Canadian Coalition for
GOOD GOVERNANCE

THE VOICE OF THE SHAREHOLDER

December 8, 2014

commentonlegislation@ccmr-ocrmc.ca

Dear Sir/Madam:

Re: Comments on Consultation Drafts of the *Provincial Capital Markets Act* ("Draft PCMA") and the *Capital Markets Stability Act* ("Draft CMSA") (collectively, the "Draft Legislation')

The Canadian Coalition for Good Governance ("CCGG") has reviewed the Draft Legislation and we thank you for the opportunity to provide our comments.

CCGG's members are Canadian institutional investors that together manage over $2.5 trillion in assets on behalf of pension funds, mutual fund unit holders, and other institutional and individual investors. CCGG promotes good governance practices in Canadian public companies and the improvement of the regulatory environment in order to best align the interests of boards and management with those of their shareholders and to promote the efficiency and effectiveness of the Canadian capital markets.

A list of our members is attached to this submission.

OVERVIEW

As CCGG has stated before, CCGG supports the Cooperative Capital Markets Regulatory System (CCMRS) initiative and the goal of a unified national securities regulator for Canada. We applaud the governments of the participating jurisdictions (the Participants) and encourage the remaining provinces and territories to join the CCMRS by executing the *Memorandum of Agreement regarding the Cooperative Capital Markets Regulatory System*.

We understand that the Draft PCMA is intended to harmonize, update and modernize the existing provincial securities legislation of the Participants. We believe that this is an opportune time to incorporate certain acknowledged governance 'best practices' into the new legislation, and its anticipated accompanying regulations, and we encourage the CCMRS to do so to the extent its mandate allows. We restrict our comments in this submission to corporate governance issues of concern to our members that are relevant to the Draft Legislation. Our comments are consistent with earlier submissions we have made over the years to various regulatory and legislative authorities with respect to existing securities legislation and corporate law. Our hope is that the Participants will take the rare opportunity created by the need to draft new legislation and regulations to address governance

concerns that remain outstanding under current legislation and regulations. We recognize that some of these concerns will be more appropriately addressed in the forthcoming CCMRS regulations, which are anticipated to be proposed for comment by December 19, 2014, rather than in the Draft PCMA. We encourage the CCMRS to consider our comments when drafting those regulations.

We also hope that the Participants will take the opportunity to address some of the gaps resulting from the interplay between corporate and securities laws that have at times in the past been an impediment to corporate governance progress. Since the Canada Business Corporations Act (CBCA) is also currently under review by Industry Canada, now is an ideal time to work with Industry Canada to address some of these issues.

CCGG supports the approach taken under the CCMRS to promote regulatory flexibility, allowing a faster response to market developments, by leaving much of the detailed requirements currently contained in provincial securities legislation to be addressed in regulations which can be enacted by the regulator instead of requiring an amendment to provincial legislation. However, we emphasize that because so much of substance will be contained in the upcoming draft regulations, it is impossible to fully assess the Draft Legislation at this point and our comments here are conditional on our review of the upcoming regulations and may change following that review.

CCGG specifically endorses two features of the Draft Legislation: (i) the enhanced criminal and administrative enforcement provisions that should lead to more efficient and uniform enforcement of securities related offences across Canada; and (ii) the creation of an independent adjudicative tribunal that functions separately from the regulatory division with policy-making authority, which addresses a material criticism of existing securities regulation.

Majority Voting

Currently, Canadian corporate law delegates to securities regulators the power to stipulate how directors are elected by proxy by virtue of section 54 of the CBCA Regulations which provides that the form of proxy must be in the form required by section 9.4 of Canadian Securities Administrators National Instrument 51-102. Section 9.4(6) of that national instrument states that the form of proxy must provide the securityholder the option to have his or her securities "be voted or withheld from voting" in respect of the election of directors. The inability to vote "against" directors (rather than only "withhold" from voting) is the foundation of our "plurality voting system" whereby a "withhold" vote has no effect and directors can be elected even if they receive only one vote. In January 2014, the TSX adopted a 'work around' this consequence by establishing as a listing requirement that every TSX listed issuer (of which there are approximately 1,420 at present), other than majority controlled issuers, must adopt a majority voting policy in the prescribed form[1], a form consistent with the majority voting policy which CCGG has publicly advocated since 2006.

[1] The TSX requires that majority voting provisions must provide that: (i) a director immediately tender his or her resignation if he or she is not elected by at least a majority of the votes cast in an uncontested election; (ii) the board of directors accept or reject the resignation within 90 days of the meeting; (iii) the resignation be rejected only in exceptional circumstances; and (iv) promptly after the board's decision, an issuer is required to issue a news release communicating the directors' decision and, if the directors refuse to accept a resignation, the news release must fully state their reasons.

While CCGG is pleased with this advancement, we do not believe it to be sufficient. Not only are there approximately 1,950 Canadian public companies listed on the TSX Venture exchange, which does not have a similar majority voting listing requirement, but listing requirements can be changed relatively easily. It is important that the fundamental shareholder right of majority voting be enshrined in law. In a 2014 submission we encouraged Industry Canada to amend the CBCA to effect true majority voting.[2] CCGG also has in the past[3] urged the Ontario Securities Commission (OSC) to act on this matter in the absence of change in the corporate law. The adoption of new securities legislation and regulations in connection with the CCMRS presents an opportunity to address this important issue in the absence of action to amend the corporate statutes. Alternatively, as noted above, it also presents an occasion to work with Industry Canada to resolve such issues collectively.

