FAIR | Canadian Foundation *for* Advancement *of* Investor Rights

September 7, 2010

John Stevenson, Secretary
Ontario Securities Commission
20 Queen Street West, Suite 1903, Box 55
Toronto, ON M5H 3S8

RE: CSA Notice and Request For Comment – Proposed Amendments to NI 54-101, Companion Policy 54-101CP, NI 51-102, Companion Policy 51-102CP, and National Policy 11-201

We are pleased to offer our comments on the proposed amendments to National Instruments 54-101 and 51-102 ("the "**Proposed Rules**") and Companion Policies 51-104CP and 51-102CP and National Policy 11-201 (the "**Proposed Policies**", and together with the Proposed Rules, the "**Proposals**"), as set out in the "Request For Comments" section of (2010) 33 OSCB 3109 (the "**Request for Comments**"). Thank you for the opportunity to provide these comments.

The Canadian Foundation for Advancement of Investor Rights ("**FAIR Canada**") is an independent non-profit organization dedicated to representing the interests of Canadian investors and shareholders in securities regulation. The mission of FAIR Canada is to be a national voice for investors and shareholders on securities regulation and a catalyst for enhancing the rights of Canadian shareholders and individual investors.

FAIR Canada would like to commend the Commission and the Canadian Securities Administrators ("**CSA**") for taking the initiative to improve the procedures in respect of communication with beneficial owners. We think this is an important step in modernizing and streamlining the procedures under which beneficial owners both receive information related to their exercise of shareholder democracy, and the exercise of that democracy itself.

We recognize that the adoption of a "notice-and-access" model of communication with

beneficial shareholders may be controversial but we would like to offer comments regarding the model, as well as suggestions for making it work in both an efficient and democratic manner.

Our comments fall into four main categories:

1. General and specific comments regarding the adoption by the CSA of the "notice-and-access" model for shareholder communication with beneficial shareholders.

2. Specific comments regarding changes to the proxy appointment process made as part of the Proposals.

3. Specific comments regarding disclosure requirements mandated as part of the Proposals.

4. Specific comments regarding the new rules within the Proposals regarding the use of NOBO information by reporting issuers and intermediaries.

In addition to the categories above, we also provide answers to the CSA's eight specific questions asked in the Supplement.

1. General and specific comments regarding the adoption by the CSA of the "notice-and-access" model for shareholder communication with beneficial shareholders.

First, we would like to note that, in our view, the key aspect to the proposed "notice-and-access" model is whether the model would result in a lower voting participation by shareholders. In our view, this aspect of the proposal outweighs all others in importance.

While we do not dismiss the potential benefits of cost savings, or the environmental factors of producing less wasted printing (and therefore paper, ink and the like), any change to shareholder communications with beneficial shareholders will only be successful if it does not reduce retail shareholder participation in corporate democracy.

The *OECD Principles of Corporate Governance*[1], as approved by all OECD members including Canada (the "**OECD Principles**"), reiterate the importance of shareholder democracy as fundamental to good corporate governance and improved economic growth

1 Available at http://www.oecd.org/dataoecd/32/18/31557724.pdf.

and efficiency. As such, moves to improve shareholder communication should be measured by their impact on the exercise of shareholder democracy.

Certain other key aspects of the OECD Principles are germane to the issue of the "notice-and-access" model. These include:

> *(a) Basic shareholder rights should include the right to... obtain relevant and material information on the corporation on a timely and regular basis; [and] participate and vote in general shareholder meetings;*
>
> *(b) Shareholders should have the right to participate in, and to be sufficiently informed on, decisions concerning fundamental corporate changes...*
>
> *(c) Shareholders should have the opportunity to participate effectively and vote in general shareholder meetings and should be informed of the rules, including voting procedures, that govern general shareholder meetings... Shareholders should be furnished with sufficient and timely information concerning the date, location and agenda of general meetings, as well as full and timely information regarding the issues to be decided at the meeting.*
>
> *(d) **Effective** shareholder participation in key corporate governance decisions, such as the nomination and election of board members, should be facilitated. [emphasis added]*

At this stage, absent independent evidence that notice-and-access will lower shareholder participation, we are not opposed to the model. However, because of the crucial importance of shareholder democracy as a value of the Canadian financial and economic system, we believe that the CSA should undertake to monitor the effect of the notice-and-access model on the participation of Canadian retail investors in shareholder democracy and to suggest further changes to the model if necessary, with the aim of holding voting participation rates at 2010 levels or increasing them.

