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August 31, 2010

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Alberta Securities Commission
Saskatchewan Financial Services Commission – Securities Division
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
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 John Stevenson
Secretary
Ontario Securities Commission
20 Queen Street West
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- and -

Anne-Marie Beaudoin
Corporate Secretary
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Response to Request for Comments: Proposed Amendments to NI 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 NI 51-102 Continuous Disclosure Obligations and Companion Policy 51-102CP Continuous Disclosure Obligations – Proposed Amendments to NP 11-201 Delivery of Documents by Electronic Means (the "Proposed Amendments")

Thank you for the opportunity to comment on the Proposed Amendments to the above-noted instruments and companion policies. We wholly support a notice-and-access regime for the dissemination of proxy materials.

General Comments

1. In the Notice regarding the Proposed Amendments the CSA notes that, in its view, the purpose of NI 54-101 is "to give beneficial owners who hold their securities through intermediaries or nominees a reasonable opportunity to exercise the voting rights attached to those securities". In contrast, the current Companion Policy states that one of the fundamental principles underlying the instrument is that "all securityholders of a reporting issuer, whether registered holders or beneficial owners, should have the opportunity to be treated alike as far as is practicable". We note that the CSA in developing the Proposed Amendments has "kept in mind" this fundamental principle but we are concerned that the CSA's commitment to establishing appropriate rules with respect to the proxy voting process has weakened, and we question whether "reasonable opportunity" is the correct standard when evaluating the underlying principle.

   In our view, it is not sufficient for beneficial owners to have a "reasonable opportunity" to exercise the voting rights associated with the securities in which they have invested. "Reasonable" could be interpreted in a number of ways, including what is commercially reasonable. This is a lower standard than beneficial owners having the opportunity to vote "as far as is practicable". The proxy voting system should not be dependent on the various parties taking commercially reasonable steps – their systems must be designed to provide a very high level of certainty that voting instructions provided by beneficial owners will be fully reflected in the proxies voted at the meeting in question. If the CSA is intending to communicate a lower level of commitment than is currently articulated in the fundamental principles set out in the Companion Policy, the marketplace should be expressly advised that this is the case.

2. In our view, a fundamental problem with the Proposed Amendments is that they seek to treat OBOs and NOBOs in the same manner, with the result that where is it possible for the treatment afforded a NOBO to more closely mirror the treatment afforded a registered shareholder, that possibility is being eliminated through the Proposed Amendments.

   The anonymity enjoyed by OBOs makes it impossible to treat OBOs exactly like registered shareholders. The purpose of NP 41 and its successor NI 54-101 was to put the beneficial holders, to the extent possible, in the position they would have been in if they had been registered shareholders. In our view, this does not require OBOs and NOBOs to be treated identically. It is contrary to this purpose, and prejudicial to the NOBOs, to force upon NOBOs the same limitations that the OBOs have elected to accept in order to preserve their anonymity.

3. The CSA has invited comment on the integrity of the proxy system as a whole. In our view, the Proposed Amendments do not address many of the widely acknowledged problems with the proxy voting system in Canada. One example is the requirement that issuers pay fees to a third party service provider to whom the intermediaries have outsourced their responsibilities for delivering proxy materials, without any market or

regulatory oversight of those fees. Another example is over-voting. The integrity of the proxy voting system is linked to confidence in our capital markets, and we believe the CSA should engage more comprehensively on these issues. We are finalizing a major research initiative on this issue, which we expect to release publicly as a discussion draft in September of this year. We hope the CSA will find this initiative helpful.

Comments on Specific CSA Questions

4. Question 1: The CSA asks whether it is appropriate for notice-and-access to be available only for meetings at which no special resolution will be put to shareholders. We support notice-and-access being available for all meetings on the basis that it is not necessarily the presence of a special resolution that makes a meeting controversial or important. For example, an annual meeting where a dissident slate of directors is put forward may be far more contentious than a transaction that is the subject of a special resolution. We also believe that consistency of process will encourage adoption of the process by issuers and investors, whereas notice-and-access for some meetings but not others may serve to confuse investors and create unnecessary work and expense for issuers. If the CSA believes that there is merit in initially testing the notice-and-access system on a restricted number of meetings, we believe that the restriction on notice-and-access only for meetings without special resolutions to be considered should have a specific sunset period (perhaps two years). Any issues with the notice-and-access process should become apparent within that time and amendments as necessary to NI 54-101 can be made.

