Canadian Investor Relations Institute
Institut canadien des relations avec les investisseurs

February 21, 2017

BRIEF TO

The House of Commons Standing Committee on Industry, Science and Technology
Re;
Bill C-25, An Act to amend the Canada Business Corporations Act, the Canada Cooperatives Act, the Canada Not-for-Profit Corporations Act and the Competition Act
and
Bill C-25 Proposed Regulations

This brief is submitted by the Canadian Investor Relations Institute (CIRI), a professional, not-for-profit association of executives responsible for communication between public corporations, investors and the financial community.

CIRI is recognized as a strong advocate of good corporate governance, particularly for practices and regulations that improve disclosure and contribute to the transparency and integrity of the Canadian capital market.

CIRI has close to 500 members from across Canada, representing over 200 publicly listed issuers, with a combined market capitalization of over $1.5 trillion. Please see Appendix A for more information about CIRI.

Overview

While Bill C-25 and its attendant proposed regulations address concerns and possible amendments to four individual acts, CIRI is limiting its comments to the Canada Business Corporations Act (CBCA) only.

CIRI supports and encourages the efforts of Industry Canada and the Parliament of Canada to update and modernize the CBCA while reducing any regulatory discrepancies between the CBCA, Canadian securities laws and TSX disclosure requirements. We encourage legislators and drafters to consider the impact that changes to the CBCA may have on securities laws and regulations, noting that any resulting changes to the act and regulations should be, as much as possible, consistent across all legislation and not present conflicts to issuers seeking to implement policies in accordance with these revised laws. CIRI believes that transparency and market efficiency can be best enhanced through regulatory harmonization and/or simplification of the regulatory environment.

Director Election Matters

Majority Voting

Under the current plurality system of voting for corporate directors, shareholders can only vote “for” or “withhold”. If the number of director nominees is the same as number of directors fixed by management (an uncontested election), then each director will be elected even if there is just one vote “for” each director and all other votes are “withhold”.

Bill C-25 proposes to eliminate plurality voting by incorporating majority voting into the CBCA. Under majority voting a director will only be elected if he or she receives a majority of the “for” votes cast at each meeting of shareholders. The language in the Bill is not consistent with the majority voting rules of the TSX. Under TSX rules, director nominees who do not receive a majority of votes cast must immediately submit their

resignation; however, if the company has adopted a majority voting policy, the Board may have the right to refuse the director's resignation under exceptional circumstances. The mandated change under Bill C-25 is significant for CBCA companies because it does not make provision for companies to refuse the director's resignation if exceptional circumstances exist. This could potentially result in failed election situations where the shareholders have not elected enough directors to meet the requirements (such as quorum or minimum number of independent directors) to act legally on behalf of the corporation.

Recommendation: CIRI recommends that the Standing Committee review this proposed change further to ensure it addresses failed election situations and to ensure consistency with existing regulations.

Director Residency

The proposed regulations in Bill C-25 provide specific circumstances whereby the Board of Directors could override the shareholders regarding a non-majority vote for a director nominee. Under a revised CBCA, the Board can refuse the nominee's resignation only if the nominee is needed to meet one of two requirements:

(a) The Board must have at least two directors that are not officers or employees of the company or its affiliates, or
(b) At least 25% (or a certain percentage) of the directors on the Board must be resident Canadians (or at least one resident Canadian if the company has fewer than four directors).

These exceptions under the proposed CBCA regulations are more stringent than the TSX's majority voting rules that allow the Board to refuse to accept a nominee resignation, citing exceptional circumstances.

CIRI notes that residency requirements are inconsistent across the 13 provincial/territorial jurisdictions in Canada. Five provinces (Alberta, Saskatchewan, Manitoba, Ontario and Newfoundland) currently have some form of residency restriction. The other eight jurisdictions have no such restriction.

The ability of responsible corporations to attract and retain the most qualified and experienced members for its Board of Directors, without restriction as to residency, is a critical element of good corporate governance. This, coupled with the global nature of capital markets, and in particular the historic capital raising completed for the global resource sector on Canadian exchanges and Canada's objective of attracting additional investment from international public companies, the mandated residency requirement referenced above appears archaic and inconsistent with the primary objective of this review process.

Recommendation: CIRI recommends that Bill C-25 be amended such that there be no stipulation of residency in the CBCA in determining the composition of a corporation's Board of Directors.

