

April 23, 2021

Coleen Kirby
Senior Policy Manager
Corporations Canada
Innovation, Science and Economic Development Canada
C.D. Howe Building, 235 Queen St., ON K1A 0H5

Via email: ic.corporationscanada.ic@canada.ca

Dear Ms. Kirby,

Re: Request for Comment – Canada Gazette, Part I, Volume 155, Number 13: Regulations Amending Certain Regulations Administered by the Department of Industry (Proposed Regulations) – Publication Date: March 27, 2021

The Canadian Coalition for Good Governance (CCGG) thanks you for the opportunity to provide feedback on the Proposed Regulations. Our comments are only in respect of the Proposed Regulations as they amend regulations made under the *Canada Business Corporations Act* (CBCA).

CCGG's members are Canadian institutional investors that together manage approximately \$5 trillion in assets on behalf of pension fund contributors, mutual fund unit holders, and other institutional and individual investors. CCGG promotes good governance practices, including the governance of environmental and social matters, at Canadian public companies and assists institutional investors in meeting their stewardship responsibilities. CCGG also works towards the improvement of the regulatory environment to best align the interests of boards and management with those of their investors and to increase the efficiency and effectiveness of the Canadian capital markets. A list of our members is attached to this submission.

GENERAL COMMENTS

CCGG was actively engaged in the dialogue surrounding the amendments to the CBCA (through Bill C-25, 42nd Parliament) that give rise to the Proposed Regulations. In particular, CCGG was supportive of entrenching majority voting in the CBCA, and we are pleased to see that the Proposed Regulations would make majority voting operational as a matter of federal corporate law. These steps will help make the federal jurisdiction a leading example of good corporate governance in Canada.

We are generally supportive of the Proposed Regulations. With respect to the changes to the director election regime, the Proposed Regulations are generally consistent with the CCGG Majority Voting Policy (subject to our comments below). We are also pleased that the timing for the coming into force of the Proposed Regulations on July 1 considers proxy season (January–June) and the election of directors at annual shareholders’ meetings.

SPECIFIC COMMENTS

Reporting detailed voting results

CCGG believes that the disclosure of detailed voting results is an integral part of a majority voting standard premised on effective shareholder democracy. Detailed voting results provide investors with visibility into the level of support received by each director nominee. Absent such disclosure, there are very limited avenues for investors to determine shareholder support for director nominees.

The Regulatory Impact Analysis Statement accompanying the Proposed Regulations argues that the enhanced director election process “would allow shareholders to influence boards more effectively and make boards more responsive and accountable to shareholders”. We agree, but these benefits can be fully realized only if detailed information about voting results is promptly disclosed in order to allow investors to be able to assess the level of shareholder support for each item that was subject to a vote.

Disclosure should include, for each class of voting shares, (i) the number of shares voted in person and by proxy, and (ii) the number and percentage of shares voted “for” and “against”.

Shareholders should be provided with sufficient information as to what transpired at a shareholder meeting in order to be able to assess the level of shareholder support for each item that was subject to a vote.

Currently, non-venture reporting issuers in Canada face such a disclosure requirement via exchange listing rules. For issuers that trade on the Toronto Stock Exchange, section 461.4 of the TSX Company Manual requires that they forthwith issue a news release disclosing the detailed voting results for the election of each director. A comparable requirement is found in section 10.02(9) of the NEO Exchange Listing Manual.

We also note section 11.3 of National Instrument 51-102 *Continuous Disclosure Obligations* (NI 51-102), which requires non-venture issuers to, promptly following a meeting of securityholders at which a matter was submitted to a vote, file a report that discloses, for each matter voted upon, information about the matter and the voting results, including detailed voting results if a matter was conducted by ballot. Such obligations are not sufficient to meet the standard of the CCGG Majority Voting Policy. First, it applies only to non-venture issuers. Second, if such a vote is held by show of hands, then there is no obligation to disclose the detailed voting results that investors require.

We understand that the CBCA does not currently provide statutory authority for regulations to be made requiring such detailed disclosure. In the future, the CBCA should be amended to correct this. Ultimately, federal law should require disclosure that is substantially similar to what is required by the listing requirements of the Toronto Stock Exchange and the NEO Exchange. Such a requirement would impose no additional burden on non-venture issuers. For venture issuers, the burden will be minimal. Such filings are typically one to two pages and are not onerous given that the issuer will, by necessity, have compiled the relevant information.

Disclosure required when relying on permitted exceptions to majority voting

In general, CCGG agrees with the exceptional circumstances enumerated in section 45.2 of the Proposed Regulations which prescribes the limited circumstances which would allow a director to be elected without a majority of votes as provided for under subsection 106(8.1) of the CBCA. The prescribed exceptions will be limited to cases where the losing director is needed to meet the resident Canadian requirements, or to meet the requirement to have at least two directors who are not officers or employees of the corporation or its affiliates.

Until such time as the CBCA can be amended to incorporate statutory authority for regulations requiring such detailed disclosure, as recommended in the previous paragraphs, a distributing corporation which relies on subsection 106(8.1) to appoint a director despite not being elected should also be required to disclose such reliance. The prescribed circumstances for making such an appointment should include a public announcement of the appointment and the board's reasons for doing so. The Director should also receive any such notice to provide Corporations Canada with information about how often and in what circumstances subsection 106(8.1) is being relied upon. In our view, subsection 106(8.1) should be used only in extraordinary cases, and it is therefore appropriate to impose modest notice requirements on corporations that choose to invoke it.

