Canadian Investor Relations Institute
Institut canadien des relations avec les investisseurs

March 31, 2011

Mr. John Stevenson
Secretary
Ontario Securities Commission
20 Queen Street West
19th Floor, Box 55
Toronto, Ontario M5H 3S8

Dear Mr. Stevenson

Re: OSC Staff Notice 54-701
Regulatory Developments Regarding Shareholder Democracy Issues

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 has been and continues to be a strong advocate of good corporate governance practices, which it believes support both fair valuations for reporting issuers and the overall integrity of the Canadian capital markets. For more information about CIRI please refer to Appendix 1.

CIRI supports the OSC's current review of certain shareholder democracy issues and appreciates the opportunity to comment on the issues identified in Staff Notice 54-107. In addition, CIRI believes that transparency in capital markets is a fundamental element of shareholder democracy. It has, therefore, included in its comments a summary of its recent submission to the Canadian Securities Administrators ("CSA") recommending increased disclosure of share ownership positions through the lowering of the beneficial ownership threshold under the Early Warning System (EWS).

In summary, CIRI submits the following comments:

- CIRI believes individual director voting is an appropriate method for electing directors and it is appropriate to develop proposals to reform securities laws that would prohibit or restrict the use of slate voting for directors.
- CIRI supports the OSC pursuing reforms that would facilitate binding majority voting for the election of directors; however, such reforms should also take into account the recommendations and modifications proposed by the CCGG for a non-binding (modified plurality) voting standard.

- The CSA should consider revising the form of proxy and the request for voting instructions ("VIF") (Forms 54-101F6 and 54-101F7 in NI 54-101) to have either an "abstain" vote or an "against" vote rather than a "withhold" vote in director elections held under a majority voting process.
- CIRI believes that an advisory Say-on-Pay vote should **not be made mandatory** for Canadian reporting issuers.
- Three issues within the proxy voting system are most in need of review – *undue influence of proxy advisory firms; lack of transparency in the OBO/NOBO system; and poor delivery of proxy materials to shareholders.*
- Shareholder democracy can be improved through enhanced share ownership disclosure by lowering the initial EWS threshold to 5% and requiring disclosure with incremental increases or decreases of 1% in shareholdings.

CIRI supports the OSC's intention to coordinate their review and the development of regulatory proposals relating to this review with other members of the CSA.

Rationale for CIRI Comments

Individual vs. Slate Voting

Issuers increasingly recognize that adopting good corporate governance practices garners support within the investment community, particularly among institutional investors, and can have a positive impact on valuation. A recent poll of a small number of CIRI members found that a majority of issuer respondents elect directors individually rather than by slate. The finding indicates that reporting issuers increasingly recognize that individual director elections are appropriate.

In addition, over two-thirds of the survey respondents supported reforms to securities laws that would prohibit or restrict the use of slate voting for directors.

Majority vs. Plurality Voting

The OSC Staff Notice 54-107 indicates that "the dominant voting standard in Ontario is plurality voting". Interestingly among respondents to the CIRI members' poll, nearly 70% specified that their company currently employs majority voting for directors at uncontested elections. The sample was fairly evenly distributed among small, medium, large and mega capitalization issuers. More than 85% of the CIRI survey respondents further indicated that they favoured the OSC pursuing reforms that would facilitate majority voting for the election of directors.

CIRI believes that majority voting in uncontested elections gives shareholders an opportunity to more clearly communicate their wishes with regard to the makeup of an issuer's board of directors. CIRI supports, therefore in principal, the pursuit of reforms to facilitate majority voting for directors in uncontested elections.

However, CIRI recognizes that under true or binding majority voting, a director would be elected only if the majority of votes cast are "for". CIRI is also aware that the Canadian Coalition for Good Governance ("CCGG") has advocated a 'modified plurality' system for majority voting, under which any director that receives more than '50% plus one additional' votes to "withhold" must tender his/her resignation to the Board. Further, the Board can then determine whether to accept the resignation or not and the decision of the Board must be news released within a specified period of time. A modified plurality vote (non-binding) gives investors a say in director elections, but not a determinative say.

Therefore, CIRI would support an OSC initiative that would pursue reforms to facilitate both binding majority voting and a non-binding (modified plurality) majority voting standard that would take into account the reasonable recommendations and modifications proposed by the CCGG.

