



AMMENDMENTS TO ELECTRONIC PROXY SOLICITATION RULES

Introduction

On July 4, 2008, certain amendments to National Instrument 51-102 – *Continuous Disclosure Obligations* ("NI 51-102") came into force. The amendments to NI 51-102 permit a person or company, other than management of a reporting issuer or a person or company acting on behalf of management (collectively, "dissident shareholders"), to solicit proxies without sending an information circular to registered securityholders and, in certain instances, without preparing or filing a dissident information circular.

The exemption from the solicitation requirements under Section 9.2 of NI 51-102 generally corresponds with existing exemptions available under corporate statutes that permit dissident shareholders to solicit proxies by broadcast, speech or publication and provide greater flexibility to dissident shareholders who wish to solicit proxies in connection with a shareholders meeting.

Background

In 2001, amendments to the *Canada Business Corporations Act* (the "CBCA") relaxed the rules relating to proxy solicitation. Similar amendments to the *Business Corporations Act (Ontario)* (the "OBCA") came into force in 2007. These amendments permit a dissident shareholder to solicit proxies without preparing and sending an information circular to shareholders if the solicitation is, in the prescribed circumstances, conveyed by public broadcast, speech or publication.

Although this corporate legislation exempts these types of solicitations, dissident shareholders of reporting issuers governed by the CBCA or OBCA were unable to take advantage of the exemptions because there was no corresponding exemption from the proxy solicitation and information circular provisions of NI 51-102. The amendments will now provide a corresponding exemption.

Amendment of s. 9.2(4) of NI 51-102

Subsection 9.2(4) of NI 51-102 has been amended to correspond to the exemptions contained in the CBCA and OBCA. NI 51-102 now permits a dissident shareholder to solicit proxies from registered securityholders without sending an information circular, provided that:

- (a) the solicitation is made to the public by public broadcast, speech or publication;
- (b) soliciting proxies by broadcast, speech or publication is permitted by the laws under which the reporting issuer is incorporated, organized or continued and the person or company making the solicitation complies with the requirements, if any, of those laws relating to the broadcast, speech or publication;
- (c) the solicitation contains information relating to the reporting issuer, the identity of the dissident shareholder, its percentage shareholdings and its interests in the matter being solicited, and such information has been filed on SEDAR.

Subsection 9.2(4) of NI 51-102 does not apply to a person or company that is proposing, at the time of the solicitation, either (i) a significant acquisition or restructuring transaction involving the reporting issuer and the person or company, under which securities of the person or company, or securities of an affiliate of the person or company, are to be changed, exchanged, issued or distributed, or (ii) to nominate an individual, including himself or herself, for election as a director of the reporting issuer, unless:

- (a) the person or company has filed an information circular or other document containing certain information relating to the acquisition or the proposed director nominee(s), as the case may be; and
- (b) the solicitation refers to that information circular or other document and discloses that the circular or other document has been filed on SEDAR.

There is no requirement to deliver that information circular or other document to shareholders.

Section 9.5 of NI 51-102, which permits a reporting issuer that solicits proxies to comply with the proxy rules of their governing corporate statutes (rather than the NI 51-102 proxy solicitation rules) where such rules are substantially similar to the proxy solicitation rules of NI 51-102, has been extended to apply to dissident shareholders soliciting proxies as well.

Amendment of Companion Policy

The Companion Policy to NI 51-102 was also amended to provide guidance on what constitutes a "solicitation to the public" referred to in Subsection 9.2(4) - indicating that securities regulatory authorities will generally consider a solicitation to be made to the public if it is disseminated in a manner calculated to effectively reach the marketplace. A solicitation to the public would generally include a solicitation that is made by a speech in a public forum, a press release, a statement or an advertisement provided through a broadcast medium or by a telephone conference call or electronic or other communication facility generally available to the public, or appearing in a newspaper, a magazine, a website or other publication generally available to the public. The Companion Policy further provides that a proxy solicitation to the public would generally not include a solicitation made by phone, mail or email to only a select group of securityholders of a reporting issuer.

New Document Types on SEDAR

As a result of the amendments, three new document types have been added to the filing type on SEDAR for "Proxy Solicitation Materials" by third party filers as follows:

- (a) "Proxy solicitation – information" for filing the information required by Section 9.2(4) relating to the reporting issuer, the identity of the dissident shareholder, its percentage shareholdings and its interests in the matter being solicited;
- (b) "Proxy solicitation – proposed transaction" for filing the information relating to a significant acquisition or restructuring transaction; and
- (c) "Proxy Solicitation – nominees for election" for filing the information relating to proposed nominee(s) to the reporting issuer's board of directors.

The filings will appear under the reporting issuer's filer profile on SEDAR. Members of the public will also be able to search for proxy solicitation materials filed by third parties by using the "Search for Public Company Documents" function on SEDAR and selecting new search criteria for "Proxy Solicitation by Third Parties".

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 any of the following:

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