Appendix "B"

National Instrument 54-101 and Companion Policy 54-101CP

Summary of Comments Received and CSA Response

Background

This is a summary of the comments received by the CSA during the comment period that expired on November 1, 2000, with the CSA response. The CSA received 179 formal submissions (listed in Appendix "A"). The CSA has considered the comments and thanks all commenters.

Below are the summarized versions of the submissions, grouped by subject, with the CSA response.

General Comments Regarding the Instrument and CSA Response

Use of E-mail

Some commenters expressed concern that the use of electronic communication was not specifically provided for in the Instrument. Other commenters thought that the requirement for issuers to obtain client consent to electronic delivery would be too onerous and that consent to electronic delivery from issuers should be provided for in the client response form, with that portion of the form given to issuers. It was suggested that issuers could be excluded from communicating electronically with their shareholders by reason of the consent to electronic communication being limited to usage only by the intermediary who has obtained the authorization.

CSA Response

The CSA point out that there is nothing in the Instrument that precludes an electronic form of delivery. In addition, section 5.4 of the Policy explains how the requirements of the Instrument can be complied with using the guidelines set out in Quebec Staff Notice 11-201, and in the rest of Canada, National Policy 11-201 Delivery of Documents by Electronic Means (the "11-201 Documents"). Although issuers will not be entitled to rely upon consents to electronic delivery given by beneficial owners to intermediaries, issuers will obtain the electronic mail address of beneficial owners from the NOBO list. Issuers will then be able to send an e-mail to beneficial owners requesting their consent to the sending of materials in an electronic format by the issuer, in accordance with the 11-201 Documents.

Form F1 has been revised to conform with the provisions of the 11–201 Documents.

Fragmentation and Economies of Scale

Some commenters suggested that the current system was operating in an effective and efficient manner and commented that, under the proposed Instrument, the voting system would be fragmented, with fewer controls, and would result in a deterioration of service. They felt that the current system was reliable, well-understood, efficient, accountable (i.e. intermediaries were accountable to their clients), equitable (i.e. both OBOs and NOBOS receive their meeting materials in a timely manner) and enjoyed a high rate of client satisfaction. They expressed concern that accountability and equity might disappear under the proposed system. They suggested that the United States had decided not to facilitate the use of shareholder lists for proxy solicitation.

Some commenters said that the current system was cost-efficient. They suggested that the revenue base was too small to justify increasing competition and competition would erode investment in system enhancements. The added complexity of the proxy process (due to an increase in the number of parties involved) would result in a more costly system. Some submitted that intermediaries would not maintain electronic voting applications for institutional holders, so issuers would be spending more for a less effective vote turn-out.

Certain commenters were concerned that intermediaries would be held accountable for deficiencies in the delivery of security holder materials where they did not control the mailing. If problems did occur, intermediaries would not know who was responsible. They submitted that increased non-compliance would lead to an increased regulatory burden.

One commenter said that the voting process would be perceived as lacking integrity and independence. Contests would be complex, potentially unfair, and costly.

On the other hand, most commenters supported the principle of direct communication between an issuer and its securityholders.

CSA Response

The CSA notes that many of these comments have been made before. The CSA reiterates that it has consulted with industry and experts in security holder communications since 1998. The CSA believes the requirement that all requests for beneficial ownership information be made through a transfer agent will better facilitate an efficient communications process and encourage a limited number of entities to invest in changing technologies. The Instrument allows the option of continued use of the existing system or the option of direct mailing to NOBOs; the CSA expects that market forces will lead issuers to the system most appropriate for their own situation.

The CSA believes that the concerns related to changing the current system to accommodate the sending of proxy-related materials directly to beneficial owners are best addressed by a delayed implementation of this aspect of the Instrument.

The Instrument does not preclude reporting issuers (through their professional transfer agents) from exploiting innovations that are developed in the registered shareholder environment. Transfer agents and other potential service providers can make use of efficiencies that they have developed in their existing business operations and may be able to "piggyback" on technologies used by their parents or affiliates.

The CSA believes that permitting reporting issuers to send proxy-related materials directly to beneficial owners is desirable. The CSA also recognizes that reporting issuers with beneficial owners in the United States may wish to use a single process for sending their proxy-related materials, which the Instrument facilitates by also providing for indirect sending through intermediaries.

In response to the concerns expressed by intermediaries about accountability, a new subsection 2.11(2) has been added to provide for specified text which addresses accountability to be included with proxy-related materials that solicit votes or voting instructions where a reporting issuer uses the NOBO list to send the materials directly to a NOBO.

Shareholder register

A commenter thought that the Instrument did not resolve the problems of issuer access to shareholders and direct participation in voting and wanted the responsibility for shareholder registers to revert to issuers. Another said that the Instrument did not effectively address the identification of beneficial owners, particularly institutional beneficial owners.

