FAIR Canada Canada's Investor Rights Advocate | Promoteur des droits des investisseurs

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Re: Corporate Governance Consultation: Improving Diversity and Facilitating Electronic Communications in Federally Regulated Financial Institutions (Consultation)

FAIR Canada is pleased to provide comments in response to the above-referenced Consultation.

FAIR Canada is a national, independent charitable organization dedicated to being a catalyst for the advancement of the rights of investors and financial consumers in Canada. We advance our mission through outreach and education, public policy submissions to governments and regulators, and proactive identification of emerging issues. FAIR Canada has a reputation for independence, thoughtful public policy commentary, and repeatedly advancing the interests of retail investors and financial consumers.

A. OVERVIEW

1. Delivery of Governance Documents

The Department of Finance (the Department) is seeking feedback on two models for the delivery of governance documents to owners of federally regulated financial institutions (FRFIs): access equals delivery (AED) and notice-and-access (N&A).

The Consultation references the Canadian Securities Administrators' (CSA) April 2022 proposal on AED (the CSA Proposal).[1] The CSA Proposal would allow non-investment fund reporting issuers to use AED for the delivery of prospectuses, annual financial statements, interim financial reports, and management's discussion and analysis (MD&A).

The stated purpose of the CSA Proposal is to "modernize the way documents are made available to investors" and "reduce costs associated with the printing and mailing of documents, which are

[1] CSA Notice and Request for Comment – Proposed Amendments and Proposed Changes to Implement an Access Equals Delivery Model for Non-Investment Fund Reporting Issuers.

currently borne by issuers" all without "compromising investor protection."[2] In its Consultation, the Department notes that electronic communications could reduce environmental impacts, decrease communication costs, and increase investor[3] participation by making information timelier and more accessible.

While we support these objectives, we believe AED falls short when it comes to investor protection and increasing investor participation. We urge the Department not to permit the use of AED for the delivery of annual financial statements, interim financial reports, MD&A, or proxy-related materials (Governance Documents).

As we specify further below, AED is inconsistent with investor preferences for the delivery of documents. Further, AED shifts the burden from reporting issuers, who are required to deliver information, to investors who would need to actively seek out information. Finally, data shows that AED may actually increase costs for some issuers.

We support N&A for the delivery of Governance Documents. In addition, we encourage policymakers to look beyond N&A and find ways to increase the use of electronic delivery of documents by email, the Internet or other electronic means.

2. Virtual-Only Shareholder Meetings

The Department is seeking feedback on allowing FRFIs to hold virtual-only shareholder meetings (VOSMs) without seeking a court order. In our view, the primary determinant for shareholder meetings should be shareholder choice.

Existing FRFI statutes state that unless the by-laws provide otherwise, any person who is entitled to attend a meeting of shareholders may participate by means of a telephonic, electronic or other communication facility.[4] Guided by the principle of shareholder choice, the way in which shareholders exercise their right to participate in meetings (virtually or in person) should be up to them. They are, after all, the owners of these entities.

As discussed further below, we do not support allowing FRFIs to hold VOSMs. We recommend that the status quo, which allows FRFIs to hold hybrid shareholder meetings, be maintained.

B. DELIVERY OF GOVERNANCE DOCUMENTS

FAIR submitted a comment letter[5] in response to the CSA Proposal. Please refer to the letter for a more detailed discussion of our concerns with AED and our recommendations.

The CSA Proposal applies to non-investment fund reporting issuers, whereas the Consultation is specific to FRFIs, some of which may not be reporting issuers. In addition, several FRFIs are widely held institutions

[2] CSA Proposal at p. 2.

[3] We use the terms "investors" and "shareholders" interchangeably throughout this letter to refer to owners of FRFIs.

[4] Bank Act s. 136(2), Insurance Companies Act s. 140(2), Trust and Loan Companies Act s. 139(2).

[5] FAIR Canada Comment Letter on the CSA Proposal, July 6, 2022.

that are closely followed by analysts and the media. Despite these differences, many of the concerns we expressed to the CSA about AED are relevant to this Consultation.

