Annex A

Summary of Comments and Responses on Notice and Request for Comment

Amendments to
National Instrument 54-101
***Communication with Beneficial Owners of Securities of a Reporting Issuer* and**
Companion Policy 54-101CP *Communication with Beneficial Owners of Securities of a Reporting Issuer*

Amendments to
National Instrument 51-102 *Continuous Disclosure Obligations* and
Companion Policy 51-102CP *Continuous Disclosure Obligations*

This annex summarizes the written public comments we received on the 2011 Proposal. It also sets out our responses to those comments.

List of Parties Commenting on the 2011 Proposal

- Broadridge Financial Solutions, Inc.
- Canadian Bankers Association
- Computershare Trust Company of Canada, Computershare Investor Services Inc. and Georgeson Shareholder Communications (joint comment letter)
- Investment Industry Association of Canada
- Mouvement d'éducation et de défense des actionnaires
- National Bank of Canada
- Osler, Hoskin & Harcourt LLP
- Securities Transfer Association of Canada

1. Notice-and-access

(a) General comments on notice-and-access

We received a comment that notice-and-access should not be introduced without further study of the familiarity of shareholders with websites and appropriate regulations to facilitate their access and review of information circulars.

> *Response: Our view is that the notice-and-access provisions strike an appropriate balance between shareholder access to materials and a more streamlined delivery process. We will monitor the implementation of notice-and-access to assess the impact on shareholders.*

We also received several comment letters recommending that investment funds be permitted to use notice-and-access.

Response: We are not prepared at this time to extend notice-and-access to investment funds without further study. We will consider this issue at a later date.

(b) Notice and permitted information in the notice package

We received a number of detailed comments on proposed s. 2.7.1 to 2.7.6 of NI 54-101, which set out the notice-and-access process. The main comments comprised the following recommendations:

- allowing or requiring all the requisite information to be provided in a single notice document, rather than a notice and a separate document explaining notice-and-access;
- removing the requirement to reference page numbers in the information circular;
- requiring a factual description of matters to be voted on only if the matter to be voted on is not otherwise fully described in the voting instruction form or proxy;
- removing the requirement to specify a date and time by which a request for a paper copy of the information circular must be received;
- removing the requirement for the reporting issuer to explain its reason for using notice-and-access;
- requiring the reporting issuer to disclose whether it is paying for intermediaries to forward proxy-related materials to OBOs.

Response: We generally have accepted most of the recommendations specified above, although in some cases we have made modifications to the specific alternatives proposed. We have, among other changes, amended s. 1.3 of NI 54-101 to clarify that any required document (and not just forms) that a person or company is required to send can be substituted for another form or document or combined with another form or document, so long as the form or document used requests or includes the same information contemplated by the required form or document.

However, we are not adopting the recommendation regarding disclosure of whether the reporting issuer is paying for intermediaries to forward proxy-related materials to OBOs. We do not think this information needs to be included in the notice, as it is already provided in the notification of meeting and record dates which is filed on SEDAR. We strongly encourage all market participants to work together to develop industry

best practices and standards for the notice to make it as user-friendly and consistent for investors as possible.

(c) Notice in advance of first use of notice-and-access

We received several comments that questioned the utility of the requirement in proposed s. 2.7.2 that a reporting issuer provide advance notice not more than 6 months and not less than 3 months before the first meeting for which notice-and-access would be used. Several alternatives were suggested, including that the notification of meeting and record dates required by s. 2.2 of NI 54-101 filed on SEDAR would be adequate. It was noted by one commenter that shareholders would be unlikely to act upon three months advance notice to educate themselves on notice-and-access; that the need for advance notice for a reporting issuer adopting notice-and-access for the first time would diminish as shareholders became increasing familiar with the process; and that the concept of an "expected date" for the meeting is an unworkable standard.

Response: We have adopted this recommendation. A reporting issuer that uses notice-and-access for the first time must file the notification of meeting and record dates, which includes information on whether the issuer will use notice-and-access, on SEDAR at least 25 days before the record date for notice, which in turn must be at least 40 days before the meeting. We think that this greater lead time will enable issuers using notice-and-access for the first time to more smoothly implement notice-and-access. We strongly encourage all market participants to work together to develop industry best practices and standards as notice-and-access is introduced for the first time.