Currently in Canada, for majority voting purposes a "withhold" vote is treated as a "no" vote. CIRI suggests that perhaps for even more direct communication consideration should be given to employing either an "abstain" vote instead of "withhold" or to the replacement with an "against" vote in the matter of director elections held under a majority voting process.

Advisory Say-on-Pay Votes

Despite the fact that advisory Say-on-Pay votes are mandatory for public issuers in the United States and that some Canadian companies have voluntarily given their shareholders an advisory Say-on-Pay vote, the practice is not widespread among CIRI member companies who responded to the survey. Less than one in five respondents in the recent CIRI poll currently gives investors an advisory Say-on-Pay vote and more than half of those not offering an advisory Say-on-Pay vote do not intend to do so in the near term. Not surprisingly, respondents expressed fairly strongly views that they believe an advisory Say-on-Pay vote should not be made mandatory for Canadian reporting issuers.

Canadian investor relations professionals and their management teams understand the importance that shareholders place on executive compensation and have worked diligently to ensure clear and transparent disclosure of compensation policies and practices to shareholders. The introduction of compensation discussion and analysis has greatly facilitated such disclosure and has served well to increase shareholder understanding of compensation policies and strategies.

CIRI is concerned that the yes-or-no nature of a Say-on-Pay vote significantly reduces an issuer's ability to understand the nature and full scope of shareholders' concerns, many of which, while compensation related to, may also encompass other issues such as financial performance, management expertise and others. In addition, an advisory Say-on-Pay vote is a relatively new issue for Canadian investors, as evidenced by the relatively small number of issuers in the TSX composite index that have adopted it. Given these factors CIRI believes it is premature to recommend a mandatory vote at this time.

Effectiveness of the Proxy Voting System

CIRI members are frustrated by the current proxy voting system in Canada and the recent attention to this issue is welcomed. The system is clearly complicated and its processes are, at times, unwieldy as detailed in the discussion paper, *The Quality of the Shareholder Vote in Canada*, issued in October 2010 by Davis Ward Phillips & Vineberg LLP. That paper identified several issues of concern that are relevant to the voting process and shareholder democracy.

CIRI members have identified several issues within the proxy voting system but we will focus here on three issues we believe are most in need of review and possibly reform – *the growing influence of proxy advisory firms; the lack of transparency inherent in the OBO/NOBO system; and the problems with the delivery of proxy materials to shareholders*.

It is not surprising that institutional investors appear to be increasingly reliant upon proxy advisory firms for voting recommendations given that corporate disclosure documents, including proxy materials, are more detailed and complex as issuers respond to stakeholders' desire for increased transparency. However, this trend means that proxy advisory firms rather than shareholder owners are setting the standards and guidelines that define good corporate governance. This is disturbing to investor relations professionals since proxy advisory firms are seen by many to have a poor understanding of issuer-specific issues. We see recommendations being published without advisory firms communicating with the issuer as well as errors in analysis that, with dialogue, may well be corrected before a recommendation for a "withhold" or "against" vote is issued. Mechanisms for increased accountability or communication with issuers are worth consideration.

Investor relations practitioners foster open and effective communications with investors and shareholders but to be effective, particularly during the proxy voting process, issuers must be able to identify their shareholders. Under the current OBO/NOBO system, investors have the ability to shield their identity from the company in which they share ownership rights and responsibilities. Given the high proportion of OBO shareholders, it is increasingly difficult and expensive to communicate effectively with a major segment of a company's shareholder base. CIRI recommends that the OBO/NOBO system be reviewed with a view to finding ways that issuers can more effectively open channels of communication with all their shareholders. Consideration should be given to allowing anyone, not just Broadridge, to mail to OBOs.

The complexity of the proxy voting system, the large numbers of third-party service providers, the need to integrate multiple databases and other factors have contributed to problems with the accurate and timely delivery of proxy-related materials. This can lead to inaccurate vote counts and the inability of shareholders to exercise their rights as owners to vote. While recognizing that the vast majority of voting processes do proceed without major problems, CIRI believes that a review of current delivery practices is warranted and that alternative systems are worth exploring, particularly further initiatives to lessen the reliance on existing paper-based systems for both the dissemination of proxy-related information and the gathering of votes from shareholders.

Improved Share Ownership Disclosure

CIRI believes that shareholder democracy in Canada can be improved by ensuring there is appropriate transparency in capital markets and that issuers are able to communicate effectively with their entire shareholder base. In order to achieve this, reporting issuers need to understand who constitutes their shareholder base. Not all shareholders in Canada are required to declare their ownership position.

