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August 17, 2010

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Ontario Securities Commission
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New Brunswick Securities Commission
Registrar of Securities, Prince Edward Island
Nova Scotia Securities Commission
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Nunavut

c/o Ontario Securities Commission
20 Queen Street West, 19th Floor, Box 55
Toronto, Ontario M5H 3S8

Attention: John Stevens
Secretary

Dear Sirs and Mesdames:

Re: 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,* National Instrument 51-102 *Continuous Disclosure Obligations* and Companion Policy 51-102CP *Continuous Disclosure Obligations, and* National Policy 11-201 *Delivery of Documents by Electronic Means* (collectively "Proposed Amendments")

This submission is made by the Business Law Section of the Ontario Bar Association (the "OBA") in response to the request for comments published on April 9, 2010 on the Proposed Amendments.

The OBA consists of 18,000 lawyers from a broad range of sectors, including those working in private practice, government, non-governmental organizations and in-house counsel. Our members have, over the years, analyzed and provided comments to the Ontario government on numerous legislation and policy initiatives. More than 1,640 of these lawyers belong to our active Business Law Section. The views expressed herein are the views of the OBA and its Business Law Section as a whole, and are not necessarily the views of each individual member or other organizations with which they may be involved.

General Comments

We support the notice-and-access model proposed by the Canadian Securities Administrators ("CSA") which promotes a more efficient, cost effective and environmentally-friendly way to send proxy-related materials and solicit voting instructions from shareholders. We further agree with the CSA for departing from the notice-and-access model adopted by the U.S. Securities and Exchange Commission ("SEC") by requiring the sending of a voting instruction form ("VIF") along with the notice, which in our view, will prompt shareholder participation. However, as discussed below under "Comments on Specific Questions," we support expanding notice-and-access to include special meetings and see no reason why it should be delayed. We also discuss difficulties reporting issuers may face trying to integrate notice-and-access with the mailing of annual financial statements and management's discussion and analysis ("MD&A") under the current timeframe permitted under National Instrument 51-102 *Continuous Disclosure Obligations* ("NI 51-102") and propose that reporting issuers be given extra time for sending the notice after they have filed their proxy-related materials rather than requiring sending and filing to be done on the same day.

We believe the other key changes set out in the Proposed Amendments including simplification of the beneficial owner proxy appointment process, enhanced disclosure regarding the beneficial owner voting process and stricter rules on the use of NOBO information and the indirect sending procedures by third parties will provide incremental improvement in the beneficial owner proxy solicitation process. We offer no comments with respect to those changes.

Comments on Specific Questions

The questions below in italics are reproduced or paraphrased from the request for comments and numbered to correspond to the numbering in the request for comments.

Questions relating to notice-and-access

1. Should we expand notice-and-access to include special meetings? Should other types of meetings be excluded from notice-and-access as well?

We support expanding notice-and-access to include special meetings as part of the implementation of the Proposed Amendments. One of the fundamental principles of National Instrument 54-101 *Communication with Beneficial Owners of Securities of a Reporting Issuer* ("NI 54-101") is to encourage efficiency. Notice-and-access will provide efficiency and cost savings by allowing shareholders to access proxy-materials from the Internet. To accommodate the non-tech savvy, shareholders are also entitled to request a paper copy of the information circular from the reporting issuer which must be sent to them promptly and free of charge. Therefore, notice-and-access should not diminish the ability of shareholders to make informed voting decisions. Also, because the VIF will be enclosed with the notice, we believe that

shareholder response rates will not be greatly impacted. We are not sure why then it would be desirable to exclude notice-and-access for special meetings or why, for special meetings only, all shareholders (beneficial and registered) should have to receive paper copies of the information circular.

The CSA's request for comments seems to suggest that the proxy process for voting on fundamental changes should be different than for non-fundamental changes and notice-and-access would not be sufficient in those circumstances. This distinction should be reconsidered as arguably the most "fundamental" item voted on by the shareholders at annual meetings is the election of the directors. Yet, notice-and-access is acceptable for such fundamental business.