Question 1 in the Consultation asks about the limitations of the AED model for financial institutions and their owners. We do not support an AED model for the delivery of Governance Documents for the following reasons:

1. AED is Inconsistent With Investor Preferences for the Delivery of Documents

Data shows investors prefer to have disclosure materials delivered to them automatically or to receive actual notice. A survey of Canadian investors found that 94% of respondents wish to either receive financial statements and MD&A automatically or receive a notification of their availability.[6]

Research also demonstrates that accessing documents online is the least preferred option for investors. In 2018, a survey by the U.S. Financial Industry Regulatory Authority (FINRA) found that only 9% of investors preferred receiving disclosure by accessing documents on the Internet. While the desire for physical delivery has declined since 2015, 36% of investors still prefer it. The number of investors that prefer delivery by email (33%) is also on the rise.[7] We expect there would be a similar breakdown in Canada.

2. AED Shifts the Burden to Investors

AED would effectively remove a burden for FRFIs (delivery of documents) and shift a new burden onto shareholders (tracking and retrieval of corporate filings). This burden is compounded by the need for shareholders to search for information without being provided any direct notice of its availability. The result is that the owners of a FRFI may be unaware of, or unable to find, important information about their holdings. This undermines timely and efficient disclosure of information (a fundamental principle of securities law),[8] and risks eroding shareholder engagement (an important tenet of corporate law).

This shift in burden is problematic because:

- *It is based on unfounded assumptions about SEDAR.* Under AED, it is assumed a shareholder would know how to locate and navigate SEDAR[9] to download documents or request copies from the FRFI. Research shows, however, that most investors are unaware of SEDAR. A study of 2,000 Canadian retail investors found that 82% of respondents were not aware of SEDAR or

[6] Broadridge Investor Communications Corporation comment letter to the CSA on Proposed Amendments to NI 51-102 Continuous Disclosure Obligations (which includes a Canada Investor Quantitative Report by True North Market Insights), September 13, 2021 at slide 31.

[7] FINRA Investor Education Foundation, Investors in the United States, A Report of the National Financial Capability Study, December 2019, at p. 17.

[8] Ontario Securities Act, s.2.1(2). "The primary means for achieving the purposes of this Act are, i. requirements for timely, accurate and efficient disclosure of information, …".

[9] System for Electronic Document Analysis and Retrieval (SEDAR): https://www.sedar.com/.

do not use it.[10] This lack of awareness is greater among investors with lower income or wealth, with less education, and among seniors.[11]

- *It assumes a press release will provide actual notice.* For some FRFIs, mainstream media may not publicize their press releases, and shareholders of such institutions would be unaware that governance documents are available for viewing. Investors would therefore have to monitor press releases and/or track filings, potentially for multiple FRFIs and other issuers.

The risk with shifting the burden to investors is that it could further reduce shareholder engagement with the entities they own, which is an undesirable public policy outcome. Given the importance of FRFIs to the safety and soundness of the Canadian financial system, it is crucial that we strengthen, not weaken, shareholder engagement in FRFI governance.

3. For Most Issuers, AED Will Not Deliver the Cost Savings the CSA Anticipates

According to the CSA, one goal of AED is to reduce issuers' costs of printing and mailing documents. However, many issuers may actually see their costs increase should they choose to use AED.

Broadridge Investor Communications Corporation (Broadridge) analyzed estimates of the potential costs and savings of AED and testing with Canadian investors. Broadridge concluded that AED will increase costs for most Canadian companies.[12] For 88% of Canadian issuers, AED would cost them more than they would save on paper and postage, so they would likely not use it.[13]

We also note that N&A provides an established mechanism that has already removed many of the costs from the system. As such, we question whether the nominal additional costs savings of moving to AED strike the appropriate balance between burden reduction and investor protection.

4. Application of AED to Governance Documents

Question 2 in the Consultation asks if an AED model were to be implemented, to which governance documents should it apply.

