



Canadian Foundation *for*
Advancement of Investor Rights

May 15, 2014

Director General
Marketplace Framework Policy Branch
Industry Canada
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Sent via e-mail to: cbca-consultations-lcsa@ic.gc.ca

RE: Industry Canada Public Consultations on the *Canada Business Corporations Act*

FAIR Canada is pleased to offer comments on Industry Canada's public consultation on the *Canada Business Corporations Act* ("**CBCA**"), published in February 2014.

FAIR Canada is a national, non-profit organization dedicated to putting investors first. As a voice of Canadian investors, FAIR Canada is committed to advocating for stronger investor protections in securities regulation. Visit www.faircanada.ca for more information.

1. FAIR Canada Executive Summary

- 1.1. FAIR Canada supports the amendment of provisions of the CBCA that deal with shareholder rights. We believe such amendments would improve the corporate governance of CBCA incorporated corporations.
- 1.2. In our view, the CBCA should require:
 - mandatory voting by ballot and disclosure of results by public companies;
 - individual election of directors;
 - annual elections for directors; and
 - director election by majority vote.

These would all improve Canada's corporate governance framework.

Shareholder Rights

2. Mandatory voting by ballot at shareholder meetings and disclosure of results by public companies

- 2.1. FAIR Canada agrees with the witnesses before the Committee who supported mandatory recorded votes for public corporations under the CBCA.
- 2.2. FAIR Canada believes that all voting should be required to be conducted by ballot in order to protect shareholders and improve corporate governance. If votes are conducted by ballot, then the number of votes cast for or withheld from the vote can be accurately disclosed to shareholders. This provides more accurate reporting and information than the result of a show of hands. Similarly, the level of support on a resolution that was the subject of a vote can also be determined. This is not the case for voting conducted through a show of hands.
- 2.3. FAIR Canada encourages a requirement that the results of the vote on the election of directors be disclosed to the public through a news release in which the detailed results of the votes received for the election of each director is provided. That is, the number of securities voted by proxy in favour of or withheld for each director is disclosed, as is the outcome of the vote by a show of hands.

3. Individual election of directors and "slate" voting

- 3.1. FAIR Canada supports amendments to the CBCA to prohibit slate voting in favour of voting for each individual director. This will allow shareholders to voice their level of support for each individual director and hold each individual director accountable. It will also provide insight into the level of support of security holders for each director.
- 3.2. Slate voting should be abolished as it does not provide shareholders with choice – the shareholder is forced to either vote for all of the directors on the ballot or withhold their vote from all directors. This form of voting does not allow shareholders to distinguish those directors who meet a high level of competence, integrity, and capability versus those who have fallen below an acceptable standard of performance.

4. Annual elections for directors

- 4.1. We encourage amendments to the CBCA to require annual director elections and prohibit staggered boards with overlapping terms of office for directors. Staggered elections can limit shareholders' ability to make changes to the board since not all directors will come up for re-election at the same time. In addition, if individual director elections are implemented, it is more logical to also formally require annual elections so that shareholders can implement changes to the composition of the board at a given date rather than over a period of years.

- 4.2. According to the Canadian Coalition for Good Governance's ("CCGG") brief to the Committee, "...all large Canadian companies have already moved to annual director elections which have not caused any disruptions to boards or their ability to engage in long-term planning."¹ We expect the same would also hold true for the small or medium-sized privately held companies incorporated under the CBCA.

5. Director election by majority vote

- 5.1. FAIR Canada urges changes to the CBCA to mandate majority voting rather than permitting, as it does currently, the election of directors by plurality voting. Under plurality voting, the candidate receiving the most votes wins election to the board even if the candidate did not receive the votes of a majority of shareholders. Majority voting policies support good governance by providing a meaningful way for security holders to hold directors accountable and remove underperforming or unqualified directors.
- 5.2. It is FAIR Canada's understanding that a significant number of Canada's leading companies have adopted majority voting as recommended by the CCGG as set out in its Majority Voting Policy of March 2011.
- 5.3. The plurality system where a single vote for a director (with the rest of the votes being "withheld") is sufficient to be duly elected to the board is inconsistent with good governance and is not in the best interests of shareholders. It does not allow underperforming directors to be voted off the board or permit directors to be voted off the board even if a majority of the shareholders withhold their vote for those directors. This disengages shareholders from the proxy voting process and impedes good corporate governance.
- 5.4. FAIR Canada supports mandatory voting given that most other international jurisdictions have adopted mandatory voting practices. Canadian investors should not have a lesser voice than investors in other jurisdictions. Amendments to the CBCA should be made with a view to bringing corporate governance of federally incorporated corporations in line with international best practices.
- 5.5. As noted in a TSX consultation regarding, inter alia, majority voting, the concerns militating against mandatory voting do not appear to have been the experience of those issuers in Canada that have adopted majority voting policies. It states, "[f]unctionally, with a non-binding majority voting policy, directors that do not receive sufficient support are still elected, but they resign at a later time giving time for the board to reconstitute and reorganize if necessary without being offside any laws or creating any governance issues."² Recent amendments to Part IV of TSX Company

¹ Canadian Coalition for Good Governance, "Brief to Standing Committee on Industry, Science and Technology Re: Five Year Review of CBCA" (February 2010), available online: <http://www.ccg.ca/site/ccgg/assets/pdf/Brief_to_Standing_Committee.pdf>.

² TSX Request for Comments: Amendments to Part IV of the TSX Company Manual (2011) 34 OSCB 9500 at page 9502.

Manual³ have effectively put into place a system where shareholders vote “for” or “against” individual directors. The CBCA should have the same approach.

- 5.6. The “concerns” of being offside corporate or securities law (which has not been the experience in Canada where majority voting policies have been voluntarily adopted) and the lack of understanding or acceptance by corporations of majority voting are not sufficient to delay the passage of an important reform which will benefit shareholders and corporate governance. The CBCA could be amended to deal with these concerns and thus Industry Canada should propose any necessary corresponding amendments to the CBCA if it mandates majority voting.

We thank you for the opportunity to provide our comments and views in this submission. We welcome its public posting and would be pleased to discuss this letter with you at your convenience. Feel free to contact Neil Gross at 416-214-3408 (neil.gross@faircanada.ca) or Lindsay Speed at 416-214-3442 (lindsay.speed@faircanada.ca).

Sincerely,



Canadian Foundation for Advancement of Investor Rights

³ Notice of Approval Amendments to Part IV of the Toronto Stock Exchange ("TSX") Company Manual (February 13, 2014), available online:
<http://tmx.complinet.com/en/display/display_viewall.html?rbid=2072&element_id=859&record_id=1009&filtered_tag>.