CORPORATE GOVERNANCE REPORT

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In This Issue:

2012 was a busy year for developments relating to proxy matters. In this issue, we look back at some of the more notable developments that we think will continue to evolve over this current proxy season.

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2013 Proxy Advisory Voting Guidelines: Matters to Consider

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While the Canadian Securities Administrators continue to consider comments received from market participants regarding whether there is a need to regulate proxy advisory firms in preparing for the 2013 proxy season, it remains important to be familiar with the latest Canadian voting guidelines as prepared by two of North America's largest proxy advisory firms: Institutional Shareholder Services Inc. ("ISS") and Glass Lewis & Co. ("Glass Lewis").

This article briefly addresses a few of the key corporate governance matters covered by the ISS corporate governance policies and Glass Lewis proxy guidelines for the 2013 proxy season.

Role of Proxy Advisory Firms

Proxy advisory firms offer a variety of services to their clients who are typically institutional investors. Primarily, proxy advisors review and analyze matters put forward for consideration at shareholder meetings and make voting recommendations concerning such matters. The items considered range from routine corporate governance matters to highly complex merger and acquisition transactions that involve a voting decision, and cover both management initiatives and shareholder proposals. A voting recommendation is generally based on the issuer's compliance with the governance practices and standards contained in the proxy advisor's general voting guidelines (or further customized guidelines) for that proxy season.

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Director Elections

Effective December 31, 2012, the Toronto Stock Exchange ("TSX") amended its Company Manual to require listed issuers to, among other things, conduct individual director elections, hold annual director elections, and provide "comply or explain" disclosure in their management information circulars regarding the adoption (or non-adoption) of majority voting policies for the election of directors for uncontested meetings.

Notably, as a result of the foregoing TSX amendments, Glass Lewis has updated its Canadian voting guidelines to provide that it will recommend that shareholders withhold votes from all members of a company's governance committee if the company is in the S&P/TSX Composite Index and elects to "explain," rather than adopt, a majority voting policy under the new TSX rules.

Further, reflecting the recent TSX amendments, ISS and Glass Lewis have also updated their Canadian voting guidelines concerning slate ballots for director elections (which are now generally prohibited for TSX-listed issuers) and Glass Lewis notes that it favours the repeal of staggered boards, which, it believes, are less accountable to shareholders than boards that are elected annually.

Advance Notice Provisions

During the 2012 proxy season, the adoption of advance notice provisions gained a foothold in Canada. Such provisions are comprised of amendments to corporate by-laws or articles or policies adopted by boards of directors, which require notice of director nominations and detailed information about nominees and dissident shareholders to be provided to management in advance of an annual or special meeting.

For the 2013 proxy season, ISS has established a Canadian policy on proposals to adopt advance notice provisions. ISS is generally supportive of such proposals and has determined to provide vote rec-

ommendations on a case-by-case basis. In its update, ISS noted it will support proposals that provide a reasonable framework for shareholders to nominate directors by allowing shareholders to submit director nominations as close to the meeting date as reasonably possible and within the broadest window possible, recognizing the need to allow sufficient notice for company, regulatory, and shareholder review. Under ISS's guidelines, to be reasonable, the company's deadline for notice of shareholders' director nominations must not be more than 65 days and not less than 30 days prior to the meeting date. As rationale for the update, ISS notes that all shareholders should be provided with sufficient disclosure and time to make appropriate decisions on the election of their board representatives.

Glass Lewis has also updated its Canadian proxy voting guidelines in respect of advance notice provisions. It will generally support policies that require a nominating shareholder to provide notice of any director nominations not less than 30 and not more than 65 days prior to the date of the annual meeting. Glass Lewis notes that, while it recognizes the increased burden that could be placed on small shareholders that wish to nominate directors under an advance notice provision, it believes that these costs are minimal compared with the potential negative impact resulting from an overhaul of a company's incumbent board.

Say-on-Pay

The implementation of shareholder say-on-pay votes on the compensation practices of public companies in Canada started in 2009 when the major Canadian banks announced that they would give shareholders an advisory say-on-pay vote.