5. Question 2: The CSA asks whether there should be restrictions on when an issuer can use notice-and-access selectively. We do not understand why issuers should be able to use notice-and-access selectively and the Notice does not adequately explain why this selective approach is being proposed. We suggest that such selectivity at worst introduces an ability to manipulate the proxy voting system to achieve a desired vote result and at best adds another complication to an already complicated process and another way that similarly situated shareholders may not be treated equally. If issuers wish to use notice-and-access, they should be required to use it for any investor who has consented to electronic delivery, either when the investor opened its account with the intermediary or thereafter, so long as there are no other barriers to doing so (for example, if prohibited by local law) and the investor has not elected another form of electronic delivery. To this end, we believe that the instrument should provide that the issuer and its agents are entitled to rely on a consent to electronic delivery provided by a beneficial owner to its intermediary.

6. Question 3: The CSA asks if the proposal adequately meets the needs of the retail holders. We do not believe that the adequacy of the proposed notice-and-access regime for retail investor use can be known until the regime is implemented. We are not aware of any empirical study which proves that method of delivery of proxy materials is a root cause of voter apathy. We are familiar with the U.S. statistics that seem to indicate a

reduction in retail investor response after the introduction of the notice-and-access regime in that country, however, commentators have suggested that confusion over the process, rather than the process itself, and confusion with respect to mandated forms were at least contributory factors. As a general proposition, we believe that updating securities rules to reflect current technological capabilities is a necessary step for issuers, transfer agents and other participants in the proxy voting system to enhance the efficiency of the system and that such steps will be perceived as positive by those retail investors for whom use of technology is second nature.

7. Question 4: The CSA requests data with respect to anticipated cost savings from notice-and-access. We are not in a position to provide data with respect to cost savings, although intuitively we expect that cost savings will result from not printing and mailing hardcopy materials. However, proxy materials are delivered, for the most part, by either Broadridge or the issuer's transfer agent on a fee-for-service-basis. In the case of Broadridge, issuers pay the fees to Broadridge but have no input into the negotiation of those fees. In the absence of some action by the CSA to ensure that cost savings are passed on to the issuer, any savings that result from notice-and-access may be for the benefit of third party service providers. The Proposed Amendments should include safeguards to ensure that this does not occur.

8. Question 5: The CSA asks whether permitting flexibility in the form of notice to be provided under notice-and-access is appropriate. Subject to our concerns expressed under Question 6 below with respect to additional materials, we support permitting flexibility in the form of notice.

9. Question 6: The CSA question whether it is appropriate to permit additional materials to be delivered with the notice and VIF. We note that the Proposed Amendments do not purport to limit the content of the website where the proxy materials are located nor to prohibit mailings of, or notice-and-access for, materials other than proxy materials. Accordingly, restricting inclusion of such materials with the notice might prove futile. We suggest a better approach may be to require that information which is provided to investors by management regarding shareholder meetings that is in other than prescribed form must be factual. In addition, the CSA should consider whether such materials should be provided to all investors regardless of whether they elect electronic delivery, so that all investors are informed by the same materials.

10. Question 7: The CSA questions whether the provisions regarding annual consent for delivery of financial statements and MD&A are adequately integrated with the Proposed Amendments. In our view, the timing of obtaining the consent, the timing of delivery of the financial statements, and the scope of the consent are not adequately integrated. We suggest that separate consents for proxy materials and financial statements, the first given once and the second given annually, is not necessary. As noted above, consent to electronic delivery of proxy materials is given by the investor to its intermediary when opening an account. That consent applies to the account and not the individual holdings

in that account. The consent for financial statements and MD&A is requested annually by the issuer (in the case of OBOs indirectly through the intermediaries) in respect of a particular security. Multiple consents can be confusing to investors and we believe that the consent process should be rationalized so that investors can elect once with respect to a particular security the materials they wish to receive electronically and thereafter can change that election as they see fit. Consents so provided to intermediaries should permit issuers and transfer agents to rely on the consent. This could avoid any problems that might arise between the timing in NI 52-102 to obtain the consent for financial statements and the timing under the Proposed Amendments for delivery of proxy materials, which could result in the issuer not being able to deliver the financial statements at the same time as the proxy materials.

Other Comments on Specific Amendments

11. Section 8 (repealing and replacing Section 2.12) would remove the reference to first class mail and require printed materials to be delivered to Broadridge at least three business days before the 21st day before the meeting date, whether they are being delivered by first class mail or not. The proposed requirements with respect to notice-and-access are less prescriptive. The issuer must provide the notice to the intermediary "in sufficient time" for the intermediary to send it to the investor at least 30 days before the meeting date.

    It is not clear to us that either of these provisions addresses the complaint we have heard frequently from issuers and investors that meeting materials are not delivered in a timely manner. In our view, NI 54-101 should mandate that any party that has carriage of mailing (such as the transfer agents or Broadridge) file with the CSA and post on SEDAR a confirmation that the mailing was completed in accordance with the requirements of NI 54-101.