2. Specific comments regarding changes to the proxy appointment process made as part of the Proposals.

We think that the specific changes to the proxy appointment process should be commended. However, we would offer one specific suggestion to improve the ease of using the process for shareholders. Currently, proposed section 4.5(b) of NI 54-101 reads "the beneficial owner submitted any other documentation that is acceptable to the intermediary."

We would propose that this be changed to read “the beneficial owner submitted any other documentation that is acceptable to the intermediary, or that contains substantially the same information or instruction as Form 54-101F7.” We do not consider the whim of the intermediary to be sufficient reason to deny the proxy appointment, where a beneficial shareholder has provided information, documentation or instruction that satisfies the legal requirements although it may not be in specific legal form.

3. **Specific comments regarding disclosure requirements mandated as part of the Proposals.**

We understand that under the Proposals, reporting issuers may, as before, choose not to pay intermediaries to send proxy information to OBOs, but must now disclose that fact. Also, management must disclose if it is employing the notice-and-access model for some beneficial owners but not all beneficial owners.

We consider that requiring the disclosure of selective employment of notice-and-access, which does require disclosure of the rationale – which we support – is a positive step. We further believe that, if the CSA is considering selective employment of notice-and-access, it should be considered only in situations where the cost of sending the full package would be disproportionate to the value of the shareholding, and where the shareholder would still receive notice-and-access. For example, this could apply in situations where shareholdings fall below a certain dollar amount (such as, for example, $1,000), or in odd lot cases.

Regarding the choice not to pay intermediaries to send proxy information to OBOs: While we agree that such a choice should be disclosed, we do <u>not</u> think that such practices should be allowed and should be ended as soon as possible. Again, the issue is one of equitable treatment by the reporting issuer. It would not be permissible for a reporting issuer to choose not to send proxy information to registered shareholders. The downloading of proxy expenses onto brokers and institutions (and by extension, onto objecting owners as costs will be passed on) is also unfair. The street name registration system provides a net benefit to reporting

issuers by reducing transaction costs and therefore increasing share prices. Reporting issuers should pay their fair cost of administering the system.

4. Specific comments regarding the new rules within the Proposals regarding the use of NOBO information by reporting issuers and intermediaries.

Generally, we support the proposed rules, including the use of undertakings and the clear delineation of acceptable use. These changes are welcome ones for the protection of investors.

We do, however, have substantive comments in relation to the proposed changes. We would consider this to be an excellent opportunity to require reporting issuers to adopt the standards of the *Personal Information Protection and Electronic Documents Act* ("**PIPEDA**")[2] in relation to NOBO information, and in particular to adopt the Canadian Standards Association's Model Code for the Protection of Personal Information that is incorporated by reference into PIPEDA. We consider this legislation to be state-of-the-art regarding the protection of personal information.

In particular, we think it incumbent on the CSA to adopt rules requiring reporting issuers and their intermediaries to impose on third parties or subcontractors, the same data protection standards imposed on themselves by rule, and making clear that reporting issuers and intermediaries are responsible for breaches.

5. Responses to CSA Questions

Finally, we would like to respond to the specific questions the CSA has asked in the Request For Comments:

1. *We propose to exclude proxy-related materials relating to special meetings from notice-and-access. Should we expand notice-and-access to include special meetings? Should other types of meetings be excluded from notice-and-access as well?*

[2] [2000, c.5] at http://laws.justice.gc.ca/PDF/Statute/P/P-8.6.pdf.

