



Canadian Investor Relations Institute
Institut canadien des relations avec les investisseurs

67 Yonge Street, Suite 601, Toronto, Ontario M5E 1J8
Telephone: 416-364-8200 Facsimile: 416-364-2805
Website: Ciri.org Email: enquiries@ciri.org

May 15, 2014

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

Re: Consultation on the *Canada Business Corporations Act (CBCA)*

Dear Mr. Halucha,

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 is recognized for its ongoing commitment to corporate governance, in particular, supporting regulations and practices that improve disclosure and transparency in the capital markets.

CIRI represents the interests of more than 500 members, 85% of whom are investor relations professionals either employed by or acting as advisors to public reporting issuers across Canada. The majority of our members represent mid-to-large market capitalization issuers. See Appendix A for more information about CIRI.

Overview

CIRI is writing in response to the request for comments on the above referenced Industry Canada Consultation Paper (Paper). CIRI recognizes that this is an important process given that the CBCA provides the national framework for CBCA corporations on a broad range of governance issues. Given that governance practices are evolving, it stands to reason that amendments to the CBCA should address the framework but not be too prescriptive on how the framework is applied. Regulations that support the CBCA framework are better left with the provincial regulatory bodies or exchanges given that they have greater flexibility in adapting to evolving best practices.

CIRI further recognizes that the Paper addresses a wide range of issues fundamental to market transparency, good governance and disclosure best practices that are often the direct responsibility of investor relations professionals. CIRI, therefore, requests that Industry Canada continue to maintain an open dialogue with key market participants, including CIRI, as the process for amending the CBCA proceeds. CIRI would appreciate the opportunity for further consultation on any specific amendments proposed by Industry Canada prior to the drafting of any legislation to amend the CBCA.

Harmonization and Streaming

On behalf of the reporting issuer members of CIRI, companies significantly affected by changes to laws and regulations enacted to govern corporate governance policies and practices, we strongly believe that any potential amendments to the CBCA should consider whether appropriate regulations or guidelines already exist within other regulatory bodies (provincial securities regulators, exchanges, etc.) having been established to provide greater transparency and good governance.

Industry Canada, through force of the CBCA, should be mindful that Canadian issuers may suffer from the burden and complexity of over-regulation or competing regulatory regimes when multiple agencies promulgate different regulatory standards to address a given governance issue. This could be unnecessarily complicated for reporting issuers. However, these same issuers may benefit from improved harmonization of regulations or preferably from streaming – where responsibility for the development and adoption of regulation(s) regarding a given topic is placed in the hands of ONE regulator and not contravened by another regulatory agency policy or instrument.

Issues Already Addressed Through Existing Regulation

CIRI believes that there are several issues discussed in the Paper that are already addressed by either provincial securities regulators or exchanges. In such cases, the capital markets, reporting issuers and other key stakeholders are best served if the CBCA avoids implementing additional regulations that cause issuers to have to deal with competing regulatory regimes for the same issue. Transparency and market efficiency can be maximized by simplification of the regulatory environment for issuers, not by complicating it unnecessarily.

The following issues in the Paper have already been addressed by alternative regulatory regimes and should either (a) not be included in any proposed amendments to the CBCA or (b) be streamlined such that responsibility for such issues or disclosure remains with provincial regulators or exchanges rather than with federal regulatory oversight under the CBCA:

- *Slate Voting*: As per our letter to the Ontario Securities Commission (OSC) in March 2011¹ and our submission to the Toronto Stock Exchange (TSX) in October 2011², CIRI believes individual director voting is an appropriate method for electing directors. The TSX subsequently mandated individual voting of directors. CBCA amendments regarding the prohibition of slate voting should be consistent or fully in line with the current existing requirements of the TSX for its listed issuers in order to minimize the complexities of complying with different regulatory requirements for director voting.
- *Majority Voting*: As per our submission to the TSX in October 2011, CIRI believes that a non-binding majority voting policy is appropriate. The TSX subsequently mandated that issuers adopt a majority voting policy. CIRI encourages Industry Canada to consider CBCA amendments, if any, regarding majority voting that are consistent with those of the TSX to minimize the burden on issuers to implement policies and procedures in compliance with multiple regulatory agency requirements.
- *Annual Election of Directors*: As per our submission to the TSX in October 2011, CIRI believes that annual elections for directors is appropriate but encourages Industry Canada to ensure any CBCA requirements are consistent with existing requirements established by other securities regulatory agencies (e.g. TSX Company Manual).

