Osler, Hoskin & Harcourt LLP
Box 50, 1 First Canadian Place
Toronto, Ontario, Canada M5X 1B8
416.362.2111 MAIN
416.862.6666 FACSIMILE

OSLER

Toronto
Montréal
Ottawa
Calgary
New York

August 16, 2011

SENT BY E-MAIL

British Columbia Securities Commission
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

John Stevenson
Secretary
Ontario Securities Commission
20 Queen St. West, 19th Floor, Box 55
Toronto ON M5H 3S8
jstevenson@osc.gov.on.ca

Anne-Marie Beaudoin
Corporate Secretary
Autorité des marché financiers
800, square Victoria, 22e étage
C.P. 246, tour de la Bourse
Montréal Québec H4Z 1G3
consultation-en-cours@lautorite.qc.ca

Dear Sirs/Mesdames:

Proposed Amendments to NI 54-101 "Communication with Beneficial Owners of Securities of a Reporting Issuer"

We are pleased to provide you with our comments concerning the proposed amendments to NI 54-101 " Communication with Beneficial Owners of Securities of a Reporting Issuer" published at (2011) 34 OSCB 6769.

1. General Comments

(A) Changes to notice-and-access:

(i) Reporting issuers other than investment funds can use notice-and-access

We support extending notice-and-access to all meetings of reporting issuers. We do not understand why investment funds would be precluded from realizing the same efficiencies and environmental benefits from notice-and-access that will be afforded to other reporting issuers.

(ii) Reporting issuers must provide advance notice of their first use of notice-and-access and disclosure and provide information regarding use of notice-and-access in the notification of meeting and record dates

We do not support the change to require a reporting issuer to provide advance notice that it intends to use notice-and-access a minimum of three and a maximum of six months before the first meeting at which notice-and-access is used. While a shareholder may be surprised by the limited content of a notice package the first time the shareholder receives one from any of the companies in which the shareholder holds shares, we think the proposed prescribed content of the package will address their potential confusion, and even if the written material is insufficient, the reporting issuer is required to provide a toll-free number to answer any questions the shareholder may have. Even if shareholders of companies which are early adopters of notice-and-access experience some confusion with the process during the first proxy season, there is no benefit to imposing the same three to six month advance notice requirement on reporting issuers which adopt notice-and-access in subsequent proxy seasons as over time shareholders will have already experienced notice-and-access through other reporting issuers who have already adopted it. In any event, there is no benefit to imposing a time limit on any advance notice to address potential shareholder confusion. Shareholders are unlikely to act upon the three months advance notice to educate themselves in advance of receiving the notice package from the reporting issuer. If a reporting issuer has given advance notice that it intends to use notice-and-access, there is no benefit to precluding the reporting issuer from doing so because the advance notice was given more than six months prior to the expected date of the first meeting at which it is to be used. Also, using the "expected date" of the first meeting is an unworkable standard. What happens if, despite expectations at the time the advance notice of first use of notice-and–access is given, the meeting date that is ultimately selected at the time the notification required by subsection 2.2(1) of the instrument is given is earlier or later such that the advance notice is given less than three months or more than six months prior to the actual meeting date? Finally, we note that the advance notice provides no assistance to persons who become shareholders of the reporting issuer after the first annual meeting at which notice-and-access is used

(iii) Reporting issuers must provide explanatory material regarding notice-and-access in the notice package

We agree that shareholders who receive a notice package should receive some basic information about notice-and-access as part of the notice package and that the explanation of notice-and-access in the notice package should be posted on the website where the proxy materials are located.

(iv) Reporting issuers cannot include additional material in the notice package other than explanatory material regarding notice-and-access

We agree with the proposal to restrict those who use notice-and-access from including additional material in the notice package.

(v) Inclusion of paper copies of the information circular with the notice package pursuant to standing instructions

We agree that shareholders should be able to request that a paper copy of the circular be automatically included with the notice package. However, proposed section 2.7.6 of NI 54-101 and proposed section 9.1.5 appear to apply only where the intermediary or reporting issuer seeks standing instructions. The reporting issuer should give effect to standing instructions it receives from registered shareholders whether or not it has taken steps to obtain them. Since not all intermediaries may be in a position to give effect to standing instructions to include a paper copy of a circular with the notice package, we would support restricting proposed section 2.7 of NI 54-101 to situations where the intermediary has sought to obtain standing instructions from the beneficial owner.

