# Kenmar Associates

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**NOTICE AND REQUEST FOR COMMENTS**

**PROPOSED AMENDMENTS TO NATIONAL INSTRUMENT 54-101**
***COMMUNICATION WITH BENEFICIAL OWNERS OF SECURITIES OF A REPORTING ISSUER* AND**

**COMPANION POLICY 54-101CP *COMMUNICATION WITH BENEFICIAL OWNERS OF SECURITIES OF A REPORTING ISSUER***

**PROPOSED AMENDMENTS TO NATIONAL INSTRUMENT 51-102**
***CONTINUOUS DISCLOSURE OBLIGATIONS* AND COMPANION POLICY 51-102CP**

***CONTINUOUS DISCLOSURE OBLIGATIONS***
**PROPOSED AMENDMENTS TO NATIONAL POLICY 11-201**
***DELIVERY OF DOCUMENTS BY ELECTRONIC MEANS***

This initiative is not a priority for investor protection .We have stated many times what our concerns are. These include, but are not limited to, increasing Limitation Act time periods, oversight of IIROC/MFDA, making complaint handling work, oversight of OBSI, real mutual fund governance, improved industry sales practices /POS disclosure, investor restitution and dramatically improved regulatory monitoring and enforcement, regulatory and criminal. Nevertheless, Kenmar Associates is pleased to respond to the CSA's request for Comments.

We came across this Notice only by chance. We again ask the CSA to establish a notification system that alerts retail investors to proposed regulatory changes that impact their investments , savings and rights.

## Introduction

The CSA appears to be proposing a change that could push retail investors even further away from having a say in how public companies are run. As we understand it , the proposed " Notice and Assess" (N&A) model would allow issuers to send their shareholders a notice informing them that their proxy materials are available online,or on demand, rather than automatically sending the entire hard copy package of materials.

We certainly agree that the CSA should take a cautious approach to the introduction of N&A . We concur that the N&A process should definitely not apply to "special meetings" called to vote on material major changes at a company. The proposed CSA N&A model is not mandatory for reporting issuers in Canada . We understand that voting instructions must be sent with the initial notice; and the issuer is responsible for fulfilling requests for paper copies of information circulars, not an intermediary.

The presumed benefit for corporations is the cost savings from not having to mail out the proxy materials to all of their shareholders, most of whom, history shows , don't bother to vote. No doubt G*oing Green* will be another reason for reducing written communication. The impact is the likely possibility that even fewer retail investors will exercise their voting rights if they don't get the nudge of a physical proxy. This in turn may weaken management's accountability to shareholders even further. Depending on the source ( and Company), somewhere between 15-30 % and more of shares are owned by individual investors excluding their holdings via investment funds. In the case of mutual funds in Canada ,the same phenomenon has occurred- as the CSA has "streamlined" document delivery, the amount of actual information delivery to unitholders has decreased .There is an argument to be made that deficient disclosure has led to Canadians having to pay the highest fund fees in the world. Since disclosure is a key instrument of investor protection we have to wonder why this is happening.

It's certainly not due to a lack of issues affecting Main Street. Bad board decisions, horrible corporate performance , excessive executive pay, stock option shareholder dilution , conflicts-of-interest , accounting restatements, dividend cuts and even fraud.. Ironically, the CSA proposals come at a time when there is an explosive growth in DIY investors and an increase in the retiree population who will have more time to tend to their stock investments. For those investors who cannot read downloaded documents on screen ,the cost of printing will be transferred by the issuer to the shareholder.

The "Notice and Assess" model has been in use in the U.S. since 2007 to the clear detriment of voter participation by retail shareholders. According to data published by Broadridge Financial Solutions Inc., the percentage of retail shareholders that vote their proxies is much lower among those that simply receive the notice of proxy materials vs those that receive the full package of materials . For the first year that the N&A model was available to issuers in the U.S., just 5% of shareholders who received a notice actually voted vs .19.4% of those who received the full proxy package. Overall, 12.5% of all retail accounts voted vs .19.5% of all shareholders. Among companies that mailed out proxies, 20.5% of retail shareholders voted vs 26.3% of all shareholders. In the second year of the new N&A process, the response rates went down further - just 4% of shareholders who received only the notice voted. The proportion of shareholders receiving the notice who requested the full package of proxy materials also declined.

Notwithstanding the fact that certain differences between the proposed CSA model and the U.S. model are intended to limit the effect on retail shareholders, firms that are also U.S. issuers will be permitted to follow the U.S. model. Thus, these differences may not come into play for many of the larger public firms so popular with Canadian retail investors especially seniors/pensioners.

**Recommendations**

Based on the above mentioned concerns ,Kenmar therefore conclude that the proposed changes are not in the best interests of small investors. We do however have some constructive suggestions that we believe would really improve shareholder democracy and corporate accountability:

1.People vote for political candidates all the time without thoroughly examining all the issues. If educating those voters is supposed to make democracy work better, the same should be true with corporate democracy. Education efforts are very important- we note that the SEC provides information of how proxy voting works and why it's important. The SEC's primer on proxy voting is at www.sec.gov/spotlight/proxymatters.shtml. We recommend the CSA do the same. A module on shareholder voting should be part of every high school student's education.

2 Require proxy Circulars to permit voting *against* a Director or resolution rather than *with-hold*. [Although directors must be elected by shareholders, we note that traditionally a candidate needs only a plurality of votes to win an election. Maybe regulators should require that candidates receive at least 50% of votes cast to win. We also note also that, according to a 2008 CCGG study, a little more than half of issuers either reported voting results using a “show of hands” or the method was not disclosed or the directors were reported as having been “acclaimed”,” passed” or appointed by way of resolution. The CCGG considers any method of disclosure other than the number of ballots cast as sub-optimal.
[http://www.ccgg.ca/media/files/reports/The%20Timeliness%20and%20Utility%20of%20Voting%20Results.pdf

3. Provide guidance that AGM’s include the CEO presentation and Q&A as integral parts of the meeting that should be recorded and minuted. The practice today is to terminate the meeting after the legal and administrative proceedings are completed. The CEO presentation is of course the real meat of the meeting.

