

May 12, 2014

Director General
Marketplace Framework Policy Branch
Industry Canada
235 Queen Street, 10th Floor
Ottawa, Ontario
K1A 0H5
cbca-consultations-lcsa@ic.gc.ca

Re: Consultation on the *Canada Business Corporations Act*

Dear Sirs/Madams:

Talisman Energy Inc. (“Talisman” or the “Company”) is pleased to have this opportunity to provide comments in response to Industry Canada’s public consultation on the *Canada Business Corporations Act* (“CBCA”).

As a global upstream oil and gas company, headquartered in Canada and incorporated under the CBCA, Talisman takes a keen interest in any revisions to this key statute. We welcome efforts by Industry Canada to seek feedback on improvements in order that the CBCA keep pace with the rapidly evolving reality of corporate governance in Canada.

Before turning to the specifics of the consultation paper, we would like to explain the principles that guide our consideration of this consultation paper and the responses we are providing:

- Boards have obligations to act in the best interests of the corporation, and not only of short-term investors;
- The CBCA should facilitate the ability of Canadian corporations to compete and thrive in the global market; and
- Regulators should communicate and cooperate in order to establish efficient and effective regulation of Canadian corporations.

Fundamentally underpinning each of the points below is Talisman’s belief that the growing investment trend of short-termism poses a risk to the Canadian economy as a whole. We believe that corporate decision-making that focuses on quick stock surges to the benefit of select investors (at the cost of long-term investment decisions that underpin corporate, and therefore, employment growth) ultimately risks the medium- and long-term survival of Canadian corporations. Talisman supports initiatives to promote and improve shareholder democracy, but believe that governance should be in the interests of all shareholders, not only the most influential, as well as other stakeholders, including employees and the

Canadian economy as a whole. These are issues of great significance to the Canadian economy that cannot be addressed in isolation and they strike at the core of the ability of Canadian corporations to compete globally. We would encourage Industry Canada to coordinate with the Canadian securities regulators to ensure a unified approach to updating corporate and securities law and regulations in Canada in a way that is relevant to and reflective of the contemporary realities of Canadian public corporations.

With respect to the specifics of the consultation paper, Talisman is supportive of Industry Canada's discussions in the consultation paper regarding:

- the move towards facilitating "notice and access" provisions under the CBCA;
- the need to address the complicated issues of over voting and empty voting;
- working towards a solution to enable corporations to send proxy materials to all shareholders, which will include balancing the related privacy concerns against the interest of corporations in knowing and understanding their shareholders;
- requirements to have nominee shareholders provide information about the shareholders they are representing so that shareholders cannot anonymously take actions with respect to the subject corporation;
- further exploration of the issue of whether shareholders should be required to hold shares in a corporation for a period of time prior to exercising their right of dissent – we would recommend share ownership prior to the announcement of the subject transaction as a means to counter the short-termism that Canadian corporations increasingly face in their shareholder base;
- generally a move towards greater transparency of ownership to both competent authorities and the corporation itself;
- continuation of the requirement that 25% of directors be resident Canadians; and
- establishing Socially Responsible Enterprises (SREs) that would be subject to the CBCA, and therefore held to the same standards and transparency as corporations.

We do, however, offer our concerns on a number of matters put forward in the consultation paper, and our views are further highlighted through the assertions at the beginning of each section below. In the remainder of this letter we draw your attention to aspects of the consultation paper that, in our opinion, warrant further attention and discussion.

1. Several of the discussed revisions encourage further shareholder activism and short-termism at the expense of the best interests of the corporation and other corporate stakeholders.

As outlined at the beginning of this letter, we have fundamental concerns with an imbalanced focus on not only one type of stakeholder, but one type of shareholder – the short-term shareholder. In Canada, there is well-established case law confirming a board's duty to the best interests of the corporation, and that this involves consideration of shareholders, bondholders, employees, and other stakeholders. The provisions discussed below would result in a CBCA that promotes the interests of short-term investors at the expense of the best interests of the corporation broadly.