As noted above, at this stage, absent independent evidence that notice-and-access will lower shareholder participation, we are not opposed to the model. However, because of the crucial importance of shareholder democracy as a value of the Canadian financial and economic system, we believe that the CSA should undertake to monitor the effect of the notice-and-access model on the participation of Canadian retail investors in shareholder democracy and to suggest further changes to the model if necessary, with the aim of holding voting participation rates at 2010 levels or increasing them. **We suggest that the CSA consider an expansion of the model to special meetings only after the proposal has been examined and shown not to lower voting participation rates.**

2. *We propose that reporting issuers be able to use notice-and-access to send proxy-related materials to some, but not all beneficial owners, so long as this fact is publicly disclosed and an explanation provided. Should there be restrictions on when a reporting issuer can use notice-and-access selectively?*

As we discussed above in our general comment #3, we consider that requiring the disclosure of selective employment of notice-and-access, which does require disclosure of the rationale – which we support – is a positive step. We further believe that, if the CSA is considering selective employment of notice-and-access, it should be considered only in situations where the cost of sending the full package would be disproportionate to the value of the shareholding, and where the shareholder would still receive notice-and-access. For example, this could apply in situations where shareholdings fall below a certain dollar amount (such as, for example, $1,000), or in odd lot cases.

3. *The US model of notice-and-access seems to have resulted in a decrease in voting by retail shareholders. Our notice-and-access proposal has some significant differences from the US model which are intended to minimize the impact on retail shareholders. Does our notice-and-access proposal adequately meet the needs of retail shareholders who wish to vote? Are there any specific enhancements or other ways that notice-and-access can be made more user-friendly?*

We consider two key differences in the CSA proposals to favour better participation. Sending the proxy forms with the notice is a definite plus, as it puts the beneficial owner that one step closer to exercising his or her voting rights. Making the issuer responsible for providing paper

copies or materials on request is also very positive.

However, one aspect of the CSA proposals is, in our view, likely to reduce participation in certain cases. This is the option, discussed above, for reporting issuers not to pay for the forwarding of materials to OBOs. As discussed above, we think that this option should be eliminated.

4. *We would appreciate data from issuers, service providers and other stakeholders on the anticipated costs and savings of implementing and using the notice-and-access process. Will notice-and-access result in meaningful costs savings that make the proxy voting system more efficient?*

We are not aware of any data that could be useful to the CSA at this time.

5. *We propose to give reporting issuers flexibility in the form and content of the notice provided the notice contains certain specified information. Is this approach appropriate, or should there be a prescribed form?*

We understand, and agree, that mandating a prescribed form for notices (especially where notices like shareholder meetings themselves may potentially deal with all matters under the sun) is difficult and prone to amplify rather than ameliorate the “hard cases”.

Although in many instances, corporate management is supportive of improved shareholder democracy, the interests of corporate managers can sometimes be at odds with the free and open exercise of shareholder democracy. The implications, in those cases, of such a choice are clear. In practice, where management wants retail investor votes, the notices will be clear; where management wishes that retail investors abstain from voting, the notices will be unclear, confusing or discouraging (for example, over-voluminous).

We believe that the CSA must take a small step to allow the clarity of notices to shine through in broad respects, regardless of the shape of the details of the notices. **We think that the CSA should mandate a plain language summary as the cover page(s) of the notice package, that details all the relevant information for the exercise of the vote or proxy. This includes details of the meeting, precisely where to access the online materials, the location of the proxy form (both online and within the material), the business of the meeting (such as appointment of auditors, election of directors), references to full**

documentation, including information on executive compensation, stock option plans and other incentive-based compensation, as well as corporate governance policies.

6. *The CSA proposal does not impose any restrictions on additional materials that can be included with the notice and voting instruction form. We do not have any concerns with including additional material that explains the notice-and-access process, such as a Q&A. However, is it appropriate for reporting issuers and others to include materials that address the substance of the matters to be voted on at the meeting? Would this create a disincentive for investors to read the full information circular? Should there be restrictions on what can be included in this these types of materials? Should there be requirements prescribing basic information that these types of materials must contain?*

Absent regulation in this area, there will likely be instances of issuers using additional material for electioneering purposes, including incentivizing or disincentivizing investors from reading the full information. However, as discussed above, we consider that a mandatory plain language summary as the cover page(s) of the notice package setting out ALL the information an investor needs to access the materials, locate the proxy, and attend the meeting if desired, will allow for additional material to be included without necessarily overwhelming the beneficial owner and harming their opportunity to exercise shareholder democracy. Given the complexity of the current system, shareholder democracy can only be improved with further standardization and simplification of the information that is sent to investors.