Currently, the ownership threshold under the Early Warning System (EWS) in Canada is reached when a shareholder acquires beneficial ownership of, or the power to exercise control or direction over, voting or equity securities of any class of a reporting issuer or securities convertible into voting or equity securities of any class of a reporting issuer that would constitute 10 per cent or more of the outstanding securities of that class (i.e. the "10 percent rule"). In addition, a shareholder is further required to make disclosure each time a shareholder or any person or company acting jointly or in concert with a shareholder acquires beneficial ownership of, or the power to exercise control or direction over, (i) an additional 2 per cent or more of the outstanding securities of the class to which the disclosure is required, or (ii) securities convertible into an additional 2 per cent or more of the outstanding securities (i.e. the "further 2 percent rule").

CIRI strongly believes that the current 10 percent rule threshold under the EWS and subsequent incremental further 2 percent rule for disclosure are too high and are out of step with requirements in other major marketplaces. As a result, the transparency and efficiency of Canada's marketplace may be negatively impacted and shareholder democracy is impeded.

Therefore, in a recommendation dated February 1, 2011, CIRI has asked that the Canadian Securities Administrators

1. **lower the beneficial ownership threshold under the EWS to 5%** from 10% for a class of voting or equity securities, including convertible securities. Reducing the threshold to this level will place Canada at the same level as other major capital markets.
2. require beneficial owners to **disclose if there are subsequent 1% incremental increases or decreases in the shareholder's holding**, from the current requirement to report subsequent purchases of 2% or more.

For CIRI's recommendation letter to the Canadian Securities Administrators please see Appendix 2.

The above noted two recommendations are expected to address deficiencies in the current system, have a positive impact on ownership transparency and market efficiency and improve engagement between issuers and investors. It is believed that they will not only strengthen corporate governance but will also contribute to improvements in shareholder democracy as a result of improved communication between shareholders and reporting issuers.

Summary of Comments

The Canadian Investor Relations Institute supports the review of shareholder democracy issues and in summary has provided the following comments:

- CIRI believes that reforms to securities laws are appropriate to facilitate individual director voting as well as both binding majority voting for uncontested director elections and a non-binding (modified plurality) majority voting standard consistent with CCGG recommendations and modifications.
- OSC should consider replacing “withhold” votes to either “abstain” or “against”.
- CIRI believes that advisory Say-on-Pay votes should not be made mandatory for Canadian reporting issuers.
- CIRI identified three issues within the proxy voting system that are most in need of review.
- Shareholder democracy can be improved through enhanced share ownership disclosure by lowering the initial EWS thresholds.

CIRI appreciates the opportunity to provide its views and comments regarding issues it believes are appropriate for review and possible regulatory reform in order to improve shareholder democracy in Ontario and Canada.

We would be pleased to discuss this letter with you further. Please contact the undersigned at (416) 364-8200 or by e-mail at tenright@ciri.org.

Yours truly,

Tom Enright,

President and Chief Executive Officer
Canadian Investor Relations Institute

APPENDIX 1

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 reflecting 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, but are not limited to: Nominating; Audit; Membership; Issues; Editorial Board; Resource and Education; Certification.

CIRI chapters are located across Canada in Ontario, Quebec, Alberta and British Columbia. Membership as of October 31, 2010 consisted of 594 professionals serving as corporate investor relations officers in reporting issuer companies, consultants to issuers or service providers to the investor relations profession. CIRI is also a 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. 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.

APPENDIX 2

February 1, 2011

Mr. William S. Rice
Chair
Canadian Securities Administrators
Tour de la Bourse
800, Square Victoria
Suite 2510
Montreal, QC H4Z 1J2

Dear Mr. Rice:

Re: Recommendation to Improve Share Ownership Disclosure in Canada

Currently, the ownership threshold under the Early Warning System (EWS) in Canada is reached when a shareholder acquires beneficial ownership of, or the power to exercise control or direction over, voting or equity securities of any class of a reporting issuer or securities convertible into voting or equity securities of any class of a reporting issuer that would constitute 10 percent or more of the outstanding securities of that class. The current ownership threshold (i.e. the "10 percent rule") under the EWS is set out in subsections 5.2(1) of Regulation 62-104 respecting Take-over Bids and Issuer Bids (Quebec) and in Ontario, subsection 102.1(1) of the Securities Act (Ontario).

