INSTITUTE OF CORPORATE DIRECTORS
INSTITUT DES ADMINISTRATEURS DE SOCIÉTÉS

March 28, 2011

Ontario Securities Commission
20 Queen Street West
19th floor, Box 55
Toronto, Ontario M5H 3S8

Attention: John Stevenson, Secretary

Dear Sirs/Mesdames:

OSC Staff Notice 54-701 Regulatory Developments Regarding Shareholder Democracy Issues dated January 10, 2011

This letter is submitted on behalf of the Institute of Corporate Directors (ICD) in response to the invitation to comment on the desirability of developing regulatory proposals to address the shareholder democracy issues identified in the OSC staff notice.

The ICD is a not-for-profit, member-based association with more than 4,500 members and nine chapters across Canada. Our vision is to be the pre-eminent organization in Canada for directors in the for-profit and not-for-profit sectors. Our mission is to foster excellence in directors to strengthen the governance and performance of Canadian corporations and organizations. This mission is achieved through education, certification and advocacy of best practices in governance.

In order to develop this letter, the ICD assembled a Task Force of distinguished directors and corporate governance experts from across Canada. The Task Force consisted of:

Ian Bourne – Calgary – Corporate Director
Tom Chambers – Vancouver - Corporate Director
Peter Dey – Toronto - Corporate Director
Thierry Dorval – Montreal – Partner and Chair, Governance and Directors' Liability Team, Ogilvy Renault LLP
John McLennan – Mahone Bay, NS - Corporate Director

The undersigned was Chair of the Task Force and Andrew MacDougall, Partner, Osler Hoskin and Harcourt LLP was Counsel to the Task Force.

This letter reflects the views of the Task Force, the input of our Chapters across the country and has been approved by the National Board of the ICD.

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Members of the ICD share the Ontario Securities Commission's interest in corporate governance and the continued evolution of best practices. We appreciate the opportunity to comment on the areas identified in the OSC staff notice. Before commenting on those issues, we would like to make two general comments.

First, we believe that corporate governance in Canada is best advanced through identification of best practices and their development in the market as opposed to the imposition of prescriptive rules and regulations in most instances. Prescriptive rules and regulations can be rigid, have unintended consequences and may be insensitive to the diversity of issuers which will be subject to them. We believe that issuers must have the flexibility to develop an approach to corporate governance that reflects their own particular circumstances. It is trite but true that in the corporate governance arena "one size does not fit all" and caution must be exercised before promoting universal standards or prescriptive rules.

Secondly, we acknowledge and support the statement in the OSC staff notice that staff intend to coordinate their review and the development of any proposals with other members of the Canadian Securities Administrators (CSA). We strongly believe that it is critical that any changes in the regulation of corporate governance matters reflect a consensus view of all of Canada's securities administrators.

Slate voting and majority voting for uncontested director elections

Staff has identified a few issues under this heading and since terminology is often used inconsistently when these issues are discussed, we think it is important to separate them. The first issue under this heading relates to whether shareholders are given the option of voting for or withholding from voting on the entire slate of director nominees (slate voting) or whether shareholders are given the option of voting for or withholding from voting on each director nominee (individual voting).

The second issue, which only arises if individual voting is made available to shareholders, is whether if any one or more director nominees fail to receive more votes in favour of their election than votes withheld from their election the directors either may be required by board policy to resign (a majority voting policy) or are not treated as having been elected (a majority election standard).

Slate Voting versus Individual Voting for Directors

We support individual voting for directors. The ability to vote on the election of directors is a fundamental right of share ownership and we agree with the view that a shareholder should not be placed in the uncomfortable position of voting 'for' some directors that the shareholder does not support, or withholding votes from all candidates when, in fact, the shareholder may support the election of many, or even most, of the director nominees. We are sympathetic to the view that where shareholders are able to vote for directors individually, they may feel more involved in the election process. We also acknowledge that individual voting for directors may provide some shareholder feedback on director suitability – since shareholders who disapprove of a particular director nominee or the decisions of a particular committee of directors can make their dissatisfaction known by withholding from voting for that nominee or the members of that committee.