In its 2013 Canadian proxy voting guidelines, ISS has adopted a new two-step methodology to be applied to all companies in the S&P/TSX Composite Index and for all management say-on-pay resolutions to measure potential long-term pay-for-performance alignment. Step one of the new process is a quantitative screen, which includes a relative and absolute analysis on pay for performance, and step two is a qualitative assessment of the chief executive officer's ("CEO") pay and company performance. The new process can lead to a recommendation to vote against management say-on-pay proposals and/or to withhold votes in respect of the election of compensation committee members (or, in rare cases where the full board is deemed responsible, all directors including the CEO), and/or to vote against an equity-based incentive plan proposal. ISS notes that it evaluates executive pay and practices on a case-by-case basis.

Glass Lewis provides in its 2013 Canadian proxy voting guidelines that it applies a "highly nuanced" approach when analyzing say-on-pay votes, reviewing each advisory vote on a case-by-case basis, and examining each company in the context of its industry, size, financial condition, historic pay-for-performance practices, and any other mitigating internal or external factors. If a company fails to provide sufficient disclosure of its policies, Glass Lewis may recommend that shareholders vote against a say-on-pay proposal solely on this basis regardless of the appropriateness of the company's compensation levels.

Considerations for Majority-Owned Companies

In October 2011, the Canadian Coalition for Good Governance ("CCGG"), an organization representing institutional shareholders and asset managers, released new governance guidelines entitled Governance Differences of Equity Controlled Corporations ("CCGG Controlled Company Guidelines"). Recognizing the "legitimate governance differences of equity controlled corporations," the CCGG Controlled Company Guidelines are intended to supplement CCGG's governance policies for public companies.

ISS previously applied its general policy considerations regarding board structure, committee compo-

sition, and independence when making vote recommendations with respect to equity-controlled companies; the same as it does for widely held companies. Drawing in part from the CCGG Controlled Company Guidelines, ISS has updated its guidelines for the 2013 proxy season to provide that it will generally support director nominees who are, or who "represent," a controlling shareholder of an equity-controlled company (Related Directors) if, among other things the number of Related Directors does not exceed the proportion of the common shares controlled by the controlling shareholder, to a maximum of two-thirds; a majority of the members of the audit and nominating committees are either independent directors or Related Directors who are independent of management of the issuer; all members of the compensation committee are independent of management of the issuer; and the issuer adopts a majority voting policy for the election of directors for uncontested elections or commits publicly to adopting such a policy if the controlling shareholder ceases to control 50 per cent or more of the issuer's common shares. ISS further notes in its update that the foregoing policy is subject to modification in cases where an equity-controlled company's CEO is related to the controlling shareholder.

In its updated Canadian voting guidelines, Glass Lewis also provides for equity-controlled companies the following exceptions from its general policies: the standard independence thresholds for board composition do not apply in specified situations; certain non-independent directors are permitted to be on the compensation, nominating, and governance committees; standing nominating and corporate governance committees are not required; and neither an independent chairman nor a lead director is required. The Glass Lewis voting guidelines, however, do not provide independence exceptions in respect of the composition of the audit committees of equity-controlled companies (*i.e.*, such committees must consist solely of independent directors).

Advance Notice Policies on the Rise

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As shareholder activism increases in Canada, the mechanics of proxy disputes are more frequently tested, while becoming increasingly refined. In the recent decision of *Northern Minerals Investment Corp. v. Mundoro Capital Inc.*,[1] the Supreme Court of British Columbia considered two of the tools used by issuers in connection with proxy contests:

- the implementation of an "advance notice policy," and
- the postponement of a shareholder meeting.

In sustaining both initiatives by the Mundoro board, the court reaffirmed the authority of boards to pursue such initiatives—providing commentary on the principles that should inform courts' approaches to the use of such tools in proxy fights and the key factors that may influence the courts' views going forward—and suggested an inclination to support advance notice by-laws and policies as a means of enhancing informed shareholder choice.

Advance notice by-laws and policies, generally speaking, require that advance notice be given to an issuer of shareholder proposals relating to the nomination of directors. Although such policies are rel-

atively new in Canada, they may have particular relevance where dissidents have had the ability to effectively "ambush" a meeting of shareholders and replace some or all of the board of directors, provided they have sufficient votes to do so, by making a motion to nominate replacement directors at a shareholder meeting (without advance notice to the issuer or to its shareholders generally).