(d) Consent to other delivery methods/Electronic delivery of notice package

We received several comments and questions regarding how notice-and-access will interact with the delivery of proxy-related materials, including annual financial statements and related MD&A.

Response: We have made a number of changes to address these comments. In particular, please see new s. 3.5(2) of 51-102CP, which clarifies that annual financial statements and related MD&A can be sent for purposes of s. 4.6(5) using notice-and-access.

Our understanding is that currently, the primary service provider for intermediaries has a separate e-delivery platform for delivering proxy-related materials which is intended to be distinct from the notice-and-access platform. The guidance clarifies that this type of separate e-delivery platform can be used in conjunction with notice-and-access. In addition, the notice package can also be delivered electronically (subject

to obtaining the beneficial owner's consent) if this delivery option is available.

(e) Standing instructions to receive paper copies of information circulars and/or annual financial statements and related MD&A

We received a comment proposing that changes be made to Form 54-101F1 *Client Response Form* to accommodate standing instructions, and requiring the provision of information on standing instructions in the explanation of notice-and-access required to be sent under s. 2.7.1. Another commenter also noted that some dealers expressed concern around implementation and management of a standing instruction database and that dealers wished to have the opportunity to consider and discuss the changes with regulators and service providers before stating a view.

We also received a comment that a reporting issuer should give effect to standing instructions it receives from registered shareholders whether or not it has taken steps to obtain standing instructions.

Response: The intent of the provisions relating to standing instructions and intermediaries is to permit ***but not require*** *intermediaries to obtain standing instructions on the inclusion of paper copies of the information circular and/or annual financial statements and related MD&A. It is ultimately the intermediaries' decision (in consultation with service providers) whether to implement operational procedures to obtain standing instructions, and whether, as a result, intermediaries will need to give additional information to clients in Form 54-101F1* Client Response Form *regarding provision of standing instructions.*

We have not adopted the recommendation that a reporting issuer give effect to standing instructions whether or not it has taken steps to obtain them. To require this would effectively require reporting issuers to implement and manage a database of standing instructions, and we do not think that this measure is warranted at this time.

(f) Stratification

One commenter cautioned that it may be necessary or advisable to limit the criteria applied to stratification and asked for clarification as to what other criteria for stratification it foresees as being acceptable.

Response: The intent of the provisions relating to stratification is to permit ***but not require*** *stratification to be used by, or available as an option to, reporting issuers and intermediaries. It is ultimately for reporting issuers and intermediaries (in consultation with the various service providers) to decide whether stratification is an appropriate and*

feasible feature for notice-and-access, subject to the guidance we have provided on the appropriate objectives for stratification. We do not propose to mandate specific permitted stratification criteria, although we will continue to monitor this issue. We strongly encourage market participants to develop best practices for stratification criteria should stratification be introduced as a feature of notice-and-access in the Canadian context. We note that stratification has been a feature of US notice-and-access for several years, and this experience may be helpful to market participants in developing stratification options and best practices.

(g) Record date for notice

A commenter noted that if the record date for notice was set at 30 days before the meeting date as currently permitted in s. 2.1 of NI 54-101, there would be operational challenges for all parties in the process to verify the record date information and send the requisite materials no more than 30 days before the meeting. The commenter requested that s. 2.1 be modified so that the record date for notice under notice-and-access leaves sufficient time for compliance with the posting and delivery requirements.

Response: We have adopted this recommendation.

(h) Collection of information on websites

One commenter noted that there may be some significant practical problems associated with permitting the collection of information on some securityholders (i.e. registered holders) and not others (i.e., beneficial owners) on the website to which proxy-related materials are posted.

Response: It is up to the reporting issuer using notice-and-access, in conjunction with relevant service providers, to determine how to comply with the restrictions on collecting information in a cost-effective manner.