We note that individual voting for directors is a common practice, does not impose any significant additional costs and, because it does not adversely affect the election process, does not give rise to the same concerns regarding board composition as does majority voting for directors. We would support changes to the form of proxy prescribed under National Instrument 51-102 – Continuous Disclosure Obligations that would make individual voting for directors mandatory.

Majority Voting Policies and a Majority Election Standard

The development of majority voting as a hot topic in Canada is largely an echo of developments in the U.S. However, there are some key differences between the U.S. and Canada which affect the issue.

First, the adoption of majority voting in the U.S. has largely been as a result of shareholder proposals whereas Canadian companies which have adopted majority voting have done so voluntarily.

Second, Canadian corporate law provisions alleviate some of the underlying causes of investor frustration in the U.S. which led to shareholder proposals on majority voting. The SEC has for several years now been considering whether to adopt rules to permit shareholders to submit the names of director nominees to be included in the management proxy circular, whereas shareholders of corporations incorporated under the *Canada Business Corporations Act* (CBCA) or provincial corporate statutes modeled on the CBCA have long been able to submit shareholder proposals which include nominations for directors. Moreover, such Canadian corporate statutes also provide that shareholders can at any time, by ordinary resolution, remove a director from office and fill the resulting vacancy, while many U.S. corporate statutes do not give shareholders such power.

Third, a significant proportion of Canadian public companies are controlled companies, for which the value of a majority voting policy or a majority election standard is marginal at best.

Whether adopted as a majority voting policy or majority election standard, majority voting raises concerns that (i) it would result in "failed elections" – i.e. that no directors are elected or that an insufficient number of the directors are elected with the attributes necessary to meet statutory director residency requirements or requirements to have an audit committee comprised of at least three independent directors or (ii) would result in the loss of directors with a particular skill set which the board believes is necessary or desirable. These concerns are heightened where majority voting is implemented via a majority election standard.

While we support the adoption of majority voting policies as a best practice, we do not think it is a useful practice for controlled companies and we recognize that it may be unsuitable for many small to medium sized companies. We note that despite considerable momentum on majority voting in the U.S. over the last several years, proposals to include a requirement for companies to have a majority voting threshold in uncontested board elections were omitted from the corporate governance reforms contained in the final version of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (Dodd-Frank Act). In our view, it is premature to consider adoption of a majority voting policy as a mandatory requirement. However, we do support the adoption of a majority voting policy as a best practice and encourage boards to consider how to address large withhold votes for the election of directors.

We oppose the adoption of a majority election standard. In addition, we note that director election standards for Canadian companies are a corporate law matter and, accordingly, the CSA do not have jurisdiction to require Canadian companies to adopt such a standard.

Shareholder advisory votes on executive compensation

We do not support the introduction of a mandatory requirement that issuers provide shareholders with a separate advisory vote on executive compensation (say on pay) or on "golden parachute" payments. It is the responsibility of the board of directors to approve the company's compensation strategy and practices, a responsibility which must be exercised consistent with the board's fiduciary duty to act in the best interests of the company. It is the responsibility of shareholders to elect directors they are confident will discharge their fiduciary duty appropriately and with the appropriate standard of care. We do not support practices which effectively undermine or diminish the board of directors' responsibility on compensation matters.

Jurisdictions which have introduced say on pay have generally done so as a political response by legislators to a mix of corporate scandals and public outrage at excessive or unjustified pay. Say on pay was introduced by the U.K. government in response to public criticism of "fat cat pay", particularly at privatized former state-owned enterprises. The Dodd-Frank Act and predecessor initiatives under the Troubled Asset Relief Program in the U.S. can both be viewed as political responses to public outrage about excessive executive pay, especially to departing CEOs. While Canada has not been free from pay scandals, the instances of public outrage at executive compensation levels have been few. There is a reason for this. Canadian compensation levels have historically been significantly lower than in the U.S. or U.K.

Executive compensation requires strategic and sophisticated calculations, a strong understanding of the roles, responsibilities and personalities of the executives, and access to confidential, competitively sensitive information. Therefore, it is a matter for which the board is best suited. Moreover, we note that an unfavourable vote on the executive compensation report provides no meaningful information as directors will not know why shareholders voted against the resolution.

