



THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

July 02, 2008

Ms. Coleen Kirby
Corporations Canada
Industry Canada
Jean Edmonds Tower South, 10th Floor
365 Laurier Avenue West
Ottawa, ON K1A 0C8

Dear Ms. Kirby:

Re: Proposed Amendments to the Proxy Circular Provisions of the *Canada Business Corporations Regulations, 2001, Canada Gazette, Part I, May 31, 2008*

On behalf of the Business Law Section of the Canadian Bar Association (CBA Section), I am writing to comment on proposed amendments to the *Canada Business Corporations Regulations, 2001* (the CBCR).

Generally, we regard these proposed changes as positive and constructive. They will contribute to the further *de facto* harmonization of the *Canada Business Corporations Act* (CBCA) with provincial securities laws, minimizing the source of what is, at best, duplication or overlap and, at worst, inconsistency. It will also foster streamlining the preparation and completion of forms of proxy, management proxy circulars and dissident's proxy circulars.

More specifically, we support the proposed changes to the CBCR with respect to the form of proxy, management proxy circular and dissident's proxy circular both for distributing and non-distributing corporations, with the one exception that a dissident's proxy circular for a non-distributing corporation should have the same Private Company Carve-outs that apply to forms of management proxy circulars for these corporations.

With this one exception, the CBA Section strongly supports all of the proposed amendments to the CBCR and the repeal of Schedules 3 and 4 and applauds the willingness of Industry Canada to minimize the degree of overlap and potential inconsistency between the requirements imposed on CBCA corporations and the requirements imposed on reporting issuers under provincial securities laws. Our comments on specific sections of the CBCR are in the attached appendix.

Thank you for this opportunity to comment on the proposed amendments to the CBCR. If you have any questions or require any elaboration, please direct them to Wayne Gray of the CBA Section's Corporate Law Committee (416.865.7842 or wayne.gray@mcmillan.ca).

Yours truly,

(original signed by Stéphanie Vig for Jennifer Babe)

Jennifer Babe
Chair, National Business Law Section

Appendix A: Comments on Specific CBCR Sections

SOR/2001-512 (Current CBCR Provision)	Proposed CBCR (Replacement) Provision	Comments
N/A	s. 1 (definition of “NI 51-102”)	We support use of a definition of the applicable National Instrument 51-102 (<i>Continuous Disclosure Obligations</i>) (NI 51-102) such that it automatically captures amendments.
ss. 54, 55 and 56	s. 54(1)	Replacing the form of proxy provisions in CBCR ss. 54 - 56 with adoption by reference of s. 9.4 of NI 51-101 significantly advances the goal of harmonizing the CBCA to applicable securities law.
s. 57	ss. 55(1) and (2)	<p>We support the initiative to primarily rely on Form NI 51-102F5 (<i>Information Circular</i>) to set out the contents of management proxy circulars of CBCA corporations.</p> <p>We also agree with that Form 51-102F5 should retain the additional useful information set out in proposed s. 55(2), namely:</p> <ul style="list-style-type: none"> (a) percentage of votes required for the approval of any matter that needs to be submitted to the vote of shareholders (other than the election of directors), in effect, preserving the current provision (CBCR s. 57(k)); (b) a statement of the right of a shareholder to dissent under s. 190 of the CBCA with respect of any matter to be acted on at the meeting and a brief summary of the procedure to be followed to exercise such right, thus preserving the effect of the current provision (CBCR s. 57(z.5)); (c) a statement, signed by a director or officer, that the contents and the sending of the circular have been approved by the directors, in effect preserving the current provision (CBCR, s. 57(z.8)); and (d) a statement indicating the final date by which the corporation must receive any written shareholder proposal under s. 137 of the CBCA, in effect preserving the current provision (CBCR s. 57(z.9)).
N/A	s. 55(3)	<p>Historically, the form and content of proxy circulars originated with publicly traded corporations (<i>i.e.</i> reporting issuers that are defined as “distributing corporations” under the CBCA). Until now, the form of proxy circular has been applied to CBCA non-distributing corporations (or private companies) without a distinction being made between these two different types of corporations or the appropriateness of the information disclosure to private companies and their management.</p> <p>Management of reporting issuers must accept disclosure of personal information as part of the price of accessing the public markets. The appropriate comparator for a CBCA distributing corporation is a non-CBCA reporting issuer. However, this rationale for mandatory disclosure does not hold for private companies and their managements.</p> <p>We agree that certain information set out in NI 51-102F5 is either inapplicable or unnecessarily intrusive for non-distributing corporations and their executives. In the case of private companies and their</p>