Notice-and-access

Notice-and-access provisions can substantially reduce the cost to issuers of printing and mailing the information circular and other proxy-related materials to shareholders by sending them a streamlined set of meeting materials and posting the full set of materials on SEDAR and an alternative website. This notice-and-access process was enacted by provincial securities commissions in March 2013, but current language in the CBCA has restricted many CBCA companies from making use of notice-and-access without applying for a specific exemption.

CIRI is supportive of Bill C-25 that proposes amendments that will align federal regulations with the provincial securities commissions. While the Bill does not change the CBCA requirement that corporations deliver annual

financial statements, it does allow the regulations to set out the rules for how and when financial statements are to be sent to shareholders. Those proposed regulations to C-25 indicate that companies using notice-and–access need only include a website link to the financial statements in the notice-and-access package sent to shareholders. Companies not using notice-and-access need only send financial statements to shareholders who specifically request them. The regulations also clarify which documents that an intermediary is required to send to beneficial shareholders under section 153 of the CBCA when the company uses notice-and-access.

However, neither Bill C-25 nor the draft regulations change the requirement to deliver the management information circular using a notice-and-access process without applying for and obtaining an exemption under section 151(1) of the CBCA.

Recommendation: CIRI recommends that the management information circular be included under notice-and-access regulations, eliminating the need for issuers to obtain an exemption.

Diversity Disclosure

Bill C-25 and the proposed regulations mandate that CBCA companies annually disclose in their proxy circular the gender composition of their Boards and senior management. Issuers must also explain their diversity policies or explain why they do not have such policies (a comply-or-explain disclosure model). This gender diversity disclosure is consistent with existing Canadian provincial securities laws and is supported by CIRI.

Shareholder Engagement and Identification

In 2014, CIRI provided comments on the review of the CBCA, advocating for increased disclosure of share ownership. This followed CIRI's advocacy efforts in 2013 to reduce the early warning reporting threshold from 10% ownership of issued and outstanding shares to 5% ownership in order to achieve greater shareholder transparency and facilitate engagement that would ultimately lead to improved governance practices. Since then, the Canadian Securities Administrators (CSA) have decided not to reduce the threshold, keeping Canada on par with jurisdictions such as Latvia, Pakistan and Chile (10%) as opposed to other developed jurisdictions including United States, France, Germany, India, Japan and Australia (5%), and the United Kingdom (3%). Recognizing that the CBCA review has progressed to Bill C-25 and that corporate governance practices continue to evolve, CIRI is providing additional commentary for consideration by the Standing Committee.

CIRI is proposing that the Standing Committee consider the value of issuer-shareholder engagement, how that could be facilitated through improved shareholder identification and the impact this would have on the efficiency of the Canadian capital markets. CIRI believes that these issues are key to establishing an internationally credible marketplace and fostering increased transparency in the marketplace as a means of contributing to improved economic growth.

CIRI believes that good governance practices can be developed through open dialogue between issuers and their shareholders. Such dialogue is essential in order for issuers to hear and understand investor concerns and thus address such concerns. However, this key two-way communication channel can only be fully effective if there is a mechanism for issuers to identify their shareholders.

This essential fact of ownership disclosure as a key route to improved market efficiency as well as corporate governance has been documented in a 2010 research study[1]. The study authors, Michael C. Schouten and Mathias M. Siems, concluded that ownership disclosure can fulfil two main functions: improving corporate governance and improving market efficiency. Their research explored share ownership disclosure in several markets around the world, including those similar in size and structure to Canadian capital markets. For example, shareholders in both the United Kingdom and in Australia are required to make their shareholder positions known, to the benefit of all shareholders.

In the UK, under corporate law, a reporting issuer has the legal right to request disclosure of the identity of any person with an interest in their shares[2]. This right allows the issuer to identify their beneficial owners underlying the nominees registered in the Certificateless Registry for Electronic Share Transfer (CREST), the UK-based central securities depository. Disclosure requests by issuers can be made at any time, and are subject to penalties for non-compliance ranging from suspension of certain shareholder rights to fines and even imprisonment[3]. In addition, an issuer can give notice to an investor that may be interested or has been interested in the issuer's shares at any point within a three-year period prior to the notice, asking that the investor provide their current or past share position. The issuer may also ask the same of the investor who held that position immediately following them[4]. This register of shareholders is also available for public inspection for a fee[5].