¹ http://www.ciri.org/Assets/OSC_Letter_March31.pdf

² http://www.ciri.org/Assets/downloads/newsreleases/101111_Comments_to_TSX_on_Director_Elections.pdf

- *Notice-and-Access*: CIRI believes that Notice-and-Access should be allowed under the current provincial securities regulations to better permit issuers to leverage opportunities to move from a paper-based proxy system to an electronic one in order to facilitate (i) faster delivery, (ii) reduced costs, (iii) more timely information, (iv) fewer errors, and (v) a less complex system. However, CIRI encourages Industry Canada to modify the CBCA so that it no longer serves to restrict CBCA corporations that wish to use the existing provincial notice-and-access provisions.
- *Insider Trading*: CIRI encourages Industry Canada to explore ways to move the CBCA toward greater harmony with provincial securities laws in addressing the regulation and disclosure of insider trading but to do so in a manner that simplifies the regulatory requirements and adds no additional burden on reporting issuers.
- *Shareholder Proposals*: CIRI generally supports efforts by regulatory agencies to harmonize regulations so as to reduce the complexity and regulatory burden facing reporting issuers. However, while it is reasonable for a dissident to explain their proposal to annual meeting participants, the amount of time allowed to do so should rightly reside with the chair of the meeting as part of the chair's duty to manage the meeting for the benefit of all stakeholders and the corporation itself.

Issues Currently Ongoing

Several of the issues contained in the Paper address topics that are currently the subject of on-going discussion and review and may, in the near term, be subject to further refinement of regulatory oversight as discussion and consultation sheds additional light on the scope and impact of potential regulatory action. CIRI has identified the following issues as important to the investor relations profession:

- *Executive Compensation*: CIRI understands the importance of adequate disclosure regarding executive compensation and feels the existing regulations are adequate. As per our letter to the OSC in March 2011 and our submission to the TSX in October 2011, CIRI is concerned that the yes-or-no nature of mandatory say-on-pay significantly reduces an issuer's ability to understand the nature and full scope of shareholders' concerns, many of which, while compensation related, may stem from other issues such as financial performance and management expertise. As such, CIRI believes that an advisory say-on-pay vote should not be made mandatory for Canadian reporting issuers but be available for voluntary adoption, consistent with the practice of a growing number of Canadian issuers.
- *Overvoting, Share Lending and Empty Voting*: In November 2013, CIRI made a submission to the Canadian Securities Administrators (CSA) in response to CSA Consultation Paper 54-401: *Review of the Proxy Voting Infrastructure*³. In that submission, we noted that the proxy voting infrastructure in Canada is prone to errors, including overvoting and empty voting, simply due to the complex and opaque nature of the system and the tight timelines that can hinder accurate vote reconciliation.

It is clear that share lending and determining who has the right to vote in lending situations has become a key issue in establishing accurate shareholder lists and in reconciling the votes and thus reducing overvoting. **CIRI believes that there must be alignment between share voting and the economic interest in the shares.** CIRI would support the implementation of guidelines or regulations stipulating that the voting rights in share lending arrangements reside with the shareholder holding the economic interest, the lender.

³ http://www.ciri.org/Assets/downloads/publications/Submissions/111313_CSA_54-401_Proxy_Voting_Infrastructure_Final.pdf

When votes affecting the valuation of a company are allowed to be cast by those with no economic interest in the company (i.e. empty voting), then the simple principle of letting the owners' voices and only the owners' voices determine the future course of the company is compromised. CIRI believes that in adhering to the principle that the primary investor has the responsibility to vote, those who borrow shares and do not have an economic interest in the long-term welfare of the issuer should be prohibited from voting the borrowed shares; the responsibility to vote should remain with the lending shareholder, despite shares being temporarily in the hands of the borrower.

