

March 7, 2014

BY EMAIL

Director General
Marketplace Framework Policy Branch
Industry Canada
235 Queen Street, 10th Floor
Ottawa, Ontario
K1A 0H5
cbca-consultations-lcsa@ic.gc.ca

Dear Sirs/Mesdames:

Re: Consultation on the Canada Business Corporations Act (the "Consultation")

The Canadian Advocacy Council¹ for Canadian CFA Institute² Societies (the CAC) appreciates the opportunity to comment on the Consultation.

The CAC is supportive of measures designed to increase accountability, integrity and transparency in the capital markets. The CAC wishes to comment on two topics relating to shareholder rights, specifically, provisions relating to majority voting for directors and issues related to overvoting.

Majority Voting

It is important that the legislation permit shareholders to exert their rightful influence as the ultimate owners of a corporation. The CAC supports individual director elections on an annual basis, as well as a majority voting standard for directors. Slate voting should be prohibited, as it does not permit shareholders to withhold their votes from any one or more particular director(s). A majority voting policy would also increase accountability of directors to shareholders, increase transparency, and improve the governance of the issuers

¹The CAC represents the 13,000 Canadian members of CFA Institute and its 12 Member Societies across Canada. The CAC membership includes portfolio managers, analysts and other investment professionals in Canada who review regulatory, legislative, and standard setting developments affecting investors, investment professionals, and the capital markets in Canada. See the CAC's website at <http://www.cfasociety.org/cac>. Our Code of Ethics and Standards of Professional Conduct can be found at <http://www.cfainstitute.org/ethics/codes/ethics/Pages/index.aspx>.

² CFA Institute is the global association of investment professionals that sets the standard for professional excellence and credentials. The organization is a champion for ethical behavior in investment markets and a respected source of knowledge in the global financial community. The end goal: to create an environment where investors' interests come first, markets function at their best, and economies grow. CFA Institute has more than 113,000 members in 140 countries and territories, including 102,000 CFA charterholders, and 137 member societies. For more information, visit <http://www.cfainstitute.org/>.

who have not yet adopted such a policy. Under the current director voting system permitted by the CBCA, it is possible that directors facing strong shareholder opposition would still be elected and sit on the board with only one vote in favour of that director. It is important that shareholders be able to hold board members accountable for their decisions. All uncontested board nominees should be required to receive a majority of the votes cast prior to being elected to the board. If majority voting was required for all distributing corporations under the CBCA, the directors would be more accountable to shareholders, and such rights would give those shareholders an appropriate amount of influence in choosing the board members acting as their representatives to the company.

On February 13, 2014, proposed amendments to Part IV of the Toronto Stock Exchange (“TSX”) Company Manual were approved, to be effective June 30, 2014. These amendments will require issuers listed on the TSX to have majority voting policies (or similar mechanisms) for director elections at uncontested meetings. We do not believe there is a policy rationale for distinguishing between large TSX listed companies and other public companies that are governed by the CBCA. The TSX amendments would exempt majority controlled corporations from the majority voting policy requirements. While we do not necessarily support such a carve-out, we recognize that there might be more feasible alternatives for electing directors in a closely-held corporation, such as through plurality voting.

In the event a nominee receives less than a majority vote, we are of the view that they should be required to resign and the board should be expected, absent exceptional circumstances, to accept that resignation. While some discretion is warranted with respect to the timing of the resignation to deal with the circumstances of each individual company (particularly smaller, closely-held issuers), we support the inclusion in the CBCA of a requirement for the board to render a decision with respect to a director resignation within 90 days.

The management information circular disseminated to shareholders in connection with the annual election of directors should specifically describe, in plain language, the impact on the company and its shareholders if there has been a failure to elect one or more directors (e.g. if any debt covenants or contractual arrangements entered into by the company would be breached) so that shareholders can make an informed choice. To the extent that issues arise from an impending director departure, we believe many of those issues could be managed by delaying the departure of the director for a reasonable period of time until the board can be reconstituted.

We believe that requiring CBCA corporations to have a majority voting policy would further enhance Canada’s strong corporate law and increase investor protection. This improvement in shareholder rights would bring Canada up to international standards and potentially increase the confidence and willingness of foreign investors to participate in Canadian capital markets.

Over Voting

The proper functioning of the proxy voting system, including accurate vote tracking and entitlement attribution, contributes to investor confidence and is an essential feature of our capital markets. We understand that there continue to be issues relating to overvoting of shares, as a result of a lack of consistently accurate record keeping among intermediaries with respect to voting rights. When overvoting occurs, an issuer and the tabulator are forced to decide how to deal with the extra votes, which can result in canceling of valid votes or discounting certain votes on a *pro rata* or other basis.

There is an economic value to voting rights which must be preserved in favour of the entitlement owner. Institutional investors often use the services of proxy agents and engage in research to help make appropriate voting decisions. For portfolio managers and others making decisions on behalf of their clients, exercising voting rights in a diligent fashion may be required in order to properly discharge their fiduciary duties owed to clients. The CFA Institute Standards of Practice Handbook, Tenth Edition (effective 1 July 2010) for CFA Institute members specifically provides that part of a member's duty of loyalty includes voting proxies in an informed and responsible manner. This duty cannot be fully discharged without assurance that the proxies and/or voting instruction forms submitted to the issuer were, in fact, counted.

Securities lending and margin accounts are but two practical examples of common situations in which overvoting can occur. We understand that once securities are in a securities lending pool, securities are fungible and thus intermediaries cease to keep track of the beneficial ownership for voting purposes. As a result, both borrowers and lenders may inadvertently try to vote the same securities. As it appears that borrowers and lenders are able to properly track dividend entitlements for securities that are placed in a securities lending pool, it should be possible through proper reconciliation to track the voting entitlements.

Similarly, it is our understanding that under standard margin documentation, dealers are often provided with full discretion to lend out securities held in the margin account without the knowledge of the account holder. Voting confusion could occur if the voting instruction form or proxy were sent directly to the account holder, who believed that they still had the right to vote the securities.

One impediment to wholesale changes to the proxy voting system is that no one market participant appears to have an incentive to spend the time and money required fixing the system. Absent demonstrated improvement from existing market participants, we believe that further regulation in this area is required. The intermediaries who hold shares on behalf of others (most often, brokers and dealers) should be required under the CBCA to reconcile their holdings of an issuer with the securities register. In addition, the CBCA should require intermediaries to ensure that the total number of votes cast at a meeting through an intermediary does not exceed the number of votes for which the intermediary is a proxyholder. Intermediaries could be required to certify that the reconciliations referred

to above have been completed. If reconciliations occurred at each stage in the voting process, it should be possible to ensure that the sum of each intermediary's holdings do not exceed the aggregate outstanding issue.

Another way the issue of overvoting could be addressed in part would be to shorten the length of time between the record date and the meeting date, to help lessen the volume of trades occurring during the intervening period. Given the wide availability of electronic communication and social media, even a shorter period should give investors a sufficient amount of time to review meeting materials and make an informed investment decision.

Finally, we also support a process that would facilitate end to end vote confirmation. Even if the beneficial holder wishes (and is permitted to, as an OBO), remain confidential, their identification could be kept anonymous from the issuer while still being used by the intermediary and/or transfer agent to confirm to the beneficial holder that their voting instructions have been acted upon.

Concluding Remarks

We thank you for the opportunity to provide these comments. We would be happy to address any questions you may have and appreciate the time you are taking to consider our points of view. Please feel free to contact us at chair@cfaadvocacy.ca on this or any other issue in future.

(Signed) *Ada Litvinov*

Ada Litvinov, CFA
Chair, Canadian Advocacy Council