AED should not be permitted for the delivery of any Governance Documents. Issuers should continue to rely on N&A or the delivery of actual notice to investors when discharging their obligations to deliver information to their shareholders.

5. Changes to AED Model

Question 4 in the Consultation asks if an AED model were implemented, are there any modifications the Department should make to the CSA's AED model.

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[10] Broadridge, *supra* note 6, at slide 23.

[11] Ibid.

[12] Broadridge comment letter on the CSA Proposal, July 6, 2022, at p. 2.

[13] Ibid.

If the Department were to proceed with AED, we strongly recommend changes to help minimize its potential negative impact on investor engagement and communications. The following are a few examples of modifications to enhance AED for investors, but we would encourage the Department to explore other options:

- *Provide advance notice to shareholders*. FRFIs should provide notice to their shareholders before moving to an AED approach. The notice should explain the reasons for doing so, and alert investors that they can (a) leave standing instructions with an intermediary to receive Governance Documents, and (b) request the materials directly from the FRFI.

- *Shareholders should have an option to subscribe to receive Governance Documents*. FRFIs should enable shareholders to subscribe to Governance Document by electronic delivery. This could be achieved by adding a subscription button on the FRFI's website.

- *Second website/social media requirement*. In addition to requiring a news release, FRFIs should be required to post their disclosure documents on their website and/or social media channels. While many FRFIs already do this, it should be an explicit requirement. Investors would be more likely to search the FRFI's website for this information than they would be to search SEDAR.

- *Mandatory hyperlink*. To help get documents into investors' hands as quickly as possible, the news release should include a hyperlink to them on SEDAR and/or the FRFI's website.

- *Restrict AED to prospectuses*. We believe AED is inappropriate for the delivery of Governance Documents. In our view, the only disclosure documents for which AED would be suitable are prospectuses. In the prospectus context, since investors have shown interest in buying the securities, there is less concern they would be unaware of the prospectus under AED. In addition, most purchasers under a prospectus are sophisticated institutional investors that can easily access prospectuses through SEDAR .[14]

6. We Support N&A for the Delivery of Governance Documents

Question 1 in the Consultation asks about the benefits of an N&A model for financial institutions and their owners.

We support N&A for the delivery of Governance Documents because it gives shareholders direct notice that documents are available electronically. Consequently, investors are more likely to be made aware of and access documents under N&A than they are under AED.

N&A also gives issuers the benefit of lower printing and postage costs and a reduced environmental impact, without undermining investor engagement or protection. In short, it strikes an appropriate balance between ensuring shareholders receive notice and decreasing costs for FRFIs. Broadridge

[14] CSA Proposal at p. 36.

estimated that N&A saved issuers approximately $29 million in 2021, a more than 200% increase in four years.[15]

Broadridge's data also shows that the rate of adopting N&A has steadily increased each year, from 15.2% of issuers adopting it in 2015, to 19.5% adopting it in 2019.[16] Given the advantages of N&A for both FRFIs and investors, we encourage measures to increase its use. This includes proclaiming into force regulations amending the *Canada Business Corporations Act* (CBCA) to facilitate the use of N&A by CBCA distributing corporations. Once the amendments take effect, we expect many more Canadian issuers would begin using N&A.[17]

N&A has already delivered substantial cost savings for issuers. It is not clear what incremental savings the CSA expects AED to provide and whether the savings outweigh the negative impacts AED could have on investor engagement.

7. Encourage the Adoption of E-Delivery

We encourage the Department and the CSA to look beyond N&A and facilitate the use of e-delivery. In a joint 2020 report, the Securities Industry and Financial Markets Association and other organizations urged the U.S. Securities and Exchange Commission (SEC) to establish e-delivery as the primary method for delivering investor disclosures and communications.[18] The report highlighted the benefits of e-delivery, including enhanced investor experience and engagement, because of a more inviting, user-friendly and efficient experience.[19]

E-delivery also provides direct notice to investors and aligns with investor preferences for the delivery of information. Moreover, it is environmentally sustainable and cost-effective. Broadridge found that e-delivery can eliminate approximately 76% of the costs of sending financial statements and MD&As.[20]

While the CSA explored making e-delivery the default option as an alternative to AED, it rejected e-delivery because of "legal uncertainties" related to the consent required under corporate and e-commerce legislation. We encourage the Department and the CSA to explore every avenue to overcome these legal ambiguities and promote increased use of e-delivery.