12. Section 9 (repealing and replacing Section 2.16) would use disclosure to deal with the issue of non-delivery of materials to OBOs who wish to receive their material. If an issuer is not paying for intermediaries to send proxy related materials to its OBO investors, the issuer would be required to disclose that fact in its meeting materials and advise OBOs that it is their responsibility to contact their intermediary to make any necessary arrangements to exercise their voting rights. We question the utility of such disclosure for OBOs – if the OBO is not receiving its materials, then it will not have the benefit of the disclosure about why it is not receiving its materials unless the OBO has seen the press release. We also query the rationale behind the requirement for the information circular disclosure to contain an explanation of why an issuer is using notice-and-access for some but not all investors (if in fact it is) and also a statement if the issuer is choosing not to pay intermediaries to send proxy materials to OBOs, while the press release does not require the statement that an issuer has elected not to pay intermediaries to provide materials to OBOs (if it has).

13. Section 10 (amending and replacing Section 2.17) and Section 17 (amending and replacing Section 4.5) would require issuers (to the extent that they mail to NOBOs) and intermediaries (with respect to all OBOs and to the extent that they mail to OBOs) to retain a record of the Form 54-101F6 and the date and time of any voting instructions, including proxy appointment instructions submitted to the issuer or to the intermediary, as the case may be. We view this amendment as a positive step towards creating an auditable system.

14. Section 11 (amending and replacing Section 2.18) and Section 17 (amending and replacing Section 4.5) would eliminate the current process for providing a non-registered investor with a legal form of proxy with what is essentially the appointee system that was previously in place under NP 41. We agree with the change but believe the amendments should go further and allow issuers to provide NOBOs with a form of proxy rather than with a request for voting instructions. As noted above, the fact that the OBOs have opted for anonymity should not adversely affect the ability to treat NOBOs like registered shareholders to the extent possible.

    We note that the STAC Protocol contemplates an issuer using this approach when it does its NOBO mailing through its transfer agent. STAC refers to this as an "Omnibus Legal Proxy", which is a proxy signed by the management nominee in favour of those investors on the NOBO list. This enables the transfer agent to send a form of proxy to the NOBOs instead of a request for voting instruction. It also allows the NOBO to either appoint the management nominee (or someone else) as its proxy and send the proxy back to the transfer agent or to simply take the proxy to the meeting and vote as if it was a registered shareholder. We understand that very few issuers ever adopted the Omnibus Legal Proxy because it is not expressly contemplated in NI 54-101. It is likely that issuers who might otherwise have wished to use it did not do so out of concern that without a specific reference to it in NI 54-101, it could be challenged. In our view, NI 54-101 should be amended to specifically contemplate the use of the Omnibus Legal Proxy for NOBOs at the option of the issuer.

15. Section 10 (repealing and replacing Section 2.17) and Section 16 (repealing and replacing Section 4.4) would require everyone to use the form of voting instruction form prescribed by the CSA. Currently an issuer has the option to use this form, but may use a different form, provided that the form or document that is used requests or includes the same information as set out in the prescribed form.

    Virtually all intermediaries use Broadridge for distribution to and tabulation of votes from beneficial owners. To the extent that issuers mail directly to their NOBOs, they sometimes provide them with a document similar to the proxy provided to the registered holders. We are not aware of any problem that results from this practice and the Notice does not adequately explain the reasons for this proposed change. The transfer agents code each of the forms going to NOBOs with an identification number which also shows the transfer agent which intermediary's omnibus proxy the voting instructions should be

counted against. This allows the NOBOs to be treated as closely as possible to registered shareholders. The fact that the OBOs would be treated differently is a consequence of OBOs remaining anonymous. NOBOs should not be prejudiced in the way they are treated by the treatment necessary to allow OBOs to maintain their anonymity.

It is not clear to us why, if the CSA is content to allow issuers to determine individually the form and content of the notice provided under the new notice-and-access rules, they would at the same time prescribe the form on which voting instructions are requested.

16. We were surprised at the limited proposed amendments to NP 11-201. We appreciate that NP 11-201 as amended would contemplate that notice-and-access is not the only means of achieving electronic delivery however, technology has advanced significantly since NP 11-201 first came into effect and the criteria expressed in existing NP 11-201 as satisfying electronic delivery requirements are no longer necessarily relevant. We suggest that NP 11-201 should be reviewed and amended in the context of current technological capabilities.

Please do not hesitate to contact Carol Hansell (chansell@dwpv.com; 416 863-5592) or Gillian Stacey (gstacey@dwpv.com; 416 367 6934) if you would like to discuss any of these comments in more detail.