Further, we would note that as defined in NI 54-101, "special meetings" are meetings at which a special resolution is being voted on by shareholders. Under most Canadian corporate statutes, a special resolution is a resolution requiring at least two-thirds of the vote at a meeting for passage. However, it is often the case that special resolutions involve routine matters. For example, under certain corporate statutes, a special resolution may be required to simply change the name of the corporation. Moreover, even in the case of many fundamental changes, such as an acquisition, despite the higher approval threshold for special resolutions, the vote is often entirely uncontroversial. In contrast, a meeting for the election of directors may be hotly contested and the election closely decided. Given the potential for special meetings to often be mundane and for regular meetings to be contested and controversial, we do not see a justification of limiting notice-and-access to non-special meetings.

Finally, we submit that the main difference in the proxy voting process between most special meetings and non-special meetings is the additional population of beneficial shareholders that must be mailed proxy-related materials in connection with a special meeting. That additional population of beneficial shareholders is comprised of the beneficial shareholders who typically failed to provide instructions to their intermediary with respect to what securityholder materials, if any, they wished to receive. Granted, this population also includes beneficial shareholders who indicated they only wished to receive proxy-related materials in respect of special meetings, but the question is whether the sending of a paper copy of the information circular to this additional group of beneficial shareholders will substantially increase the response rate of this group or more importantly, the shareholder response rate overall. We submit this seems unlikely.

We note that the US model is mandatory for all proxy solicitations other than those involving business combination transactions. If the CSA is not prepared to fully extend notice-and-access to special meetings, we would recommend that the CSA consider other alternatives such as defining "fundamental change" or excluding from notice-and-access only the additional population of beneficial shareholders who would receive proxy-related materials in respect of special meetings.

Two final observations if notice-and-access is not expanded to special meetings, (1) the cost differential associated with having a special meeting may cause some reporting issuers to elect

not to proceed with certain corporate actions that would cause a non-special meeting to become a special meeting; and (2) there may be greater confusion among shareholders as to what they will be receiving in the mail from year to year and what they are required to do. Consistency in the treatment of special and non-special meetings would help remove such confusion.

3. Does our notice-and-access proposal adequately meet the needs of retail shareholder who wish to vote? Are there any specific enhancements or other ways that notice-and-access can be made more user-friendly?

The CSA proposal should adequately meet the needs of retail shareholders who wish to vote. Two brief comments are below.

(a) News release. We believe the news release required under notice-and-access should be shortened or removed altogether. The news release appears to serve the same purpose as the notice, which is to help shareholders understand why they are receiving a notice and not the full set of paper proxy-related materials. We submit that the notice on its own could achieve this purpose. Since shareholders will receive the notice in the mail it should not be necessary to have the same information copied into a news release. Shareholders are more likely to pay attention to a notice that they receive in the mail accompanied by a VIF. We note that the US model does not have a news release requirement.

(b) Information circular to be posted on website. We note that proposed subsections 2.7.1(6) of NI 54-101 and 9.1.1(4) of NI 52-102 require that an information circular posted at a website address other than SEDAR must contain *the same information as the information circular filed on SEDAR*. This wording suggests that the information circular posted on the website may not have to be exactly the same as the one filed on SEDAR. We recommend that the proposed subsections simply state that the issuer must post its information circular at a website address other than SEDAR as well as on SEDAR.

4. Will notice-and-access result in meaningful costs savings that make the proxy voting system more efficient?

While it is apparent that sending a notice and VIF under notice-and-access instead of a full set of proxy-related materials to shareholders would provide immediate cost savings to reporting issuers in terms of foregone printing and postage costs, the actual magnitude of the cost savings will differ from issuer to issuer. Reporting issuers with large retail shareholder bases will experience greater cost savings. As previously commented, we believe these costs savings should be extended to special meetings. Reporting issuers would find it undesirable for the cost associated with shareholders meetings to fluctuate widely from year to year depending on what

was on the agenda. While substantial cost savings could be realized in some years, the cost of printing and mailing proxy-materials for special meetings would offset those cost savings.

5. Is the approach [to give reporting issuers flexibility in the form and content of the notice provided the notice contains certain specified information] appropriate, or should there be a prescribed form?

We believe it is appropriate to give reporting issuers some flexibility in the form and content of the notice as opposed to using a prescribed form. The current list of specified content appears appropriate.

6. [I]s it appropriate for reporting issuers and others to include materials that address the substance of the matters to be voted on at the meeting? Would this create a disincentive for investors to read the full information circular? Should there be restrictions on what can be included in these types of materials? Should there be requirements prescribing basic information that these types of materials must contain?