8. Revise NI 54-101, Form 54-101F1 and NI 51-102

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[15] Broadridge, *supra* note 12, at p. 7.

[16] Broadridge Comment Letter on CSA Consultation Paper 51-405 – Consideration of an Access Equals Delivery Model for Non-Investment Fund Reporting Issuers, March 9, 2020, at p. 5.

[17] See Using Notice-and-Access Under the Canada Business Corporations Act, Corporations Canada, 2018.

[18] Securities Industry and Financial Markets Association, SIFMA Asset Management Group, Financial Services Institute, Investment Advisers Association, Committee of Annuity Insurers, Insured Retirement Institute, and American Council of Life Insurers, E-Delivery: Modernizing the Regulatory Communications Framework to Meet the Needs for the 21st Century, September 2020.

[19] Ibid. at p. 11.

[20] Broadridge, *supra* note 12, at p. 7.

Question 3 in the Consultation asks if an N&A model were implemented, are there any modifications the Department should make to the N&A model as described in National Instruments 51-102 and 54-101 to better reflect the way financial institutions communicate with their owners.

We believe changes to these instruments are needed, particularly to NI 54-101. This instrument was drafted almost two decades ago and should be re-visited considering the rapid changes in technology and systems. It also includes a prescribed form, Form 54-101F1. This form needs to be reconsidered and tested with lay people to enhance comprehension and informed choices by retail investors. It should also provide appropriate consent to facilitate the ability of issuers to electronically deliver governance materials directly to shareholders.

Our submission on the CSA Proposal recommended several improvements to Form 54-101F1 and NI 54-101 to increase investor understanding of their choices for requesting disclosure materials and to facilitate e-delivery.

We also recommended that the CSA prescribe the form for the annual notice required under NI 51-102. Currently, there is a lack of consistency and clarity in how this information is presented, which creates confusion and reduces engagement. Some are written in plain language for the lay person and offer clearer options on how to request disclosure documents. Others are incomprehensible even for a sophisticated reader. An easy-to-understand, prescribed form would improve understanding of the choices available to an investor. Amendments to the consent provision could increase the use of e-delivery.

We invite you to read our comment letter[21] to the CSA for further information on the potential improvements to these rules and form.

C. VIRTUAL SHAREHOLDER MEETINGS

The COVID-19 pandemic and restrictions on public gatherings necessitated a shift from in-person meetings to VOSMs. Now that most pandemic-related restrictions have eased, it is an opportune time to consider the continued use of VOSMs.

There is no doubt that VOSMs offer many benefits for the company and its shareholders, but there are also some drawbacks. Regardless of the pros and cons, however, we believe investor choice should be the guiding principle: how shareholders participate in meetings (virtually or in person) should be up to them.

This view is shared by the Council of Institutional Investors (CII), which also expressed strong support for the principle of shareholder choice: whether a shareholder attends a meeting in person or online should be the shareholder's choice, not the company's.[22] Shareholder meetings are the one time of year when shareholders of all sizes can interact face-to-face with the company's management.[23]

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[21] FAIR Canada Comment Letter on the CSA Proposal, July 6, 2022.

[22] Council of Institutional Investors - Build a Better Meeting, October 2017, at p. 2. CII is a U.S. non-profit organization that promotes policies that enhance value for U.S. institutional asset owners and their beneficiaries. https://www.cii.org/.

[23] Ibid.

