Canadian Investor Relations Institute
Institut canadien des relations avec les investisseurs

October 16, 2015

Ontario Ministry of Government and Consumer Services
E-mail: businesslawpolicy@ontario.ca

To Whom It May Concern,

Re: Business Law Agenda – *Priority Findings and Recommendations Report*

The Canadian Investor Relations Institute (CIRI), a professional, not-for-profit association of executives responsible for communication between public corporations, investors and the financial community, is pleased to provide comments regarding the Business Law Agenda – *Priority Findings and Recommendations Report* of June 2015, specifically the Ontario Business Corporations Act (OBCA). CIRI is a strong advocate of good corporate governance practices, which it believes support both fair valuations for issuers and the overall integrity of the Canadian capital markets.

CIRI has over 500 members from across Canada, representing over 200 publicly listed issuers, including 85% of the S&P/TSX 60 Index companies and 54% of the S&P/TSX Composite Index companies, with a combined market capitalization of over $1.5 trillion. Please see Appendix A for more information about CIRI.

General Comment

We commend the Ontario government and specifically the Minister of Government and Consumer Services for initiating a comprehensive review of business legislation to ensure that Ontario public companies remain competitive and up-to-date within the increasingly global economy. As an association representing public companies across Canada, we also recognize that the OBCA impacts a great number of companies, both in and outside of Ontario, and thus the national impact that this review has across the country.

CIRI also recognizes that the expert panel has identified several pieces of legislation related to the conduct of business in Ontario with a focus on those impacting corporate law. In an effort to meet the objectives of the expert panel to encourage growth and prosperity in Ontario's public companies, CIRI has included in this submission some discussion and recommendations that may promote the review of additional legislation focused primarily on securities law. We have identified below those of our recommendations where securities laws may require review. We encourage legislators and drafters to consider the impact that changes to corporate laws may have on securities laws such that any resulting changes to those laws and the attendant regulations are consistent across all legislation and do not present conflicts to issuers seeking to implement policies in accordance with these revised laws.

CIRI's comments are based on our long-held commitment to and support of efforts to ensure our members and their shareholders are able to operate within transparent capital markets and under the principles of good governance. CIRI believes that open dialogue between issuers and investors is critical to the development of good governance practices and that provincial legislation should support this fundamental principle. CIRI also believes that good corporate performance for Ontario companies derives in part from strong, well-qualified

and engaged Boards of Directors and that legislation should not impede, but rather should be supportive of, the establishment of such Boards.

Summary of Recommendations

In summary, CIRI presents the following recommendations:

a. **That legislation be promulgated or a mechanism be established whereby issuers are able to access a list of, or otherwise identify, their shareholders in an effort to improve issuer-shareholder engagement and, ultimately, governance practices.**

b. **That the OBCA be revised to remove existing impediments to the use of current and potential future electronic communications technologies applicable to efficient business processes.**

c. **That in the spirit of transparency and disclosure, some effort be expended to produce "plain-language" explanations of laws and policies related to the standards, liabilities and protection for directors.**

d. **That Section 120 – *Cumulative voting for directors* of Part IX of the OBCA should be deleted and cumulative voting should no longer be allowed.**

e. **That in full support of majority voting, the "withhold" voting category be replaced with an "against" category, that an "abstain" option be added, giving shareholders three unambiguous choices: "for", "against" or "abstain" and that appropriate securities laws, regulations and policies be revised to ensure that a single, consistent form of proxy be mandated for issuers.**

f. **That issuers be required to establish a regular/annual performance management review process encompassing all Board members, with the applicable performance criteria disclosed to shareholders in a fashion similar to the current disclosure of Board and committee mandates. This recommendation may require the review and revision of securities laws in order to be consistent with changes to the OBCA.**

g. **That there be no stipulation of residency in determining the composition of a corporation's Board of Directors.**

h. **That rules differentiating beneficial shareholders as either OBO or NOBO, whether associated with corporate laws or securities laws, be reviewed with a view to being discontinued.**

i. **That during a period of transition away from the OBO/NOBO model, regulators consider mechanisms whereby investors communicate their ownership positions confidentially to issuers whose shares they hold, without signalling ownership positions to the broader market. This recommendation may require the review and revision of securities laws in order to be consistent with changes to the OBCA.**

Shareholder Engagement and Identification

Prior to specifically addressing the four priority areas identified by the expert panel regarding the OBCA, CIRI would like to take this opportunity to consider the value of issuer-shareholder engagement, how that could be facilitated through shareholder identification and the impact this would have on the efficiency of the Canadian capital markets. CIRI believes that these issues are key to establishing a credible marketplace and fostering increased transparency in that marketplace as a means of contributing to improved economic growth.