7. *Is the requirement in subsection 4.6(1) of NI 51-102 that requires reporting issuers to send an annual request form to registered holders and beneficial owners of their securities to request financial statements and management's discussion and analysis adequately integrated with the requirements to send proxy-related materials? Will notice-and-access have any impact?*

We would consider the opportunity to make financial statements and MD&A available from the same internet location (generally) as proxy-related materials, to be an added benefit of a notice-and-access system. We otherwise do not know if notice-and-access would have any effect on this requirement in practice.

8. *The Proposed Amendments require management of reporting issuers that choose not to pay for delivery to OBOs to disclose this fact in the management information circular.*

The intent is to make the proxy voting system more transparent and easier to navigate. Will this disclosure facilitate this objective?

As discussed above under our general comment #3, while disclosure will provide some small benefit in this regard, we consider the loophole allowing reporting issuers to escape the expense of sending proxy materials to OBOs to be destructive of the principle of equitable treatment of shareholders, and that it should be eliminated.

Finally, we would like to address the final question asked by the CSA, regarding the beneficial owner voting process generally.

The focus of the Proposed Amendments is on improving the process by which beneficial owners are sent proxy-related materials and their voting instructions are solicited. This process is one aspect of the larger proxy voting system, i.e. the entire process by which votes are solicited, submitted and tabulated.

In recent months, the proxy voting system as a whole has been the subject of some debate. Questions are being raised as to whether it is functioning with appropriate reliability, integrity and transparency. We therefore also invite general comments on:

• *the integrity of the proxy voting system as a whole; and*

• *whether there are any particular areas that require regulatory attention or reform, and if so, what priority should be assigned.*

Three aspects of the proxy voting system (in fact, the voting system as a whole) are, in our view, in need of immediate address by the CSA. In each case, the aspects are caught between regulatory responsibilities; although they are dealt with in the *Business Corporations Acts* of the relevant jurisdictions, we believe that the CSA could have a major impact by using its rule-making authority to ensure that reporting issuers act at all times in accordance with best practices of corporate governance.

The first regards access to the proxy circular. FAIR Canada considers it important that, where adequate notice is given and reasonable steps to ensure fairness are taken, significant shareholders of reporting issuers should have access to the proxy circular in order to make important facts and views known to shareholders. FAIR Canada considers this to be

supportive of the greater and more meaningful exercise of shareholder democracy and the need for better and more holistic information on the part of retail shareholders.

The second regards slate voting for directors. The OECD Principles, for example, state that "Effective shareholder participation in key corporate governance decisions, such as the nomination and election of board members, should be facilitated." We consider slate voting to be destructive of the ability of shareholders to effectively control the makeup of the board that directs reporting issuers on their behalf. There is no instance – even through the application of a voting paradox – where a slate vote will produce a result more in line with the wishes of shareholders than a straight majority vote on individual board members.

Regarding slate voting in particular, the central problem exists for reporting issuers rather than for other corporations, and so a change to the various *Business Corporations Acts* would appear to be a more cumbersome solution than the adoption of rules by the CSA's members.

The third and final point relates to allowing shareholders to vote against directors. Having in place a system in which shareholders can only vote for or abstain from voting for particular directors is not true shareholder democracy. Allowing shareholders to vote against particular directors will improve shareholder democracy in Canada.

We thank you for the opportunity to provide our comments and views on the Proposals and we welcome the public posting of this submission. We would be pleased to discuss this letter with you at your convenience. Feel free to contact Ermanno Pascutto at 416-572-2282/ ermanno.pascutto@faircanada.ca or Ilana Singer at 416-572-2215/ ilana.singer@faircanada.ca.

Sincerely,

Canadian Foundation for Advancement of Investor Rights