To avoid confusion, only proxy-related materials and regular disclosure documents (such as annual financial statements and Annual reports), should be included with the mailing of the notice. For example, marketing materials should not be included.

7. Is the requirement in subsection 4.6(1) of NI 51-102 that requires reporting issuers to send an annual request form to registered holders and beneficial owners of their securities to request financial statements and management's discussion and analysis adequately integrated with the requirements to send proxy-related materials? Will notice and-access have any impact?

Integration of notice-and-access with the mailing of annual financial statements and MD&A would be greatly enhanced if proxy-related materials could be filed *on or prior to* the day notice is sent rather than the proposed requirement in Section 2.7.1(e) that proxy-related materials be filed on SEDAR and posted on a website *on the same day* as the mailing of the notice. It is desirable for both reporting issuers and shareholders that reporting issuers retain the ability to mail the annual financial statements and MD&A and notice in a single package under notice-and-access. This is the most cost effective way for reporting issuers to mail annual meeting materials and is less confusing for shareholders than multiple mailings. Under the current proposal, a shareholder could receive up to three separate mailings relating to the same meeting all within a few weeks; (i) annual report and annual request form; (ii) notice and VIF; and (iii) hardcopy proxy circular upon request.

The requirement to send the notice to beneficial shareholders *on the same day* that proxy-related materials are filed on SEDAR and posted on a website will make it difficult for some issuers to mail (i) and (ii) above in the same package. Consider that the notice must be sent at least 30 days before the date fixed for the meeting and the proxy-related materials must be filed on SEDAR *on the same day* as the notice is sent. Using the current timeframe permitted under NI

51-102, if a reporting issuer filed its annual financial statements and MD&A on the deadline for filing (90 days after the end of the year) and wanted to mail the annual financial statements and MD&A within 10 calendar days of filing as permitted, the only way to ensure the notice is mailed at the same time would be to file the proxy-related materials on the same day that the annual financial statements and MD&A are mailed. The problem this creates is that the proxy-related materials would be filed after the 90th day after the end of the year, which also happens to be the deadline for filing an annual information form ("AIF"). Many issuers incorporate by reference information from their proxy circulars into their AIF. However, any material incorporated by reference in an AIF is required to be filed with the AIF unless the material has been previously filed (see section 6.1 of NI 51-102CP). Therefore, if the proxy circular is filed after the AIF, it would not be possible to incorporate this information by reference. Similarly, reporting issuers that file a Form 40-F with the SEC also incorporate information by reference in the Form 40-F from the proxy circular. The timing of notice-and-access may cause a conflict between a reporting issuer's desire to mail the annual financial statements and MD&A with the notice and to incorporate information by reference in the AIF or Form 40-F. A reporting issuer in such circumstances would be faced with choosing from the following undesirable options:

- Notice-and-access/ incorporate material from the proxy circular by reference in AIF or Form 40-F/ mail annual financial statements and MD&A and notice separately

- Notice-and-access/ do not incorporate material from the proxy circular by reference in AIF or Form 40-F/ mail annual financial statements and MD&A and notice in a single package

- Do not use notice-and-access/ incorporate material from the proxy circular by reference in AIF or Form 40-F/ mail annual financial statements and MD&A and full proxy-related materials in a single package

The desired option would be:

- Notice-and-access/ incorporate material from the proxy circular by reference in AIF or Form 40-F/ mail annual financial statements and MD&A and notice in a single package

A way to achieve the desired option would be to separate the notice mailing requirement from the filing requirement so that the notice may be mailed after the proxy-related materials have been filed. For example, the requirement could be revised so that the notice must be sent within 10 calendar days of filing proxy-related materials and at least 30 days before the date fixed for the meeting. This would facilitate the mailing of the annual financial statements and MD&A and notice in a single package and allow information to be incorporated by reference in an AIF or Form 40-F from the proxy circular because all those documents could be filed on the same day.

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The above is respectfully submitted. Thank you for this opportunity to comment. If you have any questions, please direct them to Kay Song (416-926-3427, kay_song@manulife.com), Eleanor Farrell (416-868-6377, efarrell@cppib.ca) or J. Alexander Moore (416-863-5570, amoore@dwpv.com).

Yours truly,

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c.c. Autorité des marchés financiers
Attention: Anne-Marie Beaudoin, Directrice du secretariat