In *Mundoro*, one of the company's shareholders, Northern Minerals, had asked the court, among other things, to set aside an advance notice policy that had been adopted by the Mundoro board after it had mailed the information circular for the meeting of Mundoro shareholders and prevent the board from postponing the annual meeting after Northern Minerals had challenged the policy. The court declined to do either, suggesting that the board's "reasonable" behaviour with respect to the policy and postponement was a key factor in reaching its decision. Below, we discuss the implications of this decision for both shareholders and boards.

Background

Briefly, the relevant facts are as follows:

- On April 20, 2012, Mundoro gave notice of its annual general meeting scheduled for June 26, 2012.
- On May 22, 2012, Mundoro issued its management information circular for the meeting, which indicated that the business to be considered at the meeting was to receive financial statements, elect directors, and reappoint the auditors.
- On June 11, 2012, Mundoro issued a press release announcing that its board had approved an advance notice policy, which, among other things, imposed a deadline by which shareholders were required to submit nominations for directors to be appointed at annual or special meetings.
- On June 14, 2012, Northern Minerals brought an application against Mundoro seeking, among other things, a declaration that the policy was unenforceable.
- On the same day, Mundoro issued a press release postponing the annual general meeting for approximately one month and indicating that shareholders would be asked to approve the policy at the postponed meeting.

In its application to the court, Northern Minerals challenged both the authority of the Mundoro board to implement the advance notice policy and to postpone the date of the meeting of shareholders.

The Decision

Northern Minerals argued that, under the British Columbia corporate statute, directors have only those specific powers granted to them by the statute and the company's articles and that, because neither the British Columbia statute nor the Mundoro articles explicitly permitted the Mundoro board to implement the policy or postpone the shareholder meeting, the board had no authority to do so. Mundoro argued that, firstly, the articles reserved to the directors all residual powers of the corporation and, secondly, the British Columbia statute should be interpreted in a manner that afforded the directors the same breadth of powers available to directors under the Canadian and Ontario corporate statutes. The court concluded that, notwithstanding certain idiosyncrasies of the British Columbia corporate statute, the Mundoro board did have the authority to implement the policy and postpone the shareholder meeting in this context.

Of particular interest is the court's response to Northern Mineral's argument that the advance notice policy diminished shareholder democracy in that it would deprive shareholders of their statutory right to elect directors. The court concluded there was no infringement on the rights of Mundoro shareholders and cited the following factors as evi-

dence of the good faith of the Mundoro directors and the reasonableness of the policy:

- the policy was not being implemented with the intention to influence or preclude a proxy contest,
- the board had unfettered discretion to waive any requirement in the policy (suggesting that, if a shareholder disagreed with the application of the policy by the board, the shareholder would have an opportunity to ask the court to review the board's exercise of that discretion), and
- the policy was to be put to shareholders for approval and confirmation at the upcoming annual general meeting (albeit after the election of directors at that meeting).

While the court made clear that its conclusion was not a general endorsement of advance notice policies and that each case will be decided on its particular facts, the court seems to suggest that such policies could be considered to be consistent with, and supportive of, shareholder rights rather than to be a simple tool of board entrenchment:

> In this case it has not been established that the Policy is one that infringes shareholder rights. Rather, the Policy in fact ensures an orderly nomination process and that the shareholders are informed in advance of an AGM what is in issue. In doing so the Policy prevents a group of shareholders from taking advantage of a poorly attended shareholders meeting to impose their slate of directors on what could be a majority of shareholders unaware of such a possibility arising. The submission of the petitioner equates the "rights" of a small group of dissident shareholders with all shareholders of the company. The interests of the two groups do not necessarily coincide.[2]

Implications

Although advance notice policies and by-laws have not yet been widely adopted by Canadian public issuers, the *Mundoro* decision may open the door for more boards to consider using them in the future. The decision suggests that advance notice policies or by-laws will need to be carefully crafted with a view to striking a reasonable balance between the shareholders' rights to replace a board and the board's rights to ensure that a fair process—with a particular focus on an informed shareholder vote—for the removal and replacement of directors is in place. In addition, activist investors in Canada will need to take the existence and potential for implementation of an advance notice policy or by-law into account whether in respect of timing, the process for selecting nominees, or the use of the court process to challenge a policy or by-law when contemplating a proxy contest.