CSA response

The CSA points out that the concern relating to issuer responsibility for shareholder registers is a matter for corporate law and may also be impacted by privacy legislation.

The CSA believes that the Instrument strikes an appropriate balance between the identification by an issuer of its beneficial owners and the beneficial owner's desire for anonymity.

CSA Survey

One commenter felt that the survey conducted by the CSA in 1999 did not contain a meaningful level of detail, in particular regarding the costs, efficiencies and integrity of voting.

CSA Response

The CSA is satisfied with the survey, which accomplished its goal: to identify how many issuers are satisfied with the current process, and how many would like to communicate directly with beneficial owners. The survey was not meant to displace the comment process, which allowed for a more detailed consideration of specific proposals and criticisms.

SEDAR

One commenter strongly urged the CSA to use SEDAR to simplify and expedite the shareholder communication process.

CSA Response

The CSA points out that SEDAR was developed to facilitate the electronic filing of information by issuers to the respective securities commissions and was not designed for electronic communication between market participants.

Specific Comments Regarding the Instrument and CSA Response

Fees (Sections 1.4 [previously Section 1.5] and 2.13)

Commenters expressed concern that the Instrument did not prescribe a fee or clarify what would be a reasonable fee. Some commenters suggested that intermediaries furnish the NOBO list free of charge while others suggested a flat fee of $15.00.

CSA Response

Section 1.4 provides that fees payable under the Instrument shall be, unless prescribed by the applicable regulator or securities regulatory authority, a reasonable amount. Consequently, the only present restriction is that the fee be a “reasonable amount”.

The CSA is of the view that, except for a threshold requirement that amount be reasonable, the determination of the amount of fees should, to the extent possible, be left to market participants who are in the best position to take account of rapidly changing technology and the attendant costs of providing the service. However, in response to concerns raised by certain commenters that there is no benchmark for determining what is a reasonable fee, the CSA has revised the Policy to state that it is the CSA expectation that market participants will be guided by the fees payable for comparable services in other jurisdictions (such as the United States) and will take account of cost reductions associated with technological change.

The requirement in Section 1.4 that the fees payable by reporting issuers to intermediaries for delivery of materials to beneficial owners be a reasonable amount is consistent with provisions of the securities legislation of some jurisdictions that specifically permit an intermediary to decline to forward materials to beneficial owners unless arrangements have been made for the payment of its reasonable costs.

The requirement in Section 1.4 that the fees payable by reporting issuers to intermediaries for responding to requests for beneficial ownership information be a “reasonable amount” is consistent with provisions of the corporate legislation of many jurisdictions that require the payment to a corporation of a reasonable fee for a list setting out the names, addresses and holdings of its security holders.

Request for Beneficial Ownership Information (Section 2.5)

A commenter requested that the position of reporting issuers be strengthened by requiring intermediaries to provide all pertinent information about beneficial owners, and that it should be provided on labels or disks.

Another commenter suggested that the NOBO list should be maintained on an issuer-by-issuer basis, rather than on an account-by-account basis, and should be updated annually.

CSA Response

The CSA believes that the Instrument strikes a balance between providing information about beneficial owners and the beneficial owner’s desire for anonymity. The CSA also believes that the modes of transmission of the beneficial ownership information are a matter to be negotiated between the issuer and the intermediary.

Transfer Agent Requirement (Section 2.5(4))

Some commenters felt that there should be no transfer agent requirement and that issuers and others should be able to perform mailing and tabulating functions themselves. They also expressed concern that only those persons and companies defined as transfer agents would be eligible to perform the functions that the Instrument requires to be performed by transfer agents. On the other hand, other commenters expressed concern that if issuers were themselves able to perform the transfer agent functions specified in the Instrument, the process would be less effective and more costly.

Some commenters asked that the CSA prescribe voting forms and procedures, as different permitted formats would add confusion to the voting process.

CSA Response

Section 2.5(4) of the Instrument remains unchanged in that all requests for beneficial ownership information must be made using the services of a person or company that carries on the business of a transfer agent. The CSA continues its view that this requirement will better facilitate an efficient and secure communications process by minimizing the number of required electronic linkages required to be established and maintained.

Request for Legal Proxy (Section 2.18)

Commenters expressed concern that the provision permitting beneficial owners to request a legal proxy may be confusing for them and that there would not be sufficient time for the legal proxy requests to be processed. These commenters felt that issuers should be permitted to send legal proxies directly to beneficial owners at the time proxy materials are mailed, rather than require beneficial owners to specifically request that a legal proxy be sent to them.

CSA Response

The CSA is of the view that this is more properly the subject of corporate law reform and is beyond the purpose of this Instrument.

Decision to remain OBO (Part 3)

A commenter felt that beneficial owners should be able to remain OBOs without penalty and that issuers should bear the costs of sending materials to OBOs.

CSA Response

The CSA reiterate its decision to be silent on the issue and permit the market to determine how the costs of sending to OBOs will be borne where the matter is not addressed by local rule.