CIRI takes the position that good governance practices can be developed through open dialogue between issuers and their shareholders. Such dialogue is essential in order for issuers to hear and understand investor concerns and thus address such concerns. This key two-way communication channel can only be fully effective if there is a mechanism for issuers to identify their shareholders.

The importance of shareholder engagement has been recognized in Australia, where transparency in share ownership exists, as witnessed by the following quote: "Shareholder engagement through dialogue, disclosure and voting ensures the accountability of company boards and management, providing an important check on their power that serves to improve corporate governance standards."[1]

This essential fact of ownership disclosure as a key route to improved market efficiency as well as corporate governance has also been documented in a recent research study[2]. The study authors, Michael C. Schouten and Mathias M. Siems, posit that ownership disclosure can fulfil two main functions: improving corporate governance and improving market efficiency. Their research explored share ownership disclosure in several other markets, including those similar in size and structure to Canadian capital markets. For example, shareholders in both the United Kingdom and in Australia are required to make their shareholder positions known, to the benefit of all shareholders.

In the UK, under corporate law, an issuer has the legal right to request disclosure of the identity of any person with an interest in their shares[3]. This right allows the issuer to identify their beneficial owners underlying the nominees registered in the Certificateless Registry for Electronic Share Transfer (CREST), the UK-based central securities depository. Disclosure requests by issuers can be made at any time, and are subject to penalties for non-compliance ranging from suspension of certain shareholder rights to fines and even imprisonment[4]. In addition, an issuer can give notice to an investor that may be interested or has been interested in its shares at any point within a three-year period prior to the notice, asking that the investor provide their current or past share position. The issuer may also ask the investor who held that position immediately following them[5]. This register of shareholders is also available for public inspection for a fee[6].

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[1] Parliamentary Joint Committee on Corporations and Financial Services, *Better shareholders – Better company: Shareholder engagement and participation in Australia*, June 2008, S. 2.23
[2] Michael C. Schouten and Mathias M. Siems, *The Evolution of Ownership Disclosure Rules Across Countries* in the *Journal of Corporate Law Studies*, Vol. 10 (2010), pp. 451-483
[3] Companies Act 2006, Part 22, S. 793
[4] *Companies Act 2006*, Part 22; S. 795
[5] *Companies Act 2006*, Part 22; S. 793
[6] *Companies Act 2006*, Chapter 2, S. 116-117

In Australia, an issuer has the legal right under corporate law to obtain disclosure of their beneficial owners through the share register, which is also available for public review. If shares are held as a nominee by an intermediary on behalf of one or more beneficial owners, the issuer can request the nominee disclose the relevant interest of the underlying investors[7]. A person who contravenes disclosure rules is liable to compensate a person for any loss or damage the person suffers because of the contravention, unless they can prove inadvertence, or mistake or that they were not aware of a relevant fact or occurrence[8]. Issuers are required to maintain a register of the resulting disclosed interests, which is open for public inspection[9].

Recommendation:

a. CIRI recommends that legislation be promulgated or a mechanism be established whereby issuers are able to access a list of, or otherwise identify, their shareholders in an effort to improve issuer-shareholder engagement and, ultimately, governance practices.

Ontario Business Corporations Act – Recommendations and Comments

In addressing the theme "Making Ontario a jurisdiction of choice for business", the expert panel identified the OBCA as a key piece of legislation for review and further focused on four priorities for potential updating. CIRI's further comments and recommendations are focused on these four priority areas as noted below.

i. Contemplating electronic meetings and communications.

CIRI believes that the OBCA should be updated to reflect the rapid and wide adoption of advanced electronic communications technologies that are in use throughout the business world and the capital markets. Electronic communications have been widely adopted by shareholders who regularly access issuers' and service providers' websites to obtain material information, including data on SEDAR and SEDI. Businesses are more productive, efficient and transparent as they continue to adopt innovative communications technologies. Legislative and regulatory policies must therefore be reviewed to ensure they are up-to-date and do not impede the ability of the business and financial communities to take maximum advantage of such technology.

