



CSA Issues Request for Comments re Communication with Beneficial Owners of Securities

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On April 9, 2010, the Canadian Securities Administrators (CSA) published proposed amendments to National Instrument 54-101 – *Communication with Beneficial Owners of Securities* (NI 54-101), National Instrument 51-102 – *Continuous Disclosure Obligations* (NI 51-102) and certain related materials for comment. NI 54-101 originally came into effect in July 2002, replacing National Policy Statement 41 *Shareholder Communications*, and is intended to give beneficial owners who hold their securities through intermediaries or nominees a reasonable opportunity to exercise the voting rights attached to such securities by establishing (among other things) beneficial owner communication procedures regarding the sending of proxy-related materials.

The CSA have indicated that the proposed amendments to NI 54-101 and NI 51-102 are intended to improve the beneficial owner communication procedures, while keeping in mind the following principles of NI 54-101:

- all securityholders of a reporting issuer, whether registered or beneficial owners, should have the opportunity to be treated alike as far as practicable;
- efficiency should be encouraged; and
- the obligation of each party in the securityholder communication process should be equitable and clearly defined.

Notice-and-Access under NI 54-101

Under new proposed section 2.7.1 of NI 54-101, reporting issuers will have the option of sending proxy-related materials for meetings that are not special meetings by posting the information circular on a website (other than SEDAR) and sending a notice informing beneficial owners that the proxy-related materials have been posted, and explaining how such owners may access

the materials. A voting instruction form (Form 54-101F6 or Form 54-101F7, as applicable) would be sent with the notice of posting. In instances where a reporting issuer has utilized the notice-and-access delivery method, a beneficial owner of securities may request that the issuer send a paper copy of the information circular at the issuer's expense.

The proposed amendments to NI 54-101 do not extend the notice-and-access proposal to "special meetings", as defined in NI 54-101, where fundamental changes to an issuer are to be voted upon.

Simplification of Proxy Appointment Process

A beneficial owner who holds securities through an intermediary generally must be appointed proxy holder in respect of those securities if such owner wishes to attend and vote those securities at a meeting. NI 54-101 currently prescribes a process by which a beneficial owner can instruct an intermediary using the voting instruction form (or the reporting issuer, if the direct sending procedures in section 2.9 of NI 54-101 are being used) to appoint the beneficial owner as proxy holder in respect of the securities the beneficial owner intends to vote at a meeting. The intermediary must send the beneficial owner a legal proxy, which the beneficial owner in turn must deposit by the relevant proxy cut-off established for the meeting.

The CSA have indicated that they have received feedback from several stakeholders that the current proxy process is too time-consuming and confusing, and can have the unintended consequence of making it more difficult for beneficial owners to be properly appointed as proxy holders. The proposed amendments to NI 54-10 will require intermediaries and reporting issuers to arrange to appoint the beneficial owner as proxy holder, if requested (and at no expense to the beneficial owner), and to deposit the proxy by any relevant proxy cut-off. Subject to these basic obligations, however, reporting issuers and intermediaries are to have flexibility

as to the specific arrangements used to appoint the beneficial owner as proxy holder.

Enhanced Disclosure regarding the Beneficial Owner Voting Process

Under proposed section 2.16 of NI 54-101, reporting issuers will be required to disclose certain information in the management information circular in specified circumstances in an effort to increase transparency and provide information to assist beneficial owners in the voting process.

If the reporting issuer chooses not to pay for intermediaries to send proxy-related materials and Form 54-101F7 to objecting beneficial owners (OBOs), NI 54-101 will require management of the reporting issuer to disclose this fact in the management information circular, and to disclose that it is the OBO's responsibility to make any necessary arrangements with the intermediary to exercise voting rights attached to the OBO's securities.

Where a reporting issuer is using notice-and-access only in respect of some, but not all beneficial owners of securities, the management information circular is to disclose such fact together with management's explanation of its decision in this regard.

Other Changes

The CSA are also proposing changes to certain technical aspects of the beneficial owner communication procedures, including:

- persons or companies permitted to make requests for beneficial ownership information;
- the timing for sending proxy-related materials;
- records of voting instructions; and
- the interaction of depositary and intermediary obligations to beneficial owners under corporate law with the equivalent obligations under NI 54-101.

Part 9 of NI 51-102 regarding proxy solicitation and information circulars will be amended to introduce notice-and-access for registered holders of reporting issuers, which process the

CSA have indicated will be substantially similar to the proposal for beneficial owners under revised NI 54-101, and to provide for the additional disclosure set out in section 2.16 of NI 54-101.

The CSA are accepting comments on the proposed amendments until August 31, 2010 and have invited comments on a number of specific questions, primarily relating to notice-and-access.

This update is intended as a summary only and should not be regarded or relied upon as advice to any specific client or regarding any specific situation.

If you would like further information regarding the issues discussed in this update or if you wish to discuss any aspect of this commentary, please feel free to contact us.

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