In addition, under subsection 102.1(2) of the Securities Act (Ontario), a shareholder is further required to make disclosure each time a shareholder or any person or company acting jointly or in concert with a shareholder acquires beneficial ownership of, or the power to exercise control or direction over, (i) an additional 2 percent or more of the outstanding securities of the class to which the disclosure required under subsection (1) relates, or (ii) securities convertible into an additional 2 per cent or more of the outstanding securities (i.e. the "further 2 percent rule").

The Canadian Investor Relations Institute (CIRI) strongly believes that the current 10 percent rule threshold under the EWS and subsequent incremental further 2 percent rule for disclosure are too high and are out of step with requirements in other major marketplaces. As a result, the transparency and efficiency of Canada's marketplace may be negatively impacted.

CIRI asks that the Canadian Securities Administrators

1. **lower the beneficial ownership threshold under the EWS to 5%** from 10% for a class of voting or equity securities, including convertible securities. Reducing the threshold to this level will place Canada at the same level as other major capital markets.
2. require beneficial owners to **disclose if there are subsequent 1% incremental increases or decreases in the shareholder's holding**, from the current requirement to report subsequent purchases of 2% or more.

For your information, CIRI has reviewed the February 24, 2010 letter from Thierry Dorval of Ogilvy Renault to Louis Morisset of the AMF regarding a proposed reduction of the early warning disclosure thresholds (the *Ogilvy Renault Letter*), and we support the recommendation in the Ogilvy Renault Letter.

Rationale for Recommendations

1. Address Deficiencies in Current Situation

Currently, issuers interested in identifying shareholders typically use the services of third-party providers such as proxy solicitation firms and shareholder identification agencies. The methods used by such providers to identify shareholders depend, to a large extent, on market relationships and goodwill, estimates derived from available data, past experiences, patterns of trading and other non-quantitative strategies. This route to shareholder identification is costly, and thus their use is often restricted to large cap issuers. In addition, the resulting ownership information is often imprecise and is typically not in the public domain which reduces transparency and market efficiency.

As a result of cost and opaque ownership data, most reporting issuers in Canada, particularly small-to-medium capitalization issuers who constitute the majority of reporting issuers, do not adequately know their shareholder base and cannot communicate effectively and directly with a significant proportion of their owners. Reducing the threshold under the EWS from 10% to 5% we expect will provide significantly more publicly available information leading to greater transparency and market efficiency.

Further, any change in the holdings of significant shareholders, both increases and decreases, is relevant information that should be publicly available to other market participants in a transparent and efficient capital market. The reporting of both increases and decreases in share ownership holdings, as opposed to only increases, is consistent with a similar requirement in Part 4.5 (c) Filing Obligations under Part 4 Alternative Monthly Reporting System of National Instrument 62-103.

2. Align Canadian Requirements with Other Major Markets

The following major markets, including markets that the CSA has previously used to benchmark practices, have the following early warning thresholds:

The United States, France, Germany, India, Japan and Australia each have a 5% disclosure threshold. United Kingdom applies a 3% threshold and Italy has a 2% threshold.

When Canadian reporting issuers look for capital or shareholders outside our national borders, global investors look closely at many factors, including the Canadian regulatory environment. A less rigorous regime may impede potential investors from investing, thus raising the cost of capital for Canadian issuers. Clearly, other major markets have adopted a lower early warning threshold than Canada.

3. Improve Market Transparency to Increase Market Efficiency

The European Union clearly links transparency to market efficiency. "In 1999, the European Commission announced a range of measures to promote integration of European financial markets. One of the aims was to enable issuers to raise capital on competitive terms across Europe. To achieve this, the Commission intended to update existing disclosure obligations. This resulted in the Transparency Directive, which in its first recital states that

> "[t]he disclosure of accurate, comprehensive and timely information about security issuers builds sustained investor confidence and allows an informed assessment of their business performance and assets. This enhances both investor protection and market efficiency."

To this end, according to the Directive, those who hold or have access to voting rights should disclose major holdings in listed companies." [1]

CIRI submits that information regarding significant shareholders is relevant necessary information for other market participants and a key element for a transparent and efficient capital market. Lowering the initial threshold to 5% and requiring disclosure of decreases, in addition to increases, of 1% above the initial threshold can only help foster greater transparency and efficiency. Note that this proposed 1% increment represents one-fifth of the proposed 5% initial threshold, consistent with the current 2% increment that is one-fifth of the existing 10% initial reporting threshold.