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		<p>executives, there is, <i>ex hypothesi</i>, no attempt to raise capital in the public markets. Thus, the values of personal autonomy and privacy should not be sacrificed to the overriding interest in disclosure.</p> <p>If minority shareholders require disclosure of executive compensation beyond that contained in the non-distributing corporation's audited financial statements, nothing prevents the negotiation of that additional disclosure by way, for example, of a unanimous shareholder agreement. Shareholders and management of non-distributing or private companies are better able to fine tune the extent of disclosure of sensitive, personal information (such as items 8, 9 and 10 of Part 2 of NI 51-102) than are shareholders and management of distributing corporations.</p> <p>An unduly onerous disclosure regime applicable to non-distributing corporations and their executives discourages the use of federal corporations. Indeed, compulsory disclosure of executive compensation could lead to bias away from, or an exodus of, CBCA non-distributing corporations – especially given the convergence of federal and provincial corporate laws in recent years. For CBCA non-distributing corporations, the relevant comparator is not a reporting issuer but a provincially incorporated private company. For example, provincial laws do not require disclosure of executive compensation in the case of non-distributing or offering corporations.</p> <p>We therefore agree that Part I (c) and items 8, 9, 10 and 16 of Part 2 of NI 51-102F5 and NI Form 51-102F6 (<i>Statement of Executive Compensation</i>) (collectively, the Private Company Carve-outs) are either inapplicable (<i>i.e.</i> Part I(c) and item 16 of Part 2) or should otherwise not apply as mandatory disclosure requirements for non-distributing corporations. For a non-distributing corporation with more than 50 shareholders entitled to vote at the annual meeting or special meeting that wishes to exclude information from the management proxy circular beyond the Private Company Carve-outs, the solution is to either seek an exemption from the Director under s. 151(1) of the CBCA or continue the corporation to a less rigorous provincial regime such as Ontario.</p> <p>In effect, with the exception of the Private Company Carve-outs, large non-distributing corporations can legitimately be held to the same standards as distributing corporations. There appears to be no principled basis to disentitle shareholders of non-distributing corporations from much of the same information they would be entitled to if their corporation were a distributing corporation. Small shareholders would benefit from receipt of the information. Nor is the cost-benefit entailed in providing the information necessarily different for non-distributing corporations than for distributing corporations. Nor is the status of the corporation as non-distributing so compelling as to warrant a blanket exemption from the proxy circular requirements. Shareholders may benefit from the more onerous CBCA regime which requires greater transparency than provincial laws applicable to non-distributing or non-offering corporations. Thus, there may be an incremental advantage to</p>

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		<p>investors in private companies in maintaining the more onerous federal regime.</p> <p>Part I(c) of NI 51-102F5 is inapplicable because a non-distributing corporation does not post information on SEDAR. Item 16 of Part 2 of NI 51-102F5 is inapplicable because the requirement to file Form 51-102F1 (<i>Management's Discussion & Analysis</i>) does not apply to a non-distributing corporation.</p>
s. 59	s. 56	This change reflects reliance on Form 51-102F5 as the form of management proxy circular sent to each director, each shareholder whose proxy has been solicited and to the corporation's auditor.
ss. 60, 61, 62, 63 and 64	s. 57	<p>Again, adoption of Form 51-102F5 to replace the form of dissident's proxy circular described in the Current Provisions (CBCR, s. 60 through 64 inclusive) furthers the goal of harmonization. However, as in the case of a management proxy circular, the Private Company Carve-outs for a non-distributing corporation referred to in proposed s. 55(3) should also apply to a dissident proxy circular. While it may be rare to find dissident's proxy circulars used in the context of proxy battles involving non-distributing corporations and rarer still for the dissidents to know the information required to complete items 8, 9 and 10 of Part 2 of Form 51-102F5 or Form 51-102F6, the content to consider for inclusion in the form of proxy circular should be no greater for dissidents than it is for management. We therefore suggest that a new s. 57(2) be added to the CBCR to mirror s. 55(3), which only applies to management proxy circulars.</p>
s. 64(2)	s. 64(2)	This change is appropriate to reflect reliance on Form 51-102F5 to replace of the dissident's proxy circular described in the Current Provision (CBCR, s. 64(2)).
s. 65	Repealed	We agree that, in light of Part I (a) of Form 51-102F5, s. 65 of the CBCR may be repealed.
s. 69(1)	s. 69(1)	We agree with these consequential amendments.
Schedule 3 (<i>Executive Remuneration</i>)	Repealed	We agree that, adoption of, Form 51-102F6 allows CBCR Schedule 3 (<i>Executive Remuneration</i>) to be repealed.
Schedule 4 (<i>Indebtedness of Directors and Officers</i>)	Repealed	We agree that item 10 of Part II of Form 51-102F5 allows CBCR Schedule 4 (<i>Indebtedness of Directors and Officers</i>) to be repealed.