Here are our proposed changes to new section 45.2 in the Proposed Regulations:

Appointment of Directors

45.2 For the purpose of subsection 106(8.1) of the Act, the prescribed circumstances are that,

- (a) after the election, the appointment of the individual would fulfil one or more of the requirements set out in subsection 102(2) or 105(3), (3.1), (3.3) or (4) of the Act;
- (b) the corporation makes a written public announcement forthwith after the appointment setting out the name of the individual appointed and which of the requirements permitted in subparagraph (a) are being relied upon by the directors in making the appointment; and
- (c) the corporation sends to the Director a copy of the announcement referred to in paragraph (b) concurrently with the making of the announcement.

Clarify reporting obligations of majority voting regime

We also encourage Corporations Canada to clarify the impact of the Proposed Regulations with respect to the reporting obligations of distributing corporations in light of existing obligations relating to the form of proxy.

We want to highlight the potential for confusion amongst issuers who may see themselves as subject to inconsistent obligations relating to the form of proxy arising from, on the one hand, paragraph 6 of section 9.4 of NI 51-102 and, on the other hand, the new section 54.1 as set out in the Proposed Regulations.

By default, NI 51-102 requires that a form of proxy provide “vote” and “withheld” options for the election of directors. However, under the Proposed Regulations in the case of a majority voting election, we read that requirement as being expressly overridden for CBCA-governed corporations, and the form of proxy is instead to include “for” and “against” options for director elections.

We have also considered section 9.5 of NI 51-102, which exempts a reporting issuer from the proxy solicitation and information circular provisions of NI 51-102 if it “complies with the requirements of the laws under which the reporting issuer is incorporated, organized or continued” and if those requirements are “substantially similar” to the requirements of the proxy solicitation provisions of NI 51-102. We are of the view that this provision permits reporting issuers to follow the provisions of the Proposed Regulations; however, we remain concerned that there is the potential for confusion.

We believe that it is important for CBCA companies to receive public clarification from the Canadian Securities Administrators, in advance of July 1, that section 9.5 of NI 51-102 will be interpreted as exempting CBCA reporting issuers from the obligations of paragraph 6 of section 9.4 of NI 51-102 as they apply to the election of directors under a majority voting standard.

Relatedly, we also encourage Corporations Canada to notify all distributing corporations of the new rules at the earliest opportunity.

CONCLUSION

We thank you again for the opportunity to provide you with our comments. If you have any questions regarding the above, please feel free to contact our Executive Director, Catherine McCall, at cmccall@ccgg.ca or our Director of Policy Development, Sarah Neville at sneville@ccgg.ca.

Yours truly,



Marcia Moffat
Chair, Canadian Coalition for Good Governance

CCGG MEMBERS 2021

- Alberta Investment Management Corporation (AIMCo)
- Alberta Teachers' Retirement Fund (ATRF)
- Archdiocese of Toronto
- BlackRock Asset Management Canada Limited
- BMO Global Asset Management Inc.
- Burgundy Asset Management Ltd.
- Caisse de dépôt et placement du Québec
- Canada Pension Plan Investment Board (CPPIB)
- Canada Post Corporation Registered Pension Plan
- CIBC Asset Management Inc.
- Colleges of Applied Arts and Technology Pension Plan (CAAT)
- Connor, Clark & Lunn Investment Management Ltd.
- Desjardins Global Asset Management
- Fiera Capital Corporation
- Forthlane Partners Inc.
- Fondation Lucie et André Chagnon
- Franklin Templeton Investments Corp.
- Galibier Capital Management Ltd.
- Healthcare of Ontario Pension Plan (HOOPP)
- Hillsdale Investment Management Inc.
- IGM Financial Inc.
- Investment Management Corporation of Ontario (IMCO)
- Industrial Alliance Investment Management Inc.
- Jarislowsky Fraser Limited
- Leith Wheeler Investment Counsel Ltd.
- Letko, Brousseau & Associates Inc.
- Lincluden Investment Management Limited
- Manulife Investment Management Limited
- NAV Canada Pension Plan
- Northwest & Ethical Investments L.P. (NEI Investments)
- Ontario Municipal Employee Retirement System (OMERS)
- Ontario Teachers' Pension Plan (OTPP)
- OPSEU Pension Trust
- PCJ Investment Counsel Ltd.
- Pension Plan of the United Church of Canada Pension Fund
- Public Sector Pension Investment Board (PSP Investments)
- QV Investors Inc.
- RBC Global Asset Management Inc.
- Régimes de retraite de la Société de transport de Montréal (STM)
- RPIA
- Scotia Global Asset Management
- Sionna Investment Managers Inc.
- SLC Management Canada
- State Street Global Advisors, Ltd. (SSgA)
- Summerhill Capital Management Inc.
- TD Asset Management Inc.
- Teachers' Pension Plan Corporation of Newfoundland and Labrador
- Teachers' Retirement Allowances Fund
- UBC Investment Management Trust Inc.
- University of Toronto Asset Management Corporation (UTAM)
- Vestcor Inc.
- Workers' Compensation Board - Alberta
- York University Pension