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1 [2012] B.C.J. No. 1544 (B.C.S.C.).
2 *Ibid*. at para. 47.

Court Invalidates Director Elections Due to Voting Instructions Provided by Telephone

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In a recent decision,[1] the Supreme Court of British Columbia set aside and declared invalid an annual general meeting of shareholders and the resolutions passed at the meeting following a proxy fight between management and dissident shareholders. The court found that management's proxy solicitation firm had improperly executed proxies on behalf of shareholders, based on instructions given by telephone to representatives of the proxy-solicitation firm (the "TeleVote System"). The court concluded that the TeleVote System failed to provide a contemporaneous, reliable, and verifiable record of proxies and voting instructions with the result that the use of such a system was oppressive to shareholders.

Background

The court's decision arose in the context of a proxy fight between the incumbent slate of directors of

Mosquito Consolidated Gold Mines Limited ("Mosquito") and a dissident slate led by two former directors of Mosquito. Each side delivered information circulars to shareholders and engaged proxy-solicitation firms to solicit proxies from shareholders.

Management's proxy-solicitation firms offered telephone and internet voting, using a unique control number found on a shareholder's proxy or voting information form. In addition, one of management's firms used the TeleVote System. Under this system, a call centre was established in which representatives of the solicitation firm telephoned registered shareholders and non-objecting beneficial owners of shares to solicit their votes for the management slate. The call centre operators were permitted to accept verbal instructions from individuals and execute proxies on their behalf.

At Mosquito's shareholder meeting, the validity of the proxies obtained through the use of the TeleVote System was challenged by the dissident slate but the Chair of meeting ruled that the proxies were valid. The shareholder vote was in favour of the management slate, albeit by a narrow margin. Had the proxies obtained through the TeleVote System been excluded, the dissident slate would have been elected.

Oral Instructions by Telephone Not Standard Practice

A company controlled by one of the members of the dissident slate filed an application seeking a declaration that Mosquito's annual general meeting was conducted in a manner that was oppressive to it as a shareholder of Mosquito, as well as orders nullifying the resolutions passed at the meeting and requiring a new shareholder meeting to be held.

In granting the application, the court held that, while Mosquito shareholders had a reasonable expectation that their proxies would be solicited by telephone, they did not reasonably expect that their proxies would be sought and votes would be cast at the same time. This process departed from the standard commercial practice of voting methods for shareholder meetings under securities instruments and the Securities Transfer Association of Canada Protocol. Moreover, the use of the TeleVote System was not disclosed in management's information circular together with the other specified voting methods, including delivering a proxy by mail, hand, or fax or appointing a different proxy holder by mail or through the internet.

Lack of Verification and Safeguards

While the court noted that the use of telephone solicitation systems is a legitimate attempt to streamline shareholder proxy solicitations and the absence of guidelines does not automatically disqualify the use of such systems, it identified several problems with the use of the TeleVote System in the context of the battle for control of the board of directors of Mosquito. In particular, amongst other deficiencies, the court criticized

- The acceptance of oral instructions without an immediate link to a verifiable, written confirmation;
- The absence of a unique identifier to ensure the identity of the individual giving instructions;
- The failure by management to make prior disclosure of the use of the TeleVote System;
- The lack of sufficient safeguards to ensure that votes were taken in a manner that allows the shareholder to make his or her choices privately, on a fully informed basis, and without undue pressure from a proxy solicitor; and
- The imbalance between the use of the TeleVote System by the management slate and the traditional proxy solicitation process used by the dissident slate.

Ultimately, the court concluded that the use of the TeleVote System constituted oppressive and unfairly

prejudicial conduct and impaired the right of shareholders to a fair and transparent voting process.

Conclusion

In the event that an incumbent slate of directors finds itself in a proxy contest, the management slate must ensure that the proxy solicitation tactics used by its proxy solicitors are fully disclosed in management's information circular and that such tactics will produce verifiable and reliable results. The failure to ensure the existence of sufficient safeguards risks invalidating the election of directors and other shareholder business at an otherwise valid shareholder meeting.

