

HANSELL

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Attention: The Secretary

Re: CSA Multilateral Staff Notice 54-304 – *Final Report on Review of the Proxy Voting Infrastructure and Request for Comments on Proposed Meeting Vote Reconciliation Protocols*

We appreciate the opportunity to provide comments to the Canadian Securities Administrators (CSA) on CSA Multilateral Staff Notice 54-304 regarding shareholder meeting protocols to tabulate proxy votes for shares held through intermediaries (the **Protocols**).

Hansell LLP advises boards, investors, shareholders and management teams in crisis and other special situations, and in respect of their governance practices, generally. As a firm, we devote considerable time and resources engaging with market participants and the CSA to advance the discussion on issues related to the integrity of the proxy voting infrastructure.¹ We have made this investment because these issues are important to our clients. One of the fundamental rights of shareholders is the right to vote their shares and communicate their preferences on important matters that affect the governance of the companies they invest. Issuers also rely on shareholder voting to confirm the approval of important corporate transactions and to receive the views of their shareholders.

We commend the CSA for taking the leadership to address the concerns of issuers and investors, and bring key entities together, to work collectively and develop solutions to these concerns. The

¹ For example, we provided a detailed comment letter in connection with CSA Consultation Paper 54-401 *Review of the Proxy Voting Infrastructure* (November 13, 2013), which is available online at http://hanselladvisory.com/includes/CSA_Commentary.pdf

release of the Protocols is an important step forward in this regulatory initiative. The Protocols are comprehensive and, in our view, they set the minimum expectations on the role and responsibilities of the key entities to support accurate, reliable and accountable meeting vote reconciliation. We agree that the Protocols will improve the sharing of information and communication flow between intermediaries and tabulators. These entities have generally operated in silos, which has negatively contributed to the opaqueness of the current system. Setting clear responsibilities and communication protocols will help support accurate vote reconciliation, which was identified as the first key issue in CSA Consultation Paper 54-401 – *Review of the Proxy Voting Infrastructure (the Consultation Paper)*.

While the adoption of the CSA's guidance set out in the Protocols remains voluntary at this stage, we note that the Protocols include a number of processes that are already provided in National Instrument 54-101 – *Communications with Beneficial Owners of Securities of a Reporting Issuer (NI 54-101)*. In particular, the Protocols confirm the intermediaries' roles and responsibilities for early-stage vote reconciliation, which we previously raised as a priority. Key entities will therefore need to review their existing operational processes to confirm that they are in line with the expectations set out in the Protocols or make necessary improvements for the 2017 proxy season. Potential costs for intermediaries, transfer agents and other service providers in implementing the information and communication procedures suggested in the Protocols should not be significant compared to the benefits of improved vote reconciliation.

In the following paragraphs, we have set out three general topics that we believe are not fully addressed in the final report and should be on the CSA's regulatory agenda going forward.

1. The Continued Role of Securities Regulators in Proxy Voting

As indicated in the final report, the CSA is the party that is best positioned to investigate, analyse and develop solutions to address the concerns of investors and issuers in a sustained and systemic way. Many of the key entities have competing priorities or interests, and meaningful progress on this initiative thus far has occurred primarily through the proactive leadership of the CSA. We are encouraged that the CSA intends to hold further consultations and establish a technical advisory committee to support the implementation of the Protocols. The CSA also has an important role to play in monitoring the implementation of the Protocols and determining whether a further regulatory response is necessary. The CSA's continued engagement in this initiative will ensure that the key entities will continue to collaborate and will be held accountable for their progress. The CSA should also consider releasing a progress report following the 2017 proxy season. The technical advisory committee can also play an important advisory role beyond 2017, as the CSA considers future amendments to NI 54-101 to potentially codify specific protocols or respond to emerging developments in the capital markets.

We note that the capital markets continuously evolve and new technologies have the potential to impact the proxy voting infrastructure. For example, major stock exchanges in other jurisdictions are currently exploring the use of blockchain database technology to facilitate the transfer of

securities.² The US Securities and Exchange Commission (SEC) recently approved a registration statement of a company offering digital securities.³ The SEC also has published a concept release on transfer agent regulations (the **SEC Concept Release**), which asked for public comment on the use of blockchain technology by transfer agents and how such systems fit within existing securities regulations.⁴ Blockchain technology has the potential to reduce costs and improve shareholder voting by providing greater transparency of the clearing and settlement process and more accurate voting records.⁵ Against this regulatory setting, the technical advisory committee will be an important forum to share knowledge and receive advice on the type of additional rules and policy guidance that may be required in Canada to regulate these new innovations.

2. The Need to Make Meaningful Progress on Vote Confirmation

The second key issue identified in the Consultation Paper was examining industry-led efforts for beneficial shareholders to receive confirmation that their voting instructions have been accurately received, tabulated and given their full weight at a shareholder meeting. Since the publication of the Consultation Paper, we note that working groups in other jurisdictions have brought forward initiatives to find solutions towards offering end-to-end vote confirmation capabilities within the existing system.⁶ However, we are not aware of any recent initiative in Canada that seeks to implement end-to-end vote confirmation capabilities. In our view, a reliable vote confirmation capability is an essential feature towards enhancing the accuracy, reliability and accountability of meeting vote reconciliation. Without vote confirmation, shareholders

² For example, NASDAQ launched a pilot project in June 2015 to evaluate the suitability of blockchains for registering and transferring shares.