We understand that securities regulators have been reluctant to establish rules in this area since the structure of director elections has historically been a matter of corporate law. We think that this concern is misplaced. In our view, securities regulators, especially those in a position to 'modernize' existing regulation, should insist on higher standards of shareholder democracy and corporate governance for reporting issuers and have the legal power to do so, irrespective of the minimum standards set out in federal or provincial corporate law.

Proxy access

Today shareholders in Canada have no meaningful access to the director nomination process. It is onerous and prohibitively expensive for shareholders to propose alternate directors for election and to actively solicit other shareholders to vote for their nominees.[4] In the past we have encouraged the OSC and Industry Canada to focus on greater proxy access for shareholders to assist in increasing shareholder democracy.[5] CCGG supports shareholders holding 3% of the outstanding shares, in aggregate, being able to nominate up to 25% of the directors and to have information about those nominees included in the management proxy information circular in the same manner as the company's nominees. CCGG encourages the Participants to support and further such initiatives to the extent possible within their respective jurisdictions.

Separation of CEO and Chair

Good corporate governance generally requires the chair of the board to be someone other than the CEO. There is an inherent conflict of interest when the chair also serves as the CEO. The oversight of management, in particular the CEO, is one of the board's key responsibilities and a combined chair/CEO

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[2] http://admin.yourwebdepartment.com/site/ccgg/assets/pdf/Submission_to_Industry_Canada_May_14,_2014_re_Consultation_Paper_on_the_CBCA_Final_signed.pdf

[3] http://www.ccgg.ca/site/ccgg/assets/pdf/CCGG_Response_to_OSC_Staff_Notice_54-701.pdf

[4] For a discussion of the challenges to proxy access under current law see CCGG's shareholder democracy submission referred to in footnote 3.

[5] Ibid

is thus responsible for leading the body that oversees himself or herself.[6] Other important responsibilities of the chair are compromised when the role is shared: setting the agenda for board meetings; ensuring directors receive the necessary information; and ensuring that board meetings are conducted with open discussion and an independent assessment of management views. Similar challenges are presented when the chair is not wholly independent of management. As stated by the Office of the Superintendent of Financial Institutions when it amended its Corporate Governance Guidelines in 2013: "The role of the Chair should be separated from the CEO, as this is critical in maintaining the Board's independence, as well as its ability to execute its mandate effectively.

In CCGG's view, if there is a controlling shareholder of the company, then there could be an exception to the rule that the board chair should be independent of the CEO. In such a case, the chair and the CEO role may be combined or the CEO may be an officer of the controlling shareholder provided there is a lead director independent of the controlling shareholder (and independent of management) appointed. The board must also have an effective and transparent process to deal with any conflicts of interest between the controlled corporation, minority shareholders and the controlling shareholder.[7]

We believe that the time has come for securities regulators to require all companies to comply with this basic tenet of good corporate governance and, again, a modernization of securities legislation and regulations through the CCMRS is an excellent opening to do so.

Say on Pay

Canada is becoming an outlier among developed nations in not having a mandatory say on pay vote that allows shareholders to voice their views on the appropriateness of an issuer's executive compensation practices. In our 2011 submission to the OSC regarding shareholder democracy we encouraged the OSC to adopt a requirement making an annual shareholder advisory vote on executive compensation mandatory for all public issuers. Say on Pay has been broadly adopted by the largest Canadian public companies and is considered to be a best practice among those issuers. It is widely acknowledged to have helped to focus the board's attention on executive compensation, improved the quality of disclosure of executive compensation and encouraged increased dialogue between shareholders and boards. We encourage the Participants to take the opportunity to introduce this important shareholder mechanism through the CCMRS and level the playing field so that all Canadian reporting issuers and their shareholders can enjoy its benefits.

In summary, we support the CCMRS initiative and encourage the Participants to take this opportunity to incorporate the corporate governance principles discussed above into the CCMRS legislation and regulations to the extent possible.

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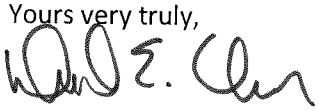
[6] "The notion that the chief executive should supervise himself as chairman is absurd", Chair of the German exchange Deutsche Bourse quoted by Jan Wagner in Responsible Investor, February 6, 2014

[7] Dual Class Share Policy

In addition, given that so much of the substance of the new securities regime will be contained in the upcoming companion regulations, we urge the Participants to provide (i) a significant comment period of at least 90 days for review of those regulations and (ii) a summary highlighting the significant changes from existing regulations as well as the purpose those changes are intended to achieve.

Thank you for the opportunity to provide you with our comments. If you have any questions regarding the above, please feel free to contact our Executive Director, Stephen Erlichman, at 416.847.0524 or serlichman@ccgg.ca or our Director of Policy Development, Catherine McCall, at 416.868.3582 or cmccall@ccgg.ca.

Yours very truly,



Daniel E. Chornous, CFA
Chair of the Board
Canadian Coalition for Good Governance

CCGG MEMBERS

Alberta Investment Management Corporation (AIMCo)
Alberta Teachers' Retirement Fund Board
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