Recommendation:

b. CIRI recommends that the OBCA be revised to remove existing impediments to the use of current and potential future electronic communications technologies applicable to efficient business processes.

Such technologies may be applicable to a wide range of activities such as; notifying and holding of director meetings, holding virtual shareholder meetings, electronic communication with shareholders, online access to information of interest to investors and shareholders, electronic delivery of required notices from issuers to stakeholders (e.g. Notice and Access provisions), and others.

[7] *Corporations Act 2001*, S. 672B
[8] *Corporations Act 2001*, S. 672F
[9] *Corporations Act 2001*, S. 672DA

ii. Providing greater certainty regarding director and officer's standards, liabilities and protections.
The establishment and implementation of standards for directors and officers is not generally a primary responsibility of investor relations professionals, however as such standards do relate the more general topic of corporate governance best practices, the following comments are provided.

The stated purpose of the Business Law Review process is to ensure that Ontario public companies remain competitive, create innovative opportunities and contribute to significant economic growth. CIRI believes that a key ingredient in a successful company resides in the quality of the company's leadership and its strategic direction, which is very often driven by its Board of Directors. Companies seeking to contribute to economic growth must be able to attract and retain the most experienced, innovative and qualified candidates to fill Board seats. This task is made increasingly difficult if the standards and risks, especially personal and professional liabilities, are not clearly defined, along with an explanation of the protections afforded them.

The OBCA Part IX – *Directors and Officers,* Section 120 deals with cumulative voting for directors. It is acknowledged that at one point in time the inclusion of such cumulative voting provisions in company by-laws or articles of incorporation may have served a useful purpose, particularly, for example, to help ensure that minority shareholders were properly represented on the Boards of Directors of some companies. However, both governance standards and director voting practices have evolved (e.g. individual voting, adoption of majority voting policies, annual voting requirements, etc.) such that cumulative voting provisions appear to be out of tune with current thinking and, indeed, with current practice in the vast majority of reporting issuers.

Recommendation:

c. CIRI recommends that in the spirit of transparency and disclosure, some effort be expended to produce "plain-language" explanations of laws and policies related to the standards, liabilities and protection for directors.

d. CIRI recommend that Section 120 – *Cumulative voting for directors* of Part IX of the OBCA should be deleted and cumulative voting should no longer be allowed.

iii. Allowing shareholders to effectively determine the composition of their Boards.
CIRI believes that the composition of a Board should be left in the hands of shareholders through a process that is both transparent and based upon a majority voting policy. The focus should be based upon attracting directors whose backgrounds, qualifications and experience are best suited to the needs of the organization regardless of residency of prospective candidates.

Majority Voting Options

Currently the Canadian corporate landscape is dominated by a plurality system where shareholders either vote "for" a director-candidate or "withhold" their vote. Under the terms of this system,

"withhold" votes are essentially not counted and therefore a director-candidate could technically be elected with only a single "for" vote. Such an outcome, although unlikely, would be incongruous with the sentiment of the shareholders who were in essence signalling that the director-candidate not be elected (or re-elected) to the Board. In order to remedy this situation, many issuers have recently adopted a majority voting policy under which a "withhold" vote is deemed an "against" vote. In the event a director-candidate receives a majority of "against" votes, the individual is obligated to tender their resignation to the Board or appropriate Committee, who would then review any unique circumstances surrounding the voting process before deciding to accept or reject the submitted resignation. The issuer then discloses to the public the acceptance or rejection (with rationale) of the submitted resignation. It should be noted that the Toronto Stock Exchange requires its issuers to adopt majority voting. This is not currently the standard for all public issuers.

Recommendation:

e. CIRI recommends that in support of majority voting the "withhold" voting category be replaced with an "against" category and that an "abstain" option be added, giving shareholders three unambiguous choices: "for", "against" or "abstain" and that appropriate securities laws, regulations and policies be revised to ensure that a single, consistent form of proxy be mandated for issuers.