Instructions from Clients (Section 3.2)

Some commenters advised that written instructions from clients may not always be received before they hold the securities and suggested that the requisite information form part of the "account-opening procedures".

CSA Response

The CSA has noted the comment and has amended section 3.2 to address this situation.

Transitional - Instructions from Existing Clients (Section 3.3)

A commenter suggested that the proposed rule should make clear what happens when a client has not responded to an intermediary's request for instructions.

A commenter suggested that intermediaries be allowed one year from implementation of the Instrument, or until July 2002, to collect new data from clients because there is a lack of incentive for intermediaries to proactively manage this issue prior to 2004.

CSA Response

Section 3.3 of the Instrument makes it clear that an intermediary has an obligation to obtain new instructions from clients who were deemed to be NOBOs under NP 41.

The timeline in the Instrument was chosen to coincide with the transitional period contained in the federal Personal Information Protection and Electronic Documents Act ("PIPEDA"). The CSA has amended Part 3.3(c) to correspond to the transition period set out in section 30 of that Act.

Request for Voting Instructions (Section 4.4)

Commenters felt that portfolio managers or trustees with full discretionary authority should not be required to seek voting instructions from clients.

CSA Response

This concern is addressed by the definition of "beneficial owner" contained in section 1.1 of the Instrument, which is explained in subsection 2.4(2) of the Policy.

Right to Decline to Receive Materials (Section 4.4 and Client Response Form)

One commenter thought that Form 54-101F1 should allow clients of intermediaries to request or decline certain of the three documents listed, not all or none, as is proposed. The same commenter suggested that interim financial statements be included in the set of materials that beneficial owners be allowed to decline to receive. Another suggested that the beneficial owner should be responsible for requesting the issuer to remove them from the mailing list and that intermediaries should no longer be responsible for Form C [being the predecessor in NP41 to the client response form in the Instrument].

One commenter thought that registered securityholders should be able to decline to receive all materials, including proxy materials relating to non-routine meetings, so as to minimize administrative burden and costs. The commenter recommended that issuers send a form

(substantially the same as the client response form F1) to registered holders allowing them to elect not to receive materials.

CSA Response

The CSA continues to take the view that by allowing beneficial owners to decline to receive some but not all security holder material strikes an appropriate balance between ensuring that beneficial owners are properly informed of the most significant issues that may have an impact on their investment in the reporting issuer and their desire not to receive material. The CSA agrees that beneficial owners should be entitled to decline to receive annual and interim financial statements that are not related to meetings and has amended the client response form accordingly.

With respect to the comment that registered securityholders should be allowed to decline to receive materials, the CSA recognizes that this is a valid comment but notes that it goes beyond the scope of this Instrument, which is intended to provide a mechanism for a reporting issuer to communicate with its beneficial owners. The CSA is currently reviewing, as a separate initiative, the requirements relating to the sending of materials to registered holders.

Third-Party Access to NOBO lists (Section 7.1)

One commenter expressed its concern that third parties would have access to NOBO lists and suggested that it might compromise the issuer's security. Another commenter said that because the NOBO list is available to third parties, beneficial owners who chose to be NOBOs under NP41 and non-responders to requests for client instructions should be deemed to be OBOs. This commenter suggested the deemed OBO provision was necessary for compliance with PIPEDA and with a trustee's fiduciary duties.

One commenter queried whether it was practical to expect a reporting issuer to delete the FINS numbers before forwarding the NOBO list to a third party, particularly if the NOBO list was sent to the issuer in electronic format.

CSA Response

These issues have been raised before. The CSA reiterates its view that the prohibitions on the misuse of NOBO lists satisfactorily address concerns about their misuse. Any party seeking a NOBO list must undertake not to misuse it and all NOBO lists must contain a warning about their misuse. The potential for misuse has been further limited by a provision in the Instrument requiring FINS numbers to be deleted from NOBO lists not requested in relation to a meeting. The CSA is satisfied that the provisions of sections 6.1(2) and 7.1 of the Instrument adequately deal with the request for and use by third parties of NOBO lists.

The transition provisions in Part 3 of the Instrument are intended to minimize the cost of obtaining new instructions from clients.

With respect to the comments concerning PIPEDA and a trustee's fiduciary duties, the CSA notes that section 7(3)(i) of PIPEDA does not require consent where the disclosure of information is required by law and that a trustee's responsibilities must be carried out in accordance with the law.

With regard to the issue of deleting FINS numbers, the CSA is of the view that a reporting issuer can generate a paper copy of the NOBO list and delete the FINS numbers from the paper copy. The CSA points out that the request for a NOBO list by a third party and the forwarding of that NOBO list to the third party must be done through a transfer agent. The rationale for deleting the FINS numbers is the valid concern that confidentiality between an intermediary and its client would be compromised if the FINS numbers could be disseminated to third parties.