(vi) Inclusion of paper copies of the information circular with the notice package where annual financial statements and MD&A are requested and sent as part of proxy-related materials

We have no comment on the proposal to treat a request for a paper copy of the annual report as also constituting an instruction to provide a paper copy of the circular. We support the decision not to require that a paper copy of the annual report be automatically included when a request is made for a paper copy of the circular.

(vii) Stratification

We support the availability of stratification.

(viii) The proposed exemption for delivery of proxy-related materials using US notice-and-access is available only to SEC issuers with a limited Canadian presence

We do not support limiting the availability of the exemption from Canadian notice and access requirements for SEC issuers who use notice and access in the manner proposed. This limitation could result in some issuers being subject to both Rule 14a-16 and the Canadian notice-and-access requirements, which we believe is unduly burdensome and inappropriate. Consider the

following example. A Canadian issuer has class of subordinate voting shares and a class of multiple voting shares. Although a majority of the issuer's voting shares are held in the United States, the multiple voting shares are all held by Canadians, so residents of Canada own voting securities carrying more than 50% of the votes for the election of directors. The issuer has more than 50% of its consolidated assets in Canada, but its business is administered principally in the United States. This issuer will not be a "foreign private issuer" under the SEC's rules (which are based on voting shares, rather than votes), and so it will be subject to Rule 14a-16. However, it will also be subject to the Canadian notice-and-access requirements, because more than 50% of the votes are held by Canadian residents and because of the location of its assets. Further, any U.S. incorporated SEC issuer (which can never be a "foreign private issuer" under the SEC's rules) will be subject to both Rule 14a-16 and the Canadian notice-and-access requirements if it has a majority of its voting shares held in Canada and any one of the three other specified connections to Canada.

We submit that any issuer that is mandatorily subject to Rule 14a-16 should not also have to comply with the Canadian notice-and-access requirements. In the alternative, we would propose that any test which disqualifies an issuer from utilizing the exemption from the Canadian notice-and-access requirements should be tied solely to the trading volume of the issuer's securities in Canada relative to its trading volume in the United States, as a more relevant basis for the determination of whether there is a sufficient connection to Canada to justify requiring compliance with both sets of requirements. Finally, we would suggest that an SEC issuer that voluntarily complies with Rule 14a-16 despite being an exempt "foreign private issuer" under the SEC's rules should also be entitled to rely on the Canadian notice-and-access requirements exemption, subject to whatever disqualification test based on connections to Canada is ultimately adopted.

(ix) Methods for sending notice package

While we expect that those who use notice-and-access will usually prefer to send a paper copy of the notice package via mail or courier, if the person has obtained appropriate consents (as contemplated in National Policy 11-201), we think they should be permitted to send the notice package electronically as well. It is unnecessarily cumbersome to require a reporting issuer to send a paper copy of the notice package to employee shareholders rather than electronically, for example.

(x) Specific times by which a reporting issuer must provide materials for forwarding to proximate intermediaries

We have no comment on this proposed change.

(xi) Methods and timing for fulfilling request for paper information circulars

We have no comment on this proposed change.

(xii) Other changes to the notice-and-access proposal

We support the proposed changes.

(B) Simplification of beneficial owner proxy appointment process

We support the proposed clarification that, unless otherwise instructed, an appointee has full discretionary authority.

We believe that intermediaries should make reasonable efforts to deposit proxies received from beneficial owners prior to the proxy cut-off established by the reporting issuer. But given that the ultimate beneficial owner may hold the shares through multiple tiers of intermediaries, we question whether it is practical to expect that an appointee proxy will in fact be deposited prior to such cut-off in all situations.

(C) Enhanced disclosure of voting process

We support the proposed changes.

(D) Other changes to NI 54-101

We have no comments on these proposed changes.

2. <u>Specific Comments</u>

- **Section 2.7.1(1)(a)** – Are reporting issuers prohibited from also stating in the notice that the proxy-related materials are available on SEDAR?

- **Section 2.7.1(1) (a)(ii)A** – We do not think an explanation of why a person or company is using notice-and-access will provide any useful information to shareholders and we recommend that this requirement be deleted.

- **Section 2.7.1(1)(c)** – Insert "on SEDAR" after "filing" so that it is clear that the filing is to be made on SEDAR.

- **Section 2.7.1(1)(f)** – Change "request" to "request for a paper copy of the information circular" so that it is clear what a request "by any other means" is meant to refer to.