Board Performance

CIRI believes that Board performance can be enhanced through the deployment of a performance management system, which would encompass regular (ideally annual) performance reviews for individual directors administered by the Chair. A peer 360-degree confidential questionnaire review could be utilized to provide feedback to all of the directors including the Chair. Given the unique and diverse number of issuers subject to Ontario-based regulation, legislation mandating the timing and methodology of such a performance management system would be intrusive and cumbersome.

Inclusion of a skills matrix chart or facsimile could also be provided in the Management's Discussion and Analysis (MD & A), clearly indicating the skills inventory of incumbent directors, as well as any skill deficiencies and a corrective plan to address them.

It has been suggested that term limits for Board members, whether based upon the age of the director in question or the longevity of their service on the Board, can serve as a catalyst for Board renewal and possibly improved Board performance. However, term limits can also be viewed as an arbitrary and blunt instrument. Accordingly, mandated term limits may force renewal but may also arbitrarily force a premature exodus of desirable expertise from a Board, to the possible detriment of the company.

Recommendation:

f. CIRI recommends that issuers be required to establish a regular/annual performance management review process encompassing all Board members, with the applicable performance criteria disclosed to shareholders in a fashion similar to the current disclosure of Board and committee mandates. This

recommendation may require the review and revision of securities laws in order to be consistent with changes to the OBCA.

Residency

Currently, Part IX – *Directors and Officers*, Section 118 (3) of the Ontario Business Corporations Act states that "At least 25 percent of the directors of a corporation other than a non-resident corporation shall be resident Canadians, but where a corporation has less than four directors, at least one director shall be a resident Canadian."

CIRI notes that residency requirements are inconsistent across the 13 provincial/territorial jurisdictions in Canada. Five provinces (Alberta, Saskatchewan, Manitoba, Ontario and Newfoundland) currently have some form of this 25% residency restriction. The other eight jurisdictions have no such restriction.

Given the global nature of capital markets, the historic capital raising completed for the global resource sector on the Toronto exchange(s) and Ontario's desire to attract additional public companies to the jurisdiction, such a mandated residency requirement appears archaic and inconsistent with the primary objective of this review process.

Recommendation:

g. CIRI recommends that there be no stipulation of residency in determining the composition of a corporation's Board of Directors.

iv. <u>How to make available to the ultimate (beneficial) investors, the rights and remedies currently available to registered holders.</u>

The OBCA references registered shareholders and does not clearly define non-registered or "beneficial" holders and as such is significantly out-of-date. The vast majority of investors today are non-registered and, following a 2005 amendment to National Policy 54-101, are required to declare a choice of either OBO (Objecting Beneficial Owner – essentially anonymous) or NOBO (Non-Objecting Beneficial Owner) status. The introduction of the OBO/NOBO distinction in Canada and the USA (the only two jurisdictions worldwide) adds significant complexity and cost to the proxy voting infrastructure and the actual voting process, reduces transparency in the capital markets and limits the rights of the true, beneficial owners of shares in North America.

The Need for OBO/NOBO

Historically the OBO/NOBO distinction was introduced in 1986 in the United States following the recommendations of an SEC Advisory Committee on Shareholder Communications[10] as a way to fix the broken lines of communication between issuers and their investors. It was seen as a compromise solution to provide issuers with an ability to identify their beneficial shareholders and communicate with them directly, while also

[10] U.S. Securities and Exchange Commission. "Improving Communications Between Issuers and Beneficial Owners of Nominee Held Securities". Report of the Advisory Committee on Shareholder Communications (June 1982).

providing one means by which shareholders with privacy concerns could elect to remain anonymous to other capital market participants.

A 2006 study[11] conducted for the New York Stock Exchange (NYSE) revealed that nearly half of respondent retail investors were not sure if their accounts were OBO or NOBO and, once the OBO/NOBO distinction was explained to them, these investors opted for NOBO status, by a 2-1 margin (64%). In addition, among those who stated a preference for OBO status, only 14 % maintained that preference if there was a nominal ($25) cost associated with their OBO choice.