Data on investor meeting preferences in the summer of 2020 showed that support for VOSMs was low. A survey by Institutional Shareholder Services (ISS) found that only 11% of investor respondents prefer VOSMs, except as a temporary extraordinary measure necessitated by emergencies such as the COVID-19 pandemic.[24] Seventy-seven percent of investor respondents preferred the hybrid shareholder meeting format.[25]

We also share the concerns of other stakeholders about the ability of shareholders to meaningfully participate in VOSMs. The research outlined below demonstrates that these concerns are justified.

In light of these concerns, and guided by the principle of shareholder choice, we do not support allowing FRFIs to hold VOSMs. We recommend that the status quo, which allows FRFIs to hold hybrid shareholder meetings, be maintained. We also provide recommendations for the content of regulations governing hybrid meetings.

1. Concerns With VOSMs

Question 7 in the Consultation asks about the risks and opportunities of holding VOSMs for financial institutions and their owners.

VOSMs offer some benefits to participants. They enable investors who would not be able to attend in person to participate. They also reduce costs associated with travel and catering, and contribute to a reduced carbon footprint.

Despite these advantages, VOSMs have several shortcomings relative to in-person meetings. For example, they hinder the ability of investors who lack computer literacy or connectivity to participate in meetings and could disenfranchise some shareholders.

In its submission to the Australian Government and Treasury on VOSMs, ISS touched on other shortcomings, including concerns that VOSMs can compromise the transparent expression of views and shareholders' right to participate in a meeting without corporate officials "curating" questions.[26] They may also impair the ability of shareholders to engage in a robust exchange of views with directors and may diminish director accountability.[27]

Research supports concerns about how effective and extensive discussions are at VOSMs compared to in-person meetings. An analysis of transcripts and recordings of 250 in-person shareholder meetings and VOSMs showed that VOSMs are shorter and allocate less time to answering questions.[28]

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[24] ISS 2020 Global Benchmark Policy Survey, September 24, 2020, at p. 11. ISS is a global corporate governance and proxy advisory firm. https://www.issgovernance.com/.

[25] Ibid.

[26] ISS Submission to the Australian Government and Treasury - Use of Technology for Meetings, July 16, 2021, at p. 3.

[27] Ibid.

[28] Miriam Schwartz-Ziv, How Shifting from In-Person to Virtual-Only Shareholder Meetings Affects Shareholders' Voice, April 2021, at p. 2 – 3.

The research also raised several serious issues with VOSMs, including:

- Questions submitted but not addressed were almost never made public.
- The number of questions submitted was almost never disclosed.
- When companies failed to address shareholder questions:
  - It was partly because they chose to ignore questions, not because shareholders failed to submit questions, and
  - They claimed there were no additional questions to avoid addressing questions when, in fact, not all questions submitted were answered.
- Companies were particularly likely to ignore queries about the number of questions submitted or the number of shareholders in attendance, which suggests companies prefer to keep investors uninformed about shareholders' involvement in the meeting.[29]

In a July 2022 letter to the SEC, a coalition of investors, asset managers and asset owners highlighted issues with VOSMs during the 2020 proxy season, including:[30]

- Difficulty getting into meetings.
- Inability to ask live questions.
- Questions not being shared with other participants.
- Cherry picking questions and providing canned responses during the Q & A session.
- Misrepresenting that no other questions had been asked.

They also noted the lack of bona fide shareholder participation could raise questions as to whether a meeting constituted a legal shareholder meeting.[31] The letter also observed that virtual meetings were a poor substitute for in-person shareholder meetings, notwithstanding the potential for technology to expand participation.[32] The coalition argued that post-pandemic, companies should return to face-to-face meetings, but acknowledged that hybrid meetings may be optimal because virtual participation has some advantages.

Research supports concerns about companies' ability to cherry pick questions at VOSMs. An ISS survey found that 91% of investors thought management unreasonably curating questions was a problematic practice at VOSMs.[33] In addition, a survey of thirteen investors who have been involved for many years in shareholder meetings asked if it is easier for companies to avoid addressing critical questions at VOSMs (1 = not easier, 10 = easier). The average response value was 8.6, indicating that shareholders are concerned that companies can more easily select which questions to answer at VOSMs.[34]

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[29] Ibid. at p. 3 – 6.