Access to proxy circular by “significant” shareholders (more than 5% ownership):

The consultation paper contends that the cost of preparing and distributing an alternative shareholder circular can be prohibitive. Specifically, it contemplates an amendment to the CBCA to permit significant shareholders (being a holder of 5% of shares or more) to include their alternate nominees for directors in management’s proxy circular so that the corporation will bear the cost of dissident shareholders communicating with shareholders. By considering the resources of recent shareholder activists in Canada it becomes clear that many activist shareholders do not lack the financial resources to fund the shareholder communications required to put forward alternative director nominees: Icahn Capital LP’s portfolio is valued at approximately \$30.5 billion¹; Pershing Square Capital Management – approximately \$8.2 billion², Jana Partners – approximately \$7.9 billion³, Mason Capital Management – \$5.4 billion⁴, and Front Four Capital Group – approximately \$384 million⁵. The existing requirement that dissident shareholders shall bear the cost of their own shareholder communications incentivizes such shareholders to weigh the costs and benefits of instigating a time-consuming and expensive “proxy fight”. If the company were to bear the significant costs of shareholder communications for both the corporation’s incumbent directors and the dissident director nominees, the incentives of the activist shareholders would be further skewed towards launching proxy fights (that is, would be immune from the costs but reap the benefits if there were an upswing in the company’s share price). We have strong concerns about risk incentivization fostered by this proposal at the expense of the corporation, and ultimately, its shareholders.

Shareholder solicitation of proxies from more than 15 shareholders without sending a dissident proxy circular:

In 2013, institutional shareholders owned approximately 67% of street shares in the United States.⁶ We believe that CBCA companies face the same realities. Institutional investors represent an ever larger portion of CBCA public companies’ shareholders, and, with their substantial investment resources, shares are held in larger blocks than they used to be. The result is that when shareholders are permitted to speak privately to a small number of shareholders they are able to influence a significant percentage of the corporation’s outstanding shares. Corporations, on the other hand, are bound by securities laws that mandate that they must communicate material information publicly, to all of their shareholders at the same time, treating all shareholders equally and fairly. We believe that shareholders should be bound by the same responsibilities as corporations to treat other shareholders fairly and equally. Permitting dissident shareholders to speak to some shareholders without having to communicate that same information to all shareholders disadvantages those smaller shareholders who will not be included in the initial discussions by the dissident and the select group of shareholders. If dissident proxy circulars are not required until after 15 or more shareholders have held non-public discussions, the matter could already be decided without having ever included smaller shareholders, or the corporation itself. Rather

¹ Insider Monkey, “Pershing Square Capital Management Fund Profile”, <http://www.insidermonkey.com/hedge-fund/icahn+capital+lp/4/> (accessed 30 April 2014).

² Insider Monkey, “Pershing Square Capital Management Fund Profile”, <http://www.insidermonkey.com/hedge-fund/pershing+square/13/> (accessed 30 Apr. 2014).

³ Insider Monkey, “Jana Partners Fund Profile”, <http://www.insidermonkey.com/hedge-fund/jana+partners/69/> (accessed 30 Apr. 2014).

⁴ Insider Monkey, “Mason Capital Management Fund Profile”, <http://www.insidermonkey.com/hedge-fund/mason+capital+management/202/> (accessed 30 Apr. 2014).

⁵ Insider Monkey, “Four Front Capital Fund Profile”, <http://www.insidermonkey.com/hedge-fund/frontfour+capital+group/493/> (accessed 30 Apr. 2014).

⁶ Broadridge, *ProxyPulse*, “Ownership by Shareholder Segment”, <http://media.broadridge.com/documents/Broadridge-PwC-ProxyPulse-Third-Edition.pdf> pg. 2 (accessed 30 Apr. 2014).

than increasing the number of shareholders with whom dissidents may privately speak without filing a dissident proxy circular, the CBCA, for its part, should make no provision for dissident shareholders to speak to some shareholders while leaving others out; such a provision frustrates efforts to increase shareholder democracy and does not protect the interests of minority shareholders.

Requisitioning a meeting as a 5% shareholder:

Not covered in this consultation paper, but a pressing issue that should be addressed in any review of the CBCA, is the right of shareholders holding 5% or more of a corporation's outstanding shares to be able to requisition a meeting of shareholders. As discussed above, corporations are increasingly held by large shareholders, holding large blocks of shares. There are many alternative ways for shareholders to engage with management and boards, but we believe that the 5% requisition power is an outdated apparatus that, given current market realities and investment trends, can be abused by short-term special interest shareholders not vested in the long-term sustainability and growth of the corporation and not bound by responsibilities to the remaining shareholder base. We would recommend a 10% or 20% threshold, which would better align with other ownership thresholds established in the Canadian securities laws.

2. The contemplated revisions would make the CBCA overly prescriptive and reduce the flexibility that makes the CBCA a competitive corporations statute and supports globally competitive Canadian corporations.

In addition to our concern, discussed above, that amendments to further empower short-term investors would undermine the competitiveness of Canadian corporations, ultimately at the expense of the Canadian workforce and economy, we are concerned that the prescriptive nature of many of the proposed revisions to the CBCA would also impede the competitiveness of Canadian corporations.