(i) Availability of exemption to use US notice-and-access

A commenter submitted that any issuer that is mandatorily subject to Rule 14a-16 should be able to use US notice-and-access exclusively, and not have to comply with the Canadian notice-and-access requirements. Alternatively, it proposed that any disqualifying criteria from accessing the exemption should be tied solely to the trading volume of the issuer's securities in Canada relative to its trading volume in the United States. Finally, it also proposed that an SEC issuer that voluntarily complies with Rule 14a-16 despite being an exempt "foreign private issuer" under the SEC's rules should also be entitled to rely on the Canadian notice-and-access requirements exemption, subject to whatever disqualification test based on connections to Canada is ultimately adopted.

Response: We are not adopting this recommendation at this time. Although the Shareholder Voting Communication Process in the United States and Canada are broadly similar, there are important differences. These include differences in the mechanisms by which a beneficial owner obtains authority to attend and vote at a meeting and differences in what documents are required to be sent as part of proxy-related materials. The Canadian notice-and-access procedures have been formulated to take these and other specific features of the Canadian Shareholder Voting Communication Process into account. We note that there are a number of exemptions from Canadian securities legislation that also apply to "SEC issuers".

(j) Use of notice-and-access by third parties

A commenter requested clarification on the obligations and restrictions applicable to third parties in using notice-and-access, particularly in light of s. 6.2 of NI 54-101. For example, how would the restriction in s. 2.7.1(2) (requiring the reporting issuer to send a paper copy of the information circular if the notice-and-access package includes any particulars of any matter submitted to the meeting that go beyond what is permitted in s. 2.7.1) apply to third parties?

Response: We have added s. 2.7.7 to address this point. We note that notice-and-access is a delivery mechanism for proxy-related materials, and does not modify any existing legal obligations of third parties such as dissident shareholders in the Shareholder Voting Communication Process.

(k) Miscellaneous comments

We received a number of other detailed drafting and technical comments and have adopted a number of them.

2. Sending "notice only" package when reporting issuer decides not to pay for delivery to OBOs

A commenter asked that we mandate that a reporting issuer who chooses not to pay for an intermediary to forward proxy-related materials to OBOs pay for the forwarding of a "notice only" package, defined as a package without a paper copy of an information circular.

Response: We are not adopting this suggestion at this time, and will consider this issue separately. We note that we would have no concerns if, where a reporting issuer chose not to pay, an intermediary voluntarily sent the "notice only" package to its beneficial owner clients.

3. Indirect sending of securityholder materials by reporting issuer

A commenter took the view that removing the present s. 2.12(2) of NI 54-101 and instead providing guidance in 54-101CP effectively permits an issuer to choose to deliver materials for forwarding to beneficial owners to any office of an intermediary, rather than to the designated agent of that intermediary. The commenter noted that this would impede timely delivery of materials to investors, add costs and reduce the overall efficiency of the delivery process. The commenter also requested that s. 2.12 be amended to clearly require that reporting issuers pay for delivery of material to intermediaries for forwarding.

> *Response: Our view is that the present s. 2.12(2)'s use of the word "may" can be interpreted as permitting, but not requiring a reporting issuer to deliver materials to the intermediary's agent. This was not the intent of the provision, which was to clarify that a reporting issuer would not have failed to comply with its obligations to send securityholder materials because it followed an intermediary's instruction to send the materials to the intermediary's third-party agent. We have added language to s. 2.7 of 54-101CP to further clarify that we expect reporting issuers to send materials to the agent designated by the intermediary unless alternate arrangements have been made with that intermediary.*
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> *We think the wording of s. 2.12 (as amended) clearly states the reporting issuer's obligation to send a proximate intermediary the requisite number of sets of materials specified by the proximate intermediary. A reporting issuer that refuses to send these materials to a proximate intermediary is not complying with its obligations under this section. We have modified the guidance in s. 3.4.1(3) of 54-101CP to further clarify this point.*

The same commenter took the view that an issuer should be obligated to deliver materials to all intermediaries in a foreign jurisdiction for forwarding to beneficial owners in that jurisdiction.

> *Response: NI 54-101 effectively only requires reporting issuers to send proxy-related materials to beneficial owners who hold their securities through intermediaries that are covered by the request for beneficial ownership information. Section 2.5(1) specifies that the request only applies to each proximate intermediary that is:*
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> *(a) identified by a depository (currently only CDS) as a participant in the depository holding securities that entitle the holder to receive notice of the meeting or to vote at the meeting; or*
>
> *(b) listed as an intermediary on the intermediary master list provided by a depository where the intermediary, or a nominee of the intermediary that is identified on the intermediary master list, is a registered holder*

of securities that entitle the holder to receive notice of the meeting or to vote at the meeting.

