogous provisions, which in our view, would warrant similar amendments. So would the CBCA and related regulations if the practice of petitioning for an arrangement (which may ultimately include liquidation) by insolvent or nearly insolvent companies continues to be permitted. Otherwise, a regulatory body such as an exchange or clearinghouse may be affected by a stay where, arguably, it should not be.

Since the CBCA contains no analogous provisions, it is unclear whether a stay under the CBCA affects the investigation by a regulatory body (such as a stock exchange, a derivatives exchange or a clearinghouse) in respect of an insolvent person or an action, suit or proceeding that is taken in respect of the insolvent person by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court. There are administrative costs as well as some elements of uncertainty involved for an exchange or clearinghouse being the subject of an automatic stay where under the existing BIA, CCAA or a new analogous provision under the CBCA and market participants would benefit from a clarification of insolvency legislation in this regard.
Three members of TMX Group: CDCC; CDS; and NGX are financial market infrastructures which must abide by PFMIs. PFMI Principle 23 states:

> an FMI should have clear and comprehensive rules and procedures and should provide sufficient information to enable participants to have an accurate understanding of the risks, fees, and other material costs they incur by participating in the FMI. All relevant rules and key procedures should be publicly disclosed.

The differences between the CBCA insolvency regime and the BIA and CCAA may make it difficult for CDCC, CDS and NGX, which are participants in FMI to provide a clear understanding of some of the finer elements of the risks incurred in participating in an FMI, as demonstrated by the two examples set out above. We would welcome any questions or dialogue with Industry Canada on this issue.

X. Administrative and Technical Matters

F. *Should the CBCA be amended to make it clear that a consolidation of shares, with or without repurchase of fractional shares, is not a transaction that triggers a right of dissent? Further, should "going-private transactions" permit the use of the right of dissent?*

TMX Group supports the clarification of the intent of the legislation in this regard.

Other

As a housekeeping change, we suggest that paragraph 36(b) of the *Canada Business Corporations Regulations* (the "Regulations") be updated to make reference to recognized stock exchanges and derivatives exchanges, since the currently referenced entities have changed names or, as is the case with The Montreal Exchange, is a derivatives exchange and no longer a stock exchange.