³ See Overstock.com, Inc. Form F-3 Registration Statement, File No. 333-203607, effective December 9, 2015, available online at https://www.sec.gov/Archives/edgar/data/1130713/999999999515003225/xslEFFEFFECTX01/primary_doc.xml

⁴ SEC, *Transfer Agent Regulations*, Release No. 34-76743 (December 22, 2015), available online at <https://www.sec.gov/rules/concept/2015/34-76743.pdf>

⁵ David Yermack, *Corporate Governance and Blockchains*, NYU Stern School of Business and National Bureau of Economic Research (November 29, 2015), available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2700475

⁶ Some recent initiatives include:

- in the US, the Securities Industry End to End Vote Confirmation Working Group and the Independent Steering Committee of Broadridge;
- in Europe, the Initiative on Vote Confirmation of the Principles for Responsible Investment, available online at <https://www.unpri.org/group/initiative-on-vote-confirmation-1024>; and
- in the UK, the Discussion Paper on Potential Progress in Transparency from the Shareholder Voting Working Group (July 1, 2015), available online at <http://uk.practicallaw.com/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1248007191752&ssbinary=true>.

cannot have confidence that their voting instructions were properly recorded at a shareholder meeting.

In the US, the Securities Industry End to End Vote Confirmation Steering Committee recently concluded that, provided that intermediaries implement pre-mailing vote reconciliation best practices, vote confirmation is possible and can be implemented without any regulatory changes.⁷ As outlined in our previous response to the Consultation Paper, the ability to provide vote confirmation already exists in instances where Broadridge acts as the "master" tabulator for the shareholder meeting. Despite this ability, there are still some impediments towards implementing automated vote confirmation capabilities. A pilot project conducted during the 2014 proxy season in the US found that resolving reconciliation requests involved manual processing steps that were cumbersome and time consuming. Participants in the pilot project also reported that the participation from US brokers was very low, which limited the development and widespread use of automated communication systems.⁸ The report from the Shareholder Voting Working Group in the UK also raised the same underlying issues and found that new systems would need to be developed.⁹

We believe that further progress needs to be made in addressing the impediments towards vote confirmation. The Protocols should help facilitate a consensus among Broadridge, the transfer agents and intermediaries to establish a common framework for providing vote confirmation in connection with shareholder meetings. As discussed in the previous section, meaningful progress through industry-led efforts are limited. We believe that the CSA has an important role to play in bringing the key parties together and overseeing the progress made towards establishing an effective technology-driven vote confirmation solution. We also note that a number of commenters to the SEC Concept Release urged the SEC to specifically include vote confirmation as part of its review of rules affecting transfer agents.¹⁰

Omnibus proxies are also identified as another impediment to establishing a "real time" vote confirmation functionality, since the voting authority resides at the nominee level and is not transferred to the ultimate beneficial owner. In addition, because omnibus proxies are generally submitted close to the proxy cut-off date, the tabulator is not able to provide any final vote confirmation until after the shareholder meeting. While there are benefits to the omnibus

⁷ *Conclusions from the Securities Industry End to End Vote Confirmation Steering Committee* (May 2016), available online at <http://proxywatch.com/wp-content/uploads/2016/05/End-to-End-Vote-Confirmation-Announcement-5-2016.pdf>

⁸ Securities Transfer Association: Report on Industry Efforts to Improve the U.S. Proxy Voting System (September 23, 2014), available online at <http://www.stai.org/pdfs/sta-report-on-us-proxy-voting-system-9-23-2014.pdf>

⁹ Discussion Paper on Potential Progress in Transparency from the Shareholder Voting Working Group, *supra* note 6, at pp. 16 and 40.

¹⁰ See, for example, comment letters from the Council of Institutional Investors (CII), <https://www.sec.gov/comments/s7-27-15/s72715-30.pdf>; the California State Teachers' Retirement System (CalSTRS), <https://www.sec.gov/comments/s7-27-15/s72715-45.pdf>; and the Independent Steering Committee of Broadridge, <https://www.sec.gov/comments/s7-27-15/s72715-23.pdf>.

structure, they also create an obstacle in the way of greater transparency. This is an area that requires the engagement of the corporate legislators and securities regulators to identify changes to the corporate statutes and securities regulation that promote a more reliable proxy voting system.

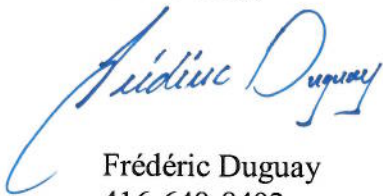
3. The Accountability of Key Entities in the Proxy Voting Infrastructure

The proper functioning of the proxy voting infrastructure is predicated upon accuracy and reliability. As we have previously stated in our comment letter to the Consultation Paper, we continue to believe that all key entities and participants that play a key role in meeting vote reconciliation should be designated as "market participants". Transfer agents, for example, are accountable to the issuers they act as agents and are subject to regular audits from the securities regulators. Proxy agents also play an important role in the proxy voting process and should be held accountable to the other participants that rely on their services.

Currently, the CSA does not have the jurisdiction to receive information from all of the key participants within the proxy voting infrastructure. Under securities legislation, an entity that is a market participant is required to keep books and records for the proper recording of their business transactions and financial affairs, and must provide them to the securities regulators upon request.¹¹ We note that designation as a market participant will not necessarily result in extensive regulation and oversight. However, it would provide securities regulators with jurisdiction and access to information from all the key entities within the proxy voting infrastructure. This in our view would promote accountability across the voting chain, which in turn will foster confidence in the system.

We would once again like to thank the CSA for its leadership and the progress made in this important initiative. If you would like to discuss any of our comments, or if we can be of any further assistance to you, please do not hesitate to contact the undersigned.

Yours truly,



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¹¹ See, for example, *Securities Act* (Ontario), section 19.