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[1] *International Energy and Mineral Resources Investment (Hong Kong) Company Limited v. Mosquito Consolidated Gold Mines Limited*, [2012] B.C.J. No. 1664 (B.C.S.C.).

Implementing New Canadian "Notice-and-Access" Rules for Electronic Posting of Proxy-Related Materials

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The Canadian Securities Administrators ("CSA") have published final amendments to National Instrument 54-101 *Communication with Beneficial Owners of Securities of a Reporting Issuer* ("NI 54-101")[1] that give reporting issuers and others the option to use the "notice-and-access" method to post proxy-related materials on a website instead of having to mail materials to registered holders (under National Instrument 51-102 *Continuous Disclosure Obligations* ("NI 51-102") and to beneficial owners (under NI 54-101). Under NI 51-102, notice-and-access may also be used to post annual financial statements and MD&A in lieu of sending all securityholders.

These amendments help to simplify the shareholder communication process and reduce costs. However, some aspects are technical and will require certain changes to the processes that reporting issuers may currently use, including the timing and content of various notices and other documents.

What Is Notice-and-Access?

Notice-and-access refers to the "delivery procedures" set out under NI 54-101 and NI 51-102, which allow for proxy-related and other materials to be "sent" by posting a copy of those materials on a non-SEDAR website.

NI 54-101 governs how materials are to be sent to beneficial owners of securities, including directly sending to non-objecting beneficial owners ("NOBOs") and treatment of objecting beneficial owners ("OBOs"). NI 51-102 governs how materials are to be sent to registered holders by both reporting issuers and others who solicit proxies from registered holders of voting securities of a reporting issuer.

The notice-and-access method is available for all meetings, including special meetings, but is not available to reporting issuers who are investment funds. As discussed below, the method used by the reporting issuer must also comply with the issuer's constating documents and governing corporate or other law, in terms of whether electronic delivery of such materials is permitted.

Content and Sending of the "Notice"

To rely on notice-and-access, an issuer's registered holders or beneficial owners must be sent a "Notice" that contains only certain prescribed information. This Notice must be sent by prepaid mail, courier or equivalent, or electronically, provided consent is obtained, along with the applicable voting instruction form (Form 54-101F6, if sending

directly to NOBOs, and 54-101F7, if sending indirectly). The timing for sending this Notice is at least 30 days before the date of the meeting, if directly sending to NOBOs, or at least 3 or 4 business days before the 30th day, if sending indirectly to beneficial owners of securities. In addition, the issuer must comply with, among other things, each of the following requirements:

- Provide public electronic access to the information circular and the Notice on or before the day the Notice is sent (*i.e.*, on or before the 30 or 30 plus 3- or 4-day deadline above) by filing the documents on SEDAR and posting the documents on a website other than SEDAR.
- Post on that website any disclosure material regarding the meeting that the reporting issuer sends to registered holders or beneficial owners of its securities and any written communications the reporting issuer has made available to the public, such as press releases, regarding matters to be voted on at the meeting regardless of whether or not they were sent to registered holders or beneficial owners.
- Provide a toll-free number for use by beneficial owners to request paper copies of the information circular and the financial statements and related management discussion & analysis ("MD&A") to be approved at the meeting.
- Ensure that materials are posted in a manner and format that permits a person with a reasonable level of computer skill and knowledge to access, read, and search the documents, as well as download and print them.

Impact on Notification and Setting of Record Dates

In order to use notice-and-access, reporting issuers are required to set their "Record Date for Notice of the Meeting" no fewer than 40 days prior to the date of the meeting. This date is otherwise required to be set between 30 and 60 days prior to the date of the meeting under NI 54-101.

The "Notification of Meeting and Record Dates," which is required to be sent to intermediaries and others at least 25 days before the Record Date for Notice of the Meeting under NI 54-101, must be filed on SEDAR at the same time that it is sent. For the first time that an issuer uses notice-and-access, this 25-day period cannot be abridged. For subsequent meetings, it can be abridged to 3 days before.