- **Section 2.7.1(2)(b)** – It is not clear what is meant by "a document related to the approval of financial statements". Should it not simply reference "financial statements of the reporting issuer"?

- **Section 2.7.3** – This section should be modified to permit a reporting issuer to require assurances that the person or company making the request is a beneficial owner or is

acting on behalf of a beneficial owner so that the reporting issuer knows it is reasonable to incur the cost of delivering paper copies to the requesting person. Also, change "request" to "request for a paper copy of the information circular" so that it is clear what a request "by any other means" is meant to refer to.

- **Section 2.7.4** – Guidance is needed regarding what written communications "regarding the meeting" are contemplated. For example, annual financial statements are usually laid before the annual meeting. Do they need to be included on that website and, if an issuer provides supplemental financial information on its corporate website, does that supplemental information also need to be included?

- **Section 2.7.6** – This section needs to be modified to require the intermediary to act on standing instructions only where the standing instructions are received a few business days before the date the intermediary provides the reporting issuer with the NOBO list. An intermediary will not be in a position to comply with their obligations in this section if the standing instructions are received after that date.

- **Section 2.18** – The drafting of this section is awkward. We would suggest replacing "A reporting issuer whose management holds a proxy in respect of securities beneficially owned by a NOBO…" with "Where a reporting issuer has sent a Form 54-101F6 to a NOBO, the reporting issuer…" Also, this section presupposes that a proxy cut-off is "specified under corporate law". In most cases, however, the corporate law is permissive and it is necessary to look to the language contained in the management information circular to determine whether the board of directors has set a proxy cut-off for the meeting and when it is.

- **Section 2.20(a.1)** – In order to be in a position to reconcile beneficial ownership provisions, intermediaries will need some advance notice of the record date. This section should be modified to require that the notice contemplated in section 2.2 is sent a minimum of three business days before the record date.

- **Section 4.5** – The drafting of this section is awkward. We would suggest replacing "An intermediary who is the registered holder of, or holds a proxy in respect of, securities owned by a beneficial owner…" with "Where a Form 54-101F7 is sent to a beneficial owner by an intermediary, the intermediary…" Also, this section needs to be modified to reflect the fact that a proxy cut-off is not usually "specified under corporate law".

- **Section 5.4(3)(c)** – The obligation should arise only where requested by the depositary. The participant should only be obliged to request the confirmation, since there can be no assurance that the participant actually will obtain it. We would recommend replacing "obtain" with "if requested by the depository request". Also, the cross-reference is incorrect - it should refer to subsection 2.18(4).

OSLER

- **Section 6.2** – Section 6.2 states that a person or company other than the reporting issuer is entitled to take any action permitted under the Instrument to be taken by a reporting issuer, and in doing so is subject to all the rights and obligations of a reporting issuer, except as provided in section 6.2. Sections 2.7.1(c) and 2.7.2 should apply only to solicitations by the reporting issuer. Therefore, section 6.2(3) should be amended to state that subsections (1) and (2) of section 6.2 do not apply to subsection 2.7.1(c) or section 2.7.2.

- **Companion Policy 54-101CP, section 3.2** – It would be helpful if the CSA were to provide some guidance on whether for purposes of a notice or other change for a meeting an issuer which did not use notice-and-access for the original notice of meeting and information circular may do so for a notice of adjournment or change.

- **Companion Policy 54-101CP, section 5.4(5)** – It is an overstatement to say that the filing of the notification contemplated in section 2.12 is intended "to broadly communicate to the reporting issuer's holders" that notice-and-access is being used. Merely filing a document on SEDAR will not result in the document coming to the attention of shareholders.

- **Companion Policy 54-101CP, section 5.4(10), first bullet** – For the sake of clarity, it would be helpful to change "still can" to "also" in the first sentence and to add at the end of the last sentence "to supplement delivery via notice-and-access". If notice-and-access is being used, the "alternate method" is no longer an alternate method, it is a supplementary one.

  Conforming changes need to be made to sections 9.1.1, 9.1.3 and 9.1.5 of NI 51-102 and to section 10.3 of 51-102CP.

- **In section 9.1.1(2) of NI 51-102**, a reporting issuer should be permitted to include in the notice package a copy of the financial statements that the issuer may be required or permitted to send to its registered shareholders.

If you have any questions or comments please contact Andrew MacDougall at (416) 862-4732 or amacdougall@osler.com

Yours very truly,

Osler, Hoskin & Harcourt LLP
:dc