4. To aid in the access of relevant information for analysis by interested stakeholders and securities analysts, the CSA should follow the SEC lead and implement a requirement to add XBRL tags to compensation data in SEDAR filings.[ Are boards/HRCC’s on top of executive compensation? The 100 highest paid CEOs of Canadian publicly traded corporations received an average of $10,408,054 in total compensation in 2007. Average CEO pay for the top 100 was up 22% from its $8.5 million average in 2006. Many of the top 100 include Canada’ s big bank CEOs, who recently received billions in federal

government bailout money to purchase mortgage loans, and energy CEOs who, until recently, were surfing the big wave of crude oil price increases. In 2007, Canada's top 50 CEOs earned 398 times more than the average worker, compared with 85 times in 1995.This is not just a governance issue, it is a social issue. The CEO report is available at www.growinggap.ca and www.policyalternatives.ca.] . See also the OECD's recent comment indicating that income inequality and poverty in Canada have increased sharply since the mid-1990s and is now "reaching levels above the OECD average." http://www.oecd.org/dataoecd/44/48/41525292.pdf

5. Deal with the critical issue of securities lending and "empty voting" ( clarify the voting rights of borrowed securities.). This will reduce the subversion of corporate democracy " empty voting" causes. (One of the essential tenets of modern corporate governance is that shareholders control corporate managers through shareholder voting. This notion is founded on the premise that shareholders will vote their economic interests, and the weight of their vote will be proportionate to their economic interest). However, research by University of Texas law professors Henry Hu and Bernard Black reveals that as a result of recent capital markets developments, hedge funds and other large investors can "decouple" voting rights from economic ownership of shares. For example, a hedge fund borrowing shares from institutional investors can acquire the voting rights of the borrowed shares, even though the shareholder who owns the shares retains the economic interest in the shares. Ref http://papers.ssrn.com/sol3/papers.cfm?abstract_id=904004)

6. Director independence, while very important, is not a sufficient criteria. Prohibit issuers from allowing convicted felons to serve as Directors or Investor relations representatives. Directors should be prohibited from serving on public company boards if they are found, in regulatory, civil or criminal proceedings, to have failed in their duties as directors. This would also apply to settlements reached through out-of-court negotiations when such failures are admitted. Directors should also be discouraged from serving on an excessive number of public company boards – in YBM Magnex's case, one director served on 15 boards. Finally, consideration should be given to requiring that all public company board members complete an accredited director education program. Completion or non-completion would be disclosed to shareholders in public documents.

7. A useful proxy access rule that would enable shareholders to nominate an alternate slate of directors essentially at a company's expense by forcing the company to post the alternate nominees' names on the same proxy cards the company sends to all shareholders. Until now, it has been prohibitively expensive for activist shareholders to run an opposing slate of board candidates. This would make it possible for shareholders to challenge corporate directors in a meaningful way. When that happens, each vote becomes much, much more valuable.

8. Give HRCC's and Disclosure Committees the same stature and prominence as Audit Committees. An HRCC should not be optional.

9. Require investment funds to provide a link in the MRFP directly to their proxy voting records. These links are difficult to locate on many fund company websites.

Additionally, Kenmar suggest that certain provisions of the ICGN Statement on Global Corporate Governance Principles regarding shareholder rights be enshrined in regulations . These rights include *Shareholder Participation in Governance, Shareholders' Right to Call a Meeting of Shareholders, the right to put resolutions to a shareholders meeting, and the right to participate in major decisions such as a major acquisition.* http://www.icgn.org/organisation/documents/cgp/revised_principles_jul2005.php

**Summary and conclusion**

We argue that making retail investors download the information or call for the proxy material discourages shareholders from voting because it adds an extra step to the process. Experience has confirmed many times that negative options/defaults are always to the disadvantage of Main Street. As Investor advocates we believe that regulators should be trying to improve retail investor engagement. That means improving the quality and readability of disclosure, facilitating access to the proxy process and pro-actively educating investors about their voting rights.

There is no question that there are savings to be had for issuers. The Broadridge report estimates the 653 companies that employed the N&A model in its first year saved US$143 million in postage and printing costs; this figure rose to US$239 million in the second year, as the number of issuers using the method rose to more than 1,300. The question is whether these savings are worth the harm done to already fragile shareholder democracy. We do not believe so.

We believe our recommendations will provide far better, faster and more assured benefits to retail investor protection than a change in proxy voting delivery mechanisms .

In the U.S , new Web sites compiling information, voting recommendations and social-networking tools aim to make it easier for investors to vote proxies to elect corporate directors or set governance rules. One site, MoxyVote.com, allows small investors to align their votes for or against management, or with interest groups. The Web site is a necessary corrective to some of the factors that stack the deck against shareholder proposals. Shareholders can use the control number on a proxy statement they get in the mail to vote on Moxy Vote on a ballot-by-ballot basis or set it up so that their brokerage will automatically direct ballots on stocks they own to the Web site. A user can search for a company under the ballots and be taken to a page that shows the date of an upcoming shareholders meeting and the dates when online voting starts and ends. It also shows how many shareholder and board proposals are on the ballot, as well as which board members are up for re-election. If the CSA were to back such a site for Canada, it could be a WIN-WIN for issuers , regulators and retail investors.

We hope this submission proves useful to the CSA.

Should you require any additional information, do not hesitate to contact us.

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