Responding to Requests for Paper Copies

Where a securityholder requests paper copies of an information circular and, if applicable, financial statements and MD&A, the reporting issuer must send the items requested within 3 business days for requests received prior to the date of the meeting, and within 10 calendar days for requests received on or after the date of the meeting but and within one year of the information circular being filed. When responding to such requests, reporting issuers are prohibited from asking for any other information about the requestor other than the name and address to which the requested materials are to be sent. They also cannot disclose that information for any purpose other than sending the requested materials. Similarly, a reporting issuer cannot collect information that may be used to identify a person who accesses proxy-related materials that are posted using notice-and-access.

Additional Disclosure

Under the amendments, management of reporting issuers must include additional disclosure in their information circulars. This includes information as to whether the reporting issuer is sending proxy-related material to registered holders or beneficial owners, using notice-and-access, and, if stratification will be used, the types of registered holders or beneficial owners who will receive paper copies. (Under the amendments, paper copies of

proxy-related materials may be provided selectively to certain types of shareholders and this is referred to as "stratification.") Management must also disclose whether proxy-related materials are being sent directly to NOBOs, whether the issuer intends to pay for an intermediary to deliver materials to OBOs, and, if it does not, a statement that OBOs will not receive the materials unless their intermediary assumes those costs. This additional disclosure, other than the statement regarding OBOs not receiving materials, must also be included in the Notification of Meeting and Record Dates.

In addition to providing a new mechanism for sending proxy-related and other materials to registered holders and beneficial owners of securities, the amendments also simplify the process by which beneficial owners are appointed as proxy holders in order to attend and vote at shareholder meetings.

Matters to Consider before Implementing "Notice-and-Access"

Given the various sources of regulation for reporting issuers, while notice-and-access has been specifically recognized for securities law purposes, as noted above, reporting issuers who intend to utilize it must ensure that in doing so they also comply with their constating documents and their governing law. Concerns involving governing corporate law, in particular, include whether electronic delivery of proxy-related materials is permitted by such governing law, whether such delivery requires express or implied consent, and whether obligations of intermediaries to forward materials to beneficial owners can be satisfied where notice-and-access is used.

Notice-and-access permits a reporting issuer to forward proxy-related materials (including its financial statements and MD&A, should it choose) to its registered holders and beneficial owners by sending to them by mail (or other means if they have consented) a "Notice-and-Access Notice" together with the relevant voting instruction form or form of proxy, and by posting the proxy-related materials on a non-SEDAR website (provided all other notice-and-access requirements are satisfied). The crux of the issue with respect to the *Canada Business Corporations Act*[2] and other *CBCA*-based statutes is that electronic delivery of proxy-related materials requires express written consent and it is unclear whether the statute's delivery obligations can be considered to be satisfied without such consent.

The *CBCA* prescribes a number of specific matters relating to the calling of a shareholders' meeting and sending of proxy materials. In particular, the *CBCA* requires that shareholders be sent a notice of meeting and form of proxy and information circular and clarifies that the requirement to provide a document under the *CBCA* is not satisfied with the provision of an electronic document unless consent in the prescribed manner is obtained. The *CBCA* also requires that copies of the financial statements and related auditors' report for the most recently completed financial year must be sent to those shareholders who have not informed the corporation in writing that they do not wish to receive them. The net effect of these provisions is that notice-and-access, in its current iteration, cannot be used under the *CBCA* without a shareholders' express consent or instructions. The *CBCA* does, however, give the Director under the *CBCA* some latitude to provide relief and could be one avenue to overcome these issues. While it is arguable that these provisions of the *CBCA* have a specific purpose to ensure that a shareholder has access to proxy-related materials, the CSA would also have had regard to similar concerns in making notice-and-access available, which is arguably more than "mere" electronic delivery but is structured with the realities of modern communication in mind, and in reasonably ensuring that a shareholder has easy access to all relevant documents and ample opportunity to request paper copies.