The strongest argument which has been made in support of say on pay is that it may promote a better dialogue or communication with shareholders (particularly institutions) to identify potential issues in the executive compensation program. However, leading Canadian companies have a history of consulting with institutional shareholders on governance matters and of voluntarily adopting corporate governance best practices, as evidenced most recently by the number of boards which have agreed to meet one-on-one with the Canadian Coalition for Good Governance and the number of Canadian companies voluntarily adopting majority voting for directors policies and say on pay votes. The willingness of Canadian boards to respond to shareholder concerns may reflect a cultural difference in Canada and may reflect differences in Canadian governance practices. For example, Canadian companies tend to have fewer executives serving on the company's board of directors than in the U.K. and in Canada the CEO rarely serves as Chair of the Board, unlike in the U.S. In our view, there is no need to adopt say on pay as a stick to promote a better dialogue with shareholders on compensation for Canadian companies.

While the boards of various companies may decide to adopt say on pay voluntarily, we do not think the fact that other jurisdictions have adopted say on pay as a political reaction to public outrage is a valid reason to adopt the practice in Canada. In deciding not to adopt auditor

attestation of internal control over financial reporting (codified in the U.S. as section 404 of the *Sarbanes-Oxley Act of 2002*), Canada recognized that this might not be appropriate regulation and took a different approach. This approach was well-received by most public market participants. We believe say on pay is another instance where Canada should distinguish itself.

The effectiveness of the proxy voting system

Shareholders are accorded a special role in the governance of Canadian companies. Shareholders elect the directors and appoint the external auditors. Under corporate statutes, certain matters of fundamental importance are required to be approved by shareholders, including changes to the articles and by-laws, amalgamations, reorganizations and the sale of all or substantially all of the corporation's assets. In addition, stock exchange rules require shareholder approval of certain dilutive transactions. The exercise of shareholder voting rights, and the confidence of corporate stakeholders in our system of corporate governance, depend on the efficiency and integrity of the system by which shareholders exercise their voting rights.

We note that for the vast majority of company votes, the current proxy voting system works fairly well, especially given the high volume of proxy materials processed.[1] In contested meetings, such as proxy contests, if the vote is close, in many cases, the voting process is carefully scrutinized through an adversarial process, including potentially judicial review, to determine an outcome. But if the continued evolution of corporate governance best practices is going to put greater emphasis on voting by shareholders, resulting in more potentially contentious business, then the integrity of the proxy voting system should be reviewed before additional pressure is placed on it.

The integrity of the proxy voting system is not just a Canadian domestic issue. In light of the international nature of capital investment, there are practical limits to what Canadian regulators can do, acting within their jurisdiction, to improve proxy voting. Moreover, Canadian rules must align with the rules in other jurisdictions which are a key source of capital investment in Canada, or at least adopt a flexible approach to avoid conflicting rules. We note that the SEC issued a Concept Release on the U.S. Proxy System seeking comment on a number of identified concerns which are equally relevant to the Canadian proxy system, including for example, the exercise of voting rights by shareholders with little or no economic interest in the corporation (or "empty voting"), the impact of securities lending arrangements on shareholder voting and the role of proxy advisory firms in the voting process. We believe any changes to the Canadian proxy voting system should take into consideration these issues and the results of the SEC's initiative.

Conclusion

We share the interest of the Ontario Securities Commission in practices which contribute meaningfully to the improvement of corporate governance practices of Canadian companies. While we support a regulatory change in favour of individual voting for directors, we believe that majority voting policies should be a best practice. We encourage the CSA to assess the integrity of the Canadian proxy voting system in conjunction with regulators internationally. In

[1] According to Broadridge's 2010 Canadian Proxy Season Key Statistics & Performance Ratings, for the 12 months ended June 30, 2010, Broadridge processed 3,856 projects for Canadian issuers involving 196.3 billion securities and tabulated votes from 79 billion shares or 40.3% of the securities processed.

our view the issue of say on pay has not evolved to the point where a regulatory proposal from the CSA would be appropriate.

The ICD is pleased to have had an opportunity to provide you with our comments. If you have any questions regarding our comments, please contact the undersigned.

Yours truly,

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