In our view, many of the revisions contemplated in the consultation paper would move the CBCA more towards a code of conduct and reduce the flexibility for Boards and corporations to adjust to changing corporate, market, investor and governance demands. Examples of such proposed revisions include, mandating say-on-pay votes, prohibiting slate elections for directors, setting one-year term maximums, promoting board diversity, and requiring disclosure of board understanding of social and environmental matters. While each of these proposals reflects current governance trends, we believe it would, nonetheless, be unnecessarily pedantic to embed such specific provisions, and would run counter to the flexibility underpinning the CBCA. There are already sufficient provisions in the CBCA requiring Boards to act in the best interests of the corporation, and as discussed in this letter, there are mechanisms to keep boards responsive to stakeholder demands and progressing governance best practices. In particular, a cornerstone to corporate governance under the CBCA is section 122, laying out in broad terms the Board's fiduciary duties. The breadth of these fiduciary duties already binds directors to diligently consider social and environmental matters, to seek relevant expertise, and to adopt practices that are in the best interests of the corporation. Just as there are good reasons to preserve the CBCA's flexibility for corporations to manage their affairs, expansive and flexible stakeholder protection clauses like section 122, establish broader accountability than narrow instruction. This principle based legislation has stood the test of time, has substantial judicial interpretation, and we believe is much more effective than prescriptive legislation.

The OECD Principles of Corporate Governance, as available on Industry Canada's CBCA website, state that "governments have an important responsibility for shaping an effective regulatory framework that

provides for sufficient flexibility to allow markets to function effectively and to respond to expectations of shareholders and other stakeholders.”⁷ The state of Delaware echoes this view, describing the *Delaware General Corporation Law*, one of the most well-respected corporations laws, as an “enabling statute intended to permit corporations and their shareholders the maximum flexibility in ordering their affairs”.⁸ Talisman recommends that this same philosophy for flexibility in managing the corporation and responding to the expectations of shareholders be preserved in the CBCA.

3. Industry Canada should consider, in concert with other relevant regulators, which institution is best-suited to regulate, and Canadian regulators should aim to regulate in an efficient and effective manner.

As discussed in the beginning of this letter and the sections above, we have concerns about the ability of the CBCA to keep pace with changing regulatory needs, particularly given the prescriptive nature of the proposed amendments and the broad range of subjects proposed to be regulated by Industry Canada through the CBCA. We encourage regulators to come together to consider which body is best equipped – with expertise, efficiency and effectiveness – to establish and maintain regulations on a given issue.

We believe that the detailed regulation of corporate social responsibility and environmental requirements and current corporate governance trends confuse the regulatory landscape in which CBCA corporations exist. Simply put, these issues are simultaneously being regulated under other administrative jurisdictions. For example, the Canadian Securities Administrators (CSA) are currently considering the issue of board diversity and empty-voting. This consultation paper’s reference to enhanced social and environmental requirements is duplicative to already existing environmental, labour and competition legislation, among others. Industry Canada should ensure that it does not create competing legislation that will impede or confuse corporate compliance.

As another example, efforts are underway by the CSA to consider the early warning requirements in Canada. Talisman’s position is that this regime is critically in need of updating to require shareholders to report acquisition of, or right to acquire, 5% or more of a company’s outstanding shares immediately. The dire consequences of an ineffective early warning regime have been discussed recently⁹ - we believe the opaque derivatives market and the speed of trading available today mean that under the current regime large shareholders have a significant advantage over smaller shareholders, and corporations can be left vulnerable. Given the significant impact of the early warning regime on CBCA corporations, we would advocate that improvements to the early warning regime be a coordinated effort, with Industry Canada supporting the CSA to achieve updates to the early warning regime.

Additionally, the Federal Government’s efforts to establish mandatory reporting standards for payments made to governments by companies in the resource sector may result in conflicts with the laws of other states in which Canadian companies do business (both the disclosure requirements in some countries, and the contractual commitments with governments and SOEs for non-disclosure in other states). Moreover, we are concerned that any mandatory reporting regime could duplicate and conflict with well-established voluntary governance principles long used by corporations in the resource sector globally. We urge whichever regulator is ultimately charged with developing regulations in this area to consider whether the

⁷ OECD, “OECD Principles of Corporate Governance”, <http://www.oecd.org/daf/ca/corporategovernanceprinciples/31557724.pdf>, pg. 14 (accessed 30 Apr. 2014).

⁸ Lewis S. Black, Jr., *Why Corporations Choose Delaware* (Wilmington, DE: Department of State Division of Corporations, 2007), 2.