While the above discussion highlights issues pertaining to the use of notice-and-access in relation to registered holders, certain *CBCA* provisions per-

taining to the duties of intermediaries also create concerns about the viability of utilizing notice-and-access in relation to beneficial owners. In particular, such provisions prohibit the voting of any shares that are registered in the name of an intermediary and not beneficially owned by it, unless the intermediary immediately sends to the beneficial owner copies of all proxy-related materials that it receives. Notice-and-access, however, provides that the intermediary would only receive a "Notice-and-Access Notice" (and paper copies of the financial statements and MD&A, if applicable). Whether forwarding of this Notice-and-Access Notice alone would satisfy that requirement and permit those shares to be voted is unclear.[3]

In a recently posted notice, Corporations Canada has provided some clarity in stating that notice-and-access "provides shareholders with sufficient disclosure to support an application for an exemption from the requirement set out in subs.. 150(1) of the CBCA to send the prescribed management proxy circular to each shareholder whose proxy is solicited." Notably, however, the same notice indicates that the authority to grant an exemption extends neither to the requirement under s. 159 to send financial statements to shareholders nor to the requirements applicable to intermediaries under s. 153 and that Corporations Canada takes "no position as to the effect of the exemption on the duties of an intermediary as detailed under s. 153 of the CBCA."[4]

The Ontario *Business Corporations Act*[5] also requires that shareholders be sent a notice of meeting, form of proxy, and information circular. However, there is no equivalent provision expressly requiring consent to electronic delivery. Further, the *OBCA* acknowledges electronic delivery in accordance with the *Electronic Commerce Act, 2000* (Ontario),[6] which in turn encompasses a concept of implied consent. The CSA have also provided comfort in this respect by setting out in the Companion Policy to NI 54-101 and NI 51-102 that, in their view, notice-and-access is consistent with the principles of electronic delivery under National Policy 11-201–*Delivery of Documents by Electronic Means* ("NP 11-201"). This policy states that such principles are compatible with the legal framework for electronic delivery under corporate legislation.

Staff of the Ontario Securities Commission ("OSC") clarified some issues in guidance published on February 28, 2013, which sets out OSC staff's interpretation of the interaction of notice-and-access with NP 11-201 as well as the availability of notice-and-access to reporting issuers incorporated under the *OBCA*.

Specifically, OSC Staff state that, in their view, the definition of the term "send" in the *OBCA* is inclusive and does not prohibit the use of electronic delivery or electronic documents, including the procedures contemplated by notice-and-access and that the *OBCA* does not impose an obligation that a reporting issuer obtain consent to use electronic delivery to send proxy-related materials. Accordingly, Staff conclude that the *OBCA* does not prevent a reporting issuer from sending proxy-related materials, using notice-and-access and they do not think it is necessary for *OBCA* issuers to obtain exemptive relief in order to use it.

They also provide their views regarding compatibility with the *ECA*. Specifically, Staff state that notice-and-access is not incompatible with the restriction in the *ECA* against requiring a recipient to use or accept a document in electronic form without his or her consent since, under notice-and-access, shareholders have the option of requesting a paper copy at no charge. Staff also clarify that notice-and-access is more than "merely posting on a website" (which the *ECA* states does not constitute provision of a document or information) since issuers must do more than merely post their proxy-related materials and must mail the package to shareholders in advance of a meeting that informs them of, among other things, the website posting of the proxy-related materials.

The amendments resulted in consequential amendments to NI 51-102 and Form 51-102F5 Information Circular, as well as National Policy 11-201 *Delivery of Documents by Electronic Means* and generally came into force on February 11, 2013. The notice-and-access provisions, however, can only be used in respect of meetings occurring on or after March 1, 2013, while certain other provisions apply as of February 15, 2013.

[1] <http://www.osc.gov.on.ca/documents/en/Securities-Category5/csa_20121129_54-101_amendments.pdf>.
[2] R.S.C. 1985, c. C-44 [*CBCA*].
[3] In contrast, see a similar provision in s. 49 of the *Securities Act* (Ontario), R.S.O. 1990, c. S.5, which applies to "registrants" and "custodians" but does not condition the ability to vote shares on the documents having been forwarded.
[4] <http://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs05598.html>.
[5] R.S.O. 1990, c. B.16 [*OBCA*].
[6] S.O. 2000, c. 17 [*ECA*].

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AND/OR

- **Do you have any ideas or suggestions for topics you would like to see featured in future issues of the *Corporate Governance Report*?**

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We look forward to hearing from you.