CIRI understands the wishes for anonymity among certain investors and/or sectors of the capital markets. However, CIRI argues that greater transparency would instill increased confidence and engagement in our markets. Research by Michael C. Schouten and Mathias M. Siems[12] makes the case that increased transparency in the form of greater disclosure of shareholder ownership positions contributes to greater market efficiency as follows:

> "Ownership disclosure can improve market efficiency through several other mechanisms, namely by creating transparency of economic interests of major shareholders, of trading interest and of the size of the free float."
>
> "The bottom line is that by promoting share price accuracy, ownership disclosure can contribute to market efficiency, and thus ultimately to an efficient allocation of resources in the economy."

Recommendation:

h. CIRI recommends that rules differentiating beneficial shareholders as either OBO or NOBO, whether associated with corporate laws or securities laws, be reviewed with a view to being discontinued.

The Issue of Investor Anonymity

CIRI understands that its recommendation to eventually eliminate the designation of OBO/NOBO may need to be phased in over some period of time. Therefore, during some transition period it may be worth exploring alternative mechanisms to OBO/NOBO status for meeting the needs of both shareholders and issuers for improved communication and the desire in the marketplace for increased transparency. A recent 2010 report[13] prepared for the Council of Institutional Investors in the U.S. concluded that the interests of shareholders and issuers in improved communication would be more effectively served by decreased reliance on, or even the elimination of, the OBO/NOBO distinction. In essence the report suggested a relaxation on the

[11] Opinion Research Corp., Investor Attitudes Study: *conducted for NYSE Group* (7 April 2006).
[12] Michael C. Schouten and Mathias M. Siems, *The Evolution of Ownership Disclosure Rules Across Countries* in the *Journal of Corporate Law Studies*, Vol. 10 (2010), pp. 451-483
[13] Council of Institutional Investors, *The OBO/NOBO Distinction in Beneficial Ownership: Implications for Shareholder Communications and Voting* (Washington: Council of Institutional Investors, 2010).

restrictions facing issuers for the distribution of proxy materials and a streamlining of the process for both companies and shareowners to obtain shareholder lists.

The use of an OBO/NOBO model is not the only way to allow shareholders to maintain anonymity.

Recommendation:

i. **CIRI recommends that during a period of transition away from the OBO/NOBO model, regulators consider mechanisms whereby investors communicate their ownership positions confidentially to issuers whose shares they hold, without signalling ownership positions to the broader market. This recommendation may require the review and revision of securities laws in order to be consistent with changes to the OBCA.**

CIRI appreciates the opportunity to comment on the recommendations related to Ontario's Business Law Agenda and is always available if there are questions regarding our submission.

Yours truly,

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APPENDIX A

The Canadian Investor Relations Institute

The Canadian Investor Relations Institute (CIRI) is a professional, not-for-profit association of executives responsible for communication between public corporations, investors and the financial community. CIRI contributes to the transparency and integrity of the Canadian capital market by advancing the practice of investor relations, the professional competency of its members and the stature of the profession.

Investor Relations Defined

Investor relations is the strategic management responsibility that integrates the disciplines of finance, communications and marketing to achieve an effective two-way flow of information between a public company and the investment community, in order to enable fair and efficient capital markets.

The practice of investor relations involves identifying, as accurately and completely as possible, current shareholders as well as potential investors and key stakeholders and providing them with publicly available information that facilitates knowledgeable investment decisions. The foundation of effective investor relations is built on the highest degree of transparency in order to enable reporting issuers to achieve prices in the marketplace that accurately and fully reflect the fundamental value of their securities.

CIRI is led by an elected Board of Directors of senior IR practitioners, supported by a staff of experienced professionals. The senior staff person, the President and CEO, serves as a continuing member of the Board. Committees reporting directly to the Board include Nominating; Audit; Membership; Issues; Editorial Board; Resource and Education; and Certification.

CIRI Chapters are located across Canada in Ontario, Quebec, Alberta and British Columbia. Membership is over 500 professionals serving as corporate investor relations officers in over 200 reporting issuer companies, consultants to issuers or service providers to the investor relations profession.

CIRI is a founding member of the Global Investor Relations Network (GIRN), which provides an international perspective on the issues and concerns of investors and shareholders in capital markets outside of North America. The President and CEO of CIRI also sits as a member of the Continuous Disclosure Advisory Committee (CDAC) of the Ontario Securities Commission. In addition, several members, including the President and CEO of CIRI, are members of the National Investor Relations Institute (NIRI), the corresponding professional organization in the United States.