The importance of shareholder engagement has also been recognized in Australia, where transparency in share ownership exists, as witnessed by the following quote: "Shareholder engagement through dialogue, disclosure and voting ensures the accountability of company boards and management, providing an important check on their power that serves to improve corporate governance standards."[6]

In Australia, a reporting issuer has the legal right under corporate law to obtain disclosure of their beneficial owners through the share register, which is also available for public review. If shares are held as a nominee by an intermediary on behalf of one or more beneficial owners, the issuer can request that the nominee disclose the relevant interest of the underlying investors[7]. A person who contravenes disclosure rules is liable to compensate a person for any loss or damage the person suffers because of the contravention, unless they can prove inadvertence, or mistake or that they were not aware of a relevant fact or occurrence[8]. Issuers are required to maintain a register of the resulting disclosed interests, which is open for public inspection[9].

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[1] Michael C. Schouten and Mathias M. Siems, *The Evolution of Ownership Disclosure Rules Across Countries* in the *Journal of Corporate Law Studies*, Vol. 10 (2010), pp. 451-483
[2] Companies Act 2006, Part 22, S. 793
[3] *Companies Act 2006*, Part 22; S. 795
[4] *Companies Act 2006*, Part 22; S. 793
[5] *Companies Act 2006*, Chapter 2, S. 116-117
[6] Parliamentary Joint Committee on Corporations and Financial Services, *Better shareholders – Better company: Shareholder engagement and participation in Australia*, June 2008, S. 2.23
[7] *Corporations Act 2001*, S. 672B
[8] *Corporations Act 2001*, S. 672F
[9] *Corporations Act 2001*, S. 672DA

CIRI understands the wishes for anonymity among certain investors; however, CIRI argues that greater transparency of ownership would instil increased issuer-shareholder engagement and confidence in our markets. Research by Michael C. Schouten and Mathias M. Siems[10] makes the case that increased transparency in the form of greater disclosure of shareholder ownership positions contributes to greater market efficiency as follows:

> "Ownership disclosure can improve market efficiency through several other mechanisms, namely by creating transparency of economic interests of major shareholders, of trading interest and of the size of the free float."

> "The bottom line is that by promoting share price accuracy, ownership disclosure can contribute to market efficiency, and thus ultimately to an efficient allocation of resources in the economy."

Recommendation: CIRI recommends that Bill C-25 include a provision that an appropriate mechanism be established whereby issuers are able to access a list of, or otherwise identify, their shareholders in an effort to improve issuer-shareholder engagement and, ultimately, governance practices.

CIRI appreciates the opportunity to provide these additional comments regarding Bill C-25 and the proposed regulations regarding the Canada Business Corporations Act.

Should you wish to discuss this brief, please feel free to contact me.

Yours truly,

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[10] Michael C. Schouten and Mathias M. Siems, *The Evolution of Ownership Disclosure Rules Across Countries* in the *Journal of Corporate Law Studies*, Vol. 10 (2010), pp. 451-483

APPENDIX A

The Canadian Investor Relations Institute

The Canadian Investor Relations Institute (CIRI) is a professional, not-for-profit association of executives responsible for communication between public corporations, investors and the financial community. CIRI contributes to the transparency and integrity of the Canadian capital market by advancing the practice of investor relations, the professional competency of its members and the stature of the profession.

Investor Relations Defined

Investor relations is the strategic management responsibility that integrates the disciplines of finance, communications and marketing to achieve an effective two-way flow of information between a public company and the investment community, in order to enable fair and efficient capital markets.

The practice of investor relations involves identifying, as accurately and completely as possible, current shareholders as well as potential investors and key stakeholders and providing them with publicly available information that facilitates knowledgeable investment decisions. The foundation of effective investor relations is built on the highest degree of transparency in order to enable reporting issuers to achieve prices in the marketplace that accurately and fully reflect the fundamental value of their securities.

CIRI is led by an elected Board of Directors of senior IR practitioners, supported by a staff of experienced professionals. The senior staff person, the President and CEO, serves as a continuing member of the Board. Committees reporting directly to the Board include Human Resources and Corporate Governance (HRCG); Audit; Membership; and Issues.

CIRI Chapters are located across Canada in Ontario, Quebec, Alberta and British Columbia. Membership is close to 500 professionals serving as corporate investor relations officers in over 200 reporting issuer companies, consultants to issuers or service providers to the investor relations profession.

CIRI is a founding member of the Global Investor Relations Network (GIRN), which provides an international perspective on the issues and concerns of investors and shareholders in capital markets outside of North America. The President and CEO of CIRI has been a member of the Continuous Disclosure Advisory Committee (CDAC) of the Ontario Securities Commission. In addition, several members, including the President and CEO of CIRI, are members of the National Investor Relations Institute (NIRI), the corresponding professional organization in the United States.