

Regulatory Impact Analysis Statement

Issue and Objectives

Ensure that the *Canada Business Corporations Regulations, 2001* (CBCR) and *Canada Cooperatives Regulations* (Coop Regulations) requirements for forms of proxy and proxy circulars are aligned with provincial and territorial corporate and securities law requirements, as set out in the relevant parts of National Instrument 51-102 – *Continuous Disclosure Obligations*. In addition, correct errors, such as language, in the CBCR and Coop Regulations sections related to forms of proxy and proxy circulars. Further, assist the Government in meeting its target of reducing paper burden on small business by 20%.

Description and Rationale

The *Canada Business Corporations Act* (CBCA) currently requires all distributing corporations and non-distributing corporations with more than 50 shareholders to solicit proxies from their shareholders before each shareholder meeting. The solicitation for proxies must be accompanied by a form of proxy and a management proxy circular that meets the requirements of the CBCR. Similarly, the *Canada Cooperatives Act* (Coop Act) requires cooperatives that have issued investment shares to solicit proxies from shareholders with an accompanying form of proxy and a management proxy circular that meets the requirements of the Coop Regulations. According to both acts, any person other than the management of the corporation or cooperative must send a dissident proxy circular to shareholders if that person solicits proxies from more than 15 shareholders. Currently, the requirements in the CBCR and Coop Regulations concerning forms of proxy and proxy circulars are based on the provincial and territorial corporate and securities law requirements of the 1980s and 1990s.

However, on March 30, 2004, the National Instrument 51-102 – *Continuous Disclosure Obligations* was established by the Canadian Securities Administrators (CSA) (the provincial and territorial securities commissions). Regulators from each province and territory play a role in the CSA, which is primarily responsible for developing a harmonized approach to securities regulation across the country, particularly through the creation of national instruments. By collaborating on rules, regulations and other programs, the CSA helps avoid duplication of requirements and streamlines the regulatory process for companies seeking to raise investment capital and others working in the investment industry. The use of national instruments agreed upon by all members of the CSA ensures that the regulatory requirements spelled out in the instrument are identical in all provinces and territories.

As a result of National Instrument 51-102 – *Continuous Disclosure Obligations*, the requirements under the CBCR and the Coop Regulations now need to be updated to ensure alignment and harmonization with National Instrument 51-102. National Instrument 51-102 – *Continuous Disclosure Obligations* updates the disclosure requirements partially in response to changes in global corporate governance standards, including enhancements to transparency and increasing accountability of corporations towards investors and shareholders.

Incorporating the relevant sections of National Instrument 51-102 – *Continuous Disclosure Obligations* directly into the CBCR and Coop Regulations ensures that the federal and provincial / territorial requirements remain harmonized. Currently, differences in the requirements cause unnecessary burden for corporations resulting in an inefficient use of resources. For distributing corporations, even minor differences can increase the cost of providing the form of proxy and the proxy circular since the corporation must adhere to both federal and provincial/territorial requirements.

In *Advantage Canada* (November 2006) and the 2007 and 2008 Budgets, the Government committed to reducing the regulatory and paper burden on business, particularly small- and medium-sized enterprises, by 20 per cent before November 2008. These regulatory amendments to the CBCR and Coop Regulations are part of that reduction. By replacing the current requirements concerning the form of proxy and proxy circulars with references to the relevant portions of National Instrument 51-102 – *Continuous Disclosure Obligations* the federal corporate law requirements will be harmonized with the provincial and territorial corporate and securities law requirements. This lack of harmonization has a cost for businesses that must adhere to both the federal corporate law rules and the provincial securities law rules. By harmonizing the federal and provincial rules in this area, duplication and regulatory burden on corporations will be reduced.

For non-distributing corporations, the objective is to maintain the high standard of corporate disclosure that is expected of CBCA corporations while reducing the administrative and paper burden on small Canadian businesses. This is accomplished by requiring non-distributing corporations to use the generally accepted corporate governance disclosure rules that are well known for Canadian corporations, but exempting non-distributing corporations from requirements that could be considered too onerous and not required by the marketplace (i.e. Item 8 – *Executive Compensation*, 9 – *Securities Authorized for Issuance under Equity Compensation Plans* and 10 – *Indebtedness of Directors and Executive Officers* of Form 51-102F5 – *Information Circular*). The benefit of disclosure is seen as minimal and is far outweighed by the cost of that disclosure.

There are also amendments to address errors in the wording and language of the regulations that have been found by various stakeholders and the Standing Joint Committee of the Senate and House of Commons for the Scrutiny of Regulations. These amendments include: clearer links to the section of the Act that relates to the regulatory provision; and differences between the English and French language in various sections.

Consultation

In November 2007, approximately 20 letters were sent to a group of corporate lawyers requesting their views on replacing the proxy circular requirements in the CBCR and Coop Act with the relevant requirements in National Instrument Form 51-102F5 – *Continuous Disclosure*. We received 5 responses, including one from the Canadian Bar Association, all of which supported the proposal. However, the responses suggested that Item 8 – *Executive Compensation*, 9 – *Securities Authorized for Issuance under Equity Compensation Plans* (i.e. stock options) and 10

– *Indebtedness of Directors and Executive Officers of Form 51-102F5 – Information Circular* should not apply to non-distributing corporations because the requirements would be too onerous on them and there is no marketplace demand for such disclosure. The suggestion has been considered and the proposed amendments exempt non-distributing corporations from the requirements of Items 8 to 10 of Form 51-102F5 – *Information Circular*.

Implementation and Enforcement

Corporations Canada will inform corporations and their legal counsel about the changes in the requirements for proxy circulars.

There is already a compliance procedure in place to address forms of proxies and proxy circulars. Corporations Canada's compliance and enforcement strategies are based on rigorous risk-management and resource management. In accordance with this approach, alleged contraventions of proxy solicitation and proxy requirements are considered on a case-by-case basis. The Director appointed under the CBCA exercises his discretion to pursue an allegation of non-compliance by balancing his role in protecting the public interest and preserving the integrity of the Act with his responsibility to ensure that public resources are used appropriately. This is consistent with the self-enforcing principle underlying the CBCA. There will be no need to make changes to these compliance procedures, except that the staff responsible for ensuring compliance will need to be trained about the new requirements.

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