[30] Interfaith Center on Corporate Responsibility, Shareholder Rights Group, The Forum for Sustainable and Responsible Investment, Council of Institutional Investors, Ceres, Virtual and Hybrid Meetings: Concerns from 2020 Proxy Season, July 6, 2020.

[31] Ibid. at p. 4.

[32] Ibid. at p. 2.

[33] ISS 2021 Global Benchmark Policy Survey, October 1, 2021, at p. 5 and p. 13.

[34] Miriam Schwartz-Ziv, *supra* note 28, at p. 16 – 17.

Research also demonstrates that companies constrain shareholder voices in VOSMs when shareholders' votes are inconsistent with management's recommendations. In these instances, companies are likely to significantly limit shareholder questions to subjects for which a proposal was submitted. Notably, limiting questions to proposals has become at least four times more common at VOSMs compared to in-person meetings. This finding indicates that when investors are critical of management, communication with shareholders is restricted.[35] This is precisely when shareholder voice is most important.

2. Recommendations for Hybrid Meetings

Question 9 in the Consultation asks how the legal and regulatory framework should be structured to ensure that communication during virtual meetings is inclusive and effective.

In February 2022, the CSA issued updated guidance on VOSMs.[36] They recommended that reporting issuers provide for a level of shareholder participation that is comparable to what they would receive at an in-person meeting and that the practices used at virtual meetings be transparent.

In keeping with the principles of transparency and comparable experience, we recommend that the regulations governing shareholder meetings with a virtual component require:[37]

- Authentication of attendees.
- Disclosure of the number of shareholders who logged into the meeting.
- A mechanism for attendees to access real-time assistance with technical issues.
- The process for submitting and selecting questions to be explained, and disclosure of all questions submitted.
- Written responses to questions that were not answered during the meeting to be posted on the FRFI's website.
- FRFIs to outline their approach to the presentation of shareholder proposals.
- FRFIs to provide a clear, simple mechanism for voting.
- Audio recordings and transcripts of meetings to be made available to investors entitled to participate in the meeting.
- FRFIs to assess the costs and benefits of using video versus audio-only technology in their meetings with the objective to use video to facilitate shareholder engagement. (In 2020, 99% of the VOSMs conducted on Broadridge's platform used audio only.[38] While this helps minimize data usage and the possibility of technical failures, the use of video more closely approximates in-person meetings and should be encouraged.)

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[35] Ibid. at p. 5.

[36] Canadian securities regulators provide updated guidance on virtual shareholder meetings, February 25, 2022.

[37] See Broadridge - Go Beyond Best Practices for Virtual Shareholder Meetings (2021) for guidance on best practices for virtual meetings.

[38] Broadridge - Virtual Shareholder Meetings: 2020 Facts and Figures at p. 2.

D. SUMMARY AND CONCLUSION

With respect to the electronic delivery of Governance Documents, we urge the Department not to permit AED for FRFIs. While we support N&A, we encourage the Department and the CSA to look beyond N&A and facilitate the increased use of e-delivery.

Regarding VOSMs, we support allowing FRFIs to hold hybrid meetings, and oppose VOSMs because they curtail shareholder choice. As ISS aptly stated, "to enshrine in law the ability for companies to choose a virtual-only shareholder meeting format would have a negative impact on shareholder rights and corporate governance in publicly listed companies."[39]

We thank you for the opportunity to provide our comments and views in this submission. We welcome its public posting. We intend to make our submission public by posting it to the FAIR Canada website. We would be pleased to discuss our submission with you should you have questions, or require further explanation of our views on these matters. Please contact Jean-Paul Bureaud, Executive Director, at jp.buread@faircanada.ca or Tasmin Waley, Policy Counsel, at tasmin.waley@faircanada.ca.

Sincerely,

Jean-Paul Bureaud
President, CEO and Executive Director
FAIR Canada | Canadian Foundation for Advancement of Investor Rights

[39] ISS, *supra* note 26, at p. 2.