⁹ Trevor Norwitz, “A New Takeover Threat: Symbiotic Activism”, *The Harvard Law School Forum on Corporate Governance and Financial Regulation*, <https://blogs.law.harvard.edu/corpgov/2014/04/25/a-new-takeover-threat-symbiotic-activism/> (accessed 30 Apr. 2014).

requirements would place Canadian companies at a competitive disadvantage when operating abroad compared with international companies not bound by similar disclosure requirements. On this topic, we would encourage Industry Canada, together with other Federal Government departments and potentially the CSA, as well as its counterparts in other countries, to work together towards a more efficient approach to this disclosure that would keep Canadian corporations competitive globally.

4. The contemplated revisions do not reflect the current reality of shareholder composition or shareholder engagement.

The consultation paper asserts that “communication from management to shareholders is primarily achieved through the management proxy circular.”¹⁰ According to a recent study of US board-shareholder engagement, “87% of security issuers, 70% of asset managers, and 62% of asset owners reported at least one engagement in the previous year. Moreover, the level of engagement is increasing rapidly, with 50% of issuers, 64% of asset managers, and 53% of asset owners reporting that they were engaging more.”¹¹ CBCA corporations face the same realities, and in many cases, the same investors. These empowered and sophisticated shareholders have access to management, and to the board in many cases, for information about the corporation, they are well versed in the corporate and governance issues of the day, and they are in a position to bring pressure to bear on corporate management and directors when they have views on actions taken by the corporation. In other words, they do not require prescriptive provisions in the CBCA mandating how communications will occur or which best practices corporations must adopt. Shareholders today will make clear to boards and management, through in-person and telephone communications, voting, and, ultimately, through their investment decisions, what they think of management and what actions they would like to see taken by the corporation.

5. The pace of change of the CBCA is too slow to keep pace with changing corporate and investor realities.

The consultation paper is based on topics recommended by a House of Commons Committee that reviewed the CBCA in 2009-2010 and the last update to the CBCA was in 2001. We respectfully submit that the issues raised in this consultation paper are, in many respects, out of date, while other topics that have emerged since that time are missing from this consultation paper. The House of Commons Committee finished its work before shareholder activism had become as prevalent and well-understood in Canada as it is today. With over a decade between updates to this foundational statute, we believe that the prescriptive approach proposed in the consultation paper will imbed rigid and detailed governance requirements that may outlive their relevance and utility well before corrective amendments are adopted, given that already the consultation paper is behind the current realities of shareholder composition and engagement.

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In its introduction to the consultation, Industry Canada stated that the consultation was undertaken to “ensure that the governance framework of the CBCA remains effective, fosters competitiveness, supports investment and entrepreneurial activity, and instills investor and business confidence”. For the reasons outlined above, it is our position that several of the proposed changes to the CBCA will, in fact, hamper

¹⁰ Industry Canada, “Section B”, *Consultation on the Canada Business Corporations Act* http://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/h_cl00867.html (accessed 30 Apr. 2014).

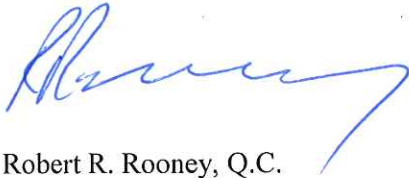
¹¹ Matteo Tonello, “Global trends in Board-Shareholder Engagement”, *The Harvard Law School Forum on Corporate Governance and Financial Regulation*, <http://blogs.law.harvard.edu/corpgov/2013/10/25/global-trends-in-board-shareholder-engagement/> (accessed 30 Apr. 2014).

the ability of CBCA corporations to be governed effectively, weaken CBCA companies in relation to increasingly aggressive and powerful shareholder activists, hamper entrepreneurial activity through overly prescriptive and quickly outdated rules, and decrease investor confidence in CBCA corporations to govern themselves or survive in the face of short-term investors. We strongly recommend that this consultation be reconsidered with an understanding of the Canadian business and investor landscape today, and to avoid prescriptive solutions that hamper efficiency and effectiveness by reducing the flexibility and binding corporations to specific conduct that will not keep pace with evolving trends. Instead we advocate that the CBCA protect flexibility for corporations and their boards of directors, who are already bound by strict fiduciary duties to protect the interests of corporate stakeholders and to be responsive to changing governance expectations and needs.

Thank you for the opportunity to submit comments to the public consultation on the *Canada Business Corporations Act*. We request an opportunity to meet with Industry Canada in person to discuss this proposal and the issues underlying it. Please do not hesitate to contact me at (403) 237-1234 or by email at brooney@talisman-energy.com.

Sincerely,

TALISMAN ENERGY INC.



Robert R. Rooney, Q.C.
Executive Vice-President Corporate and General Counsel

cc: Alberta Securities Commission
British Columbia Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission (New Brunswick)
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island
Nova Scotia Securities Commission
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Yukon
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Nunavut
The Honourable John Manley, P.C., O.C.