We are not adopting this recommendation at this time and will consider this issue separately. In the meantime, we strongly encourage reporting issuers to send proxy-related materials to any intermediary in a foreign jurisdiction who requests them on behalf of beneficial owners.

4. Requests for NOBO lists

A commenter raised a concern that proposed s. 2.5(4) requires an intermediary to make an assessment about whether a person or company requesting a NOBO list has the technological capacity to receive the list. The commenter also noted concerns on the part of dealers about their ability to assess the technological capacities of a wide variety of reporting issuers and third parties, and also about issues that could arise should an intermediary determine not to provide the list. The commenter proposed an alternative self-certification process, whereby the requester certifies as to its technological capacity to receive the list.

Response: We have adopted this recommendation and made changes to the undertaking in Form 54-101F9.

Another commenter recommended that s. 2.5 be amended to not require any request for beneficial ownership information to come through a transfer agent, regardless of whether the request is only for the limited purpose of requesting a NOBO list.

Response: We are not adopting this recommendation.

5. Appointing beneficial owner as proxy holder

A commenter was concerned that requiring a beneficial owner or its nominee appointed under s. 2.18(2) or s. 4.5(2) be given authority to attend, vote and otherwise act for and on behalf of management of the reporting issuer or intermediary (as applicable) could conflict with the laws applicable to certain, largely foreign companies which only permit proxyholders to vote on items set out in the information circular. The commenter also was concerned that requiring that this authority be limited if expressly instructed by a beneficial owner would be difficult to implement.

Response: We have modified the relevant sections to clarify that the required grant of authority is subject to any prohibitions under corporate law. We have removed the reference to express limitations on voting authority by beneficial owner. In our view, a beneficial owner that wishes to provide more limited voting authority can make appropriate arrangements with its appointee without necessarily involving

management of the reporting issuer or the intermediary (as applicable).

A commenter requested that proposed s. 2.18 be amended to permit management of the reporting issuer to use the power of substitution in the proxy they hold on behalf of NOBOs (where the reporting issuer is sending proxy-related materials directly to NOBOs) to send proxies instead of VIFs to NOBOs. Conversely, another commenter requested that s. 3.6 of 54-101CP be amended to expressly state that sending proxies instead of VIFs is not permitted.

Response: We are not adopting either recommendation at this time. We will consider this issue at a later date. While we support in principle measures to simplify the voting process of all beneficial owners, we believe the process described above needs to be studied further in the context of the larger Shareholder Voting Communication Process before determining whether it is appropriate to codify it in NI 54-101.

6. Use of alternate forms

A commenter requested that s. 1.3 of NI 54-101 be expanded to a more general provision that allows participants to use forms and documents that are acceptable for the purposes of corporate statutes and for achieving the purpose of NI 54-101. The objective would be to prevent technical non-compliance with the Instrument from being a factor that could potentially invalidate the vote for the meeting under corporate statutes, if otherwise acceptable documentation exists to allow non-registered holders to exercise their rights to vote.

Response: We are not adopting this recommendation at this time. We will consider this issue at a later date. We believe the issue described above is an important one, but that it needs to be studied further in the context of the larger Shareholder Voting Communication Process before determining whether it is appropriate to make the requested changes to NI 54-101.

7. Reconciliation of positions

A commenter called for NI 54-101 to explicitly require intermediaries to:

- Reconcile the files of beneficial ownership data with their registered, depository and nominee positions;
- Give clear direction to the tabulator regarding through which depository, nominee or intermediary securities being voted are held;
- Ensure that any omnibus proxy required from an intermediary or depository through whom they hold shares is being filed; and

- Ensure that a restricted proxy is not issued by the intermediary without verifying that a position has not been voted.

Response: We are not adopting this recommendation at this time. We will consider this issue at a later date. We believe the issue of reconciliation of voting positions is an important one and needs to be studied further in the context of the larger Shareholder Voting Communication Process before determining whether it is appropriate to codify provisions affecting this issue in NI 54-101 and the form those provisions should take.