- *Board Diversity*: As per our submission in response to proposed OSC amendments to Form 58-101F1 *Corporate Governance Disclosure* of National Instrument 58-101 *Disclosure of Corporate Governance Practices*⁴, CIRI believes that corporate governance can be enhanced through broader diversity, rather than focusing only on gender; that the requirement to look at diversification on the board is best done at the candidate identification stage; that a comply or explain model for disclosure of women on boards is appropriate; that disclosure of issuer targets to increase diversity on boards should not be a regulatory requirement; and that the representation of women in senior management positions is not a securities regulation issue.
- *Beneficial Shareholder Rights*: CIRI is generally in favour of expanding the rights of beneficial shareholders to include the rights available to registered shareholders. However, concurrent with such an expansion of rights, beneficial shareholders should in turn be required to provide the level of disclosure currently required of registered shareholders, i.e. full disclosure regarding the ownership position in the securities they own.

Other Issues of Concern to Investor Relations Professionals

CIRI has long been an advocate of share ownership disclosure as a key element for improved transparency and efficiency in capital markets. CIRI has proposed to the CSA⁵ that the current 10% share ownership threshold under the Early Warning System (EWS) is too high and is out of step with requirements in other major marketplaces. As a result, the transparency of Canada's market place is being negatively impacted. CIRI's recommended reduction to a 5% threshold for ownership disclosure will place Canada at the same level as other developed capital markets around the world, including the United States, France, India, China, Sweden, Japan and Australia and closer to the United Kingdom (3%), Switzerland (3%), Germany (3%) and Italy (2%). Many of these markets have liquidity similar to the Canadian market and operate effectively and efficiently under this level of share ownership disclosure. Reducing the threshold under the EWS from 10% to 5% will provide a significant improvement to the identification of shareholders, including beneficial shareholders, in addition to leading to greater transparency and market efficiency.

Another impediment to share ownership disclosure is the classification of Objecting Beneficial Owners (OBOs), shareholders who can effectively elect to hide their identity from other marketplace participants, unlike Non-Objecting Beneficial Owners (NOBOs). The OBO/NOBO system, as it stands today, is expensive, contributes to the opaque nature of the proxy voting system and adds to the complexity of the proxy voting infrastructure. The OBO/NOBO concept, which is unique to only two capital markets worldwide – the USA and Canada – is anachronistic as capital markets become increasingly globalized. CIRI believes that the entire OBO/NOBO practice should be reviewed with an eye toward removing the OBO status. See CIRI's letter to the OSC in March 2011, CIRI's submission to the CSA Consultation

⁴ http://www.ciri.org/Assets/downloads/publications/Submissions/041714_CIRI_Submission_58-101_Women%20on%20Boards_Final.pdf

⁵ http://www.ciri.org/Assets/downloads/publications/Submissions/020111_Ownership_%20Disclosure_%20letter.pdf and http://www.ciri.org/Assets/downloads/newsreleases/070913_Response_to_CSA_EWS_Notice.pdf

Paper 25-401: *Potential Regulation of Proxy Advisory Firms*⁶ and CIRI's comments on the CSA Consultation Paper 54-401: *Review of the Proxy Voting Infrastructure*, November 2013 for more details.

We thank you for the opportunity to provide our initial comments and input to Industry Canada to ensure that the CBCA remains an effective framework for the improvement of corporate governance. We believe this process can serve to improve investor confidence and we look forward to contributing further to this important consultation process.

Yours truly,

A handwritten signature in black ink, appearing to read 'Yvette Lokker', with a stylized flourish at the end.

Yvette Lokker
President & CEO
Canadian Investor Relations Institute

⁶ http://www.ciri.org/Assets/downloads/publications/Submissions/091212_PA_Firm_Comment_Letter_FINAL.pdf

Appendix A – Canadian Investor Relations Institute

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 Nominating; Audit; Membership; Issues; Editorial Board; Resource and Education; Certification.

CIRI Chapters are located across Canada in Ontario, Quebec, Alberta and British Columbia. Membership is approximately 500 professionals serving as corporate investor relations officers in approximately 300 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 also sits as 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.