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[1]Abstract: Schouten, Michael C., The Case for Mandatory Ownership Disclosure (September 28, 2009). Stanford Journal of Law, Business, and Finance, Vol. 15, pp. 127-182, 2010. Available at SSRN: http://ssrn.com/abstract=1327114

A later paper by Michael C. Schouten and Mathias M. Siems, *The Evolution of Ownership Disclosure Rules Across Countries*[2] discusses the various mechanisms through which ownership disclosure can fulfill two main functions: improving corporate governance and improving market efficiency. The abstract for this paper states, in part, "Our main finding is that ownership disclosure rules have become more stringent over time. A breakdown of the results suggests that not legal origin, but the degree of countries' economic development is a relevant factor in explaining the differences between countries. The differences have become smaller over time, though, as most countries had settled for a 5% threshold for ownership disclosure by the end of the sample period. Furthermore, we observe a large positive correlation between the variable for ownership disclosure and other variables that protect minority shareholders against controlling shareholders. The data also indicates that the stringency of countries' ownership disclosure rules is positively correlated with the degree of dispersed ownership."

The authors also speak directly to improved transparency and market efficiency: "Once the shares are floating, disclosure of the entry or exit of large shareholders enables investors to continue to anticipate agency costs. The appearance of an activist hedge fund, for example, may signal an increase in monitoring. By requiring shareholders to disclose major acquisition, again, investors are enabled to make an informed estimate of the implications for the value of the share - this is one of the objectives of the US disclosure regime."

In addition, the importance of share ownership identification has long been recognized in the United States. According to the SEC website, Congress passed Section 13(f) of the Securities Exchange Act in 1975 in order to increase public availability of information regarding the securities holdings of institutional investors. See Section 13(f) of the Securities Exchange Act. Congress believed that this institutional disclosure program would increase investor confidence in the integrity of the United States securities markets.

Furthermore, in a September 2009 position paper, *Overcoming Short-termism: A Call for a More Responsible Approach to Investment and Business Management*[3], twenty-eight leaders in the U.S. representing business, investment, government, academia, and labor joined the Aspen Institute Business & Society Program's Corporate Values Strategy Group (CVSG) to endorse a call to end the focus on value-destroying short-termism in financial markets and create public

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[2]Michael Schouten and Mathias M. Siems. "The Evolution of Ownership Disclosure Rules Across Countries" *Journal of Corporate Law Studies* 10 (2010): 451-483.

[3] Aspen Institute Business & Society Program, "Overcoming Short-termism: A Call for a More Responsible Approach to Investment and Business Management," September 2009. Available at: http://www.aspeninstitute.org/publications/overcoming-short-termism-call-more-responsible-approach-investment-business-management.

policies that reward long-term value creation for investors and the public good. One of three key leverage points recognized that increased transparency resulting from strengthened investor disclosure is a key component of value-creating market efficiency.

4. Foster Good Corporate Governance

NP 58-201 Corporate *Governance Guidelines* states that 'the board should adopt a written mandate in which it explicitly acknowledges responsibility for the stewardship of the issuer including responsibility for adopting a communication policy for the issuer (Board Mandate 3.4 (e)).

This responsibility originated in the 1994 Report "Where Were the Directors". This report described the responsibility to 'ensure the corporation has in place a policy to enable the corporation to communicate effectively with its shareholders, other stakeholders and the public generally …" Clearly dialogue can be strengthened if the corporation can more easily identify its shareholders and if shareholders have greater transparency to the ownership of a company.

In addition, while institutional investors push for greater access to the boardroom, the conversation can be one-sided unless issuers are provided with a better opportunity to know and understand who their shareholders are.

Summary and Recommendations

The Canadian regulatory EWS regime is out of step with major capital markets such as the United States, France, Germany, India, Japan, Italy, the United Kingdom and Australia. The following two recommendations:

- lowering the initial reporting threshold to 5%, and
- requiring disclosure with incremental increases or decreases of 1% in shareholdings

are expected to address deficiencies in the current system, have a positive impact on ownership transparency and market efficiency and improve engagement between issuers and investors to strengthen corporate governance.

We would be pleased to discuss this letter with you further. Please contact the undersigned at (416) 364-8200 or by e-mail at tenright@ciri.org.

Yours truly,

Tom Enright,
President & Chief Executive Officer
Canadian Investor Relations Institute