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VIA E-MAIL AND MAIL

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British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
The Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission of New Brunswick
Superintendent of Securities, Prince Edward Island
Nova Scotia Securities Commission
Superintendent of Securities, Newfoundland and Labrador
Superintendent of Securities, Yukon
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Nunavut

Me Anne-Marie Beaudoin
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Re: Canadian Securities Administrators Proposed National Policy 25-201 – Guidance for Proxy Advisory Firms

Dear Sirs:

We are pleased to respond to your request for comments on the proposed policy.

Our national law firm represents a large number of public company issuers, of varying size, industry sector and principal provincial jurisdiction.

We are extensively involved in assisting issuers in preparing disclosure contained in proxy management circulars, and providing advice on matters forming the subject matter of such meetings.

We are also extensively involved in assisting and advising issuers on corporate governance requirements and practices.

We also have an extensive public company M&A practice. Our deal studies (the Blakes Public M&A Deal Study) done over the past five years indicate that most significant M&A transactions in Canada are effected through a plan of arrangement, which are subject to a shareholder vote.

Our response is focused with respect to the matters with which we have day-to-day experience arising out of our practice on behalf of issuers and attempting to provide comments of a practical nature to facilitate accurate disclosure concerning reporting issuers and shareholder consideration of matters which come before them for voting.

Purposes of Securities Legislation

We believe it is important to put in context our comments in the context of the purposes of securities legislation. The *Securities Act* (Ontario) (the "Act") in Section 1.1 provides that the purposes of the Act are (a) to provide protection to investors from unfair, improper or fraudulent practices; and (b) to foster fair and efficient capital markets and confidence in capital markets. *The primary means for achieving the purposes of the Act are set out in Section 2.1 of the Act, which include requirements for timely, accurate and efficient disclosure of information and requirements for the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants*. The legislation administered by the other Canadian Securities Administrators have similar purposes and provide for similar means.

We recognize that the primary relationship of proxy advisors is to their clients and thus the degree and form of any regulatory response should be proportionate and attempt to obtain maximum benefit at the least cost to participants through practical measures.

However, we believe that, if there are practical steps which can be taken to facilitate better disclosure to shareholders and the orderly shareholder consideration of matters on an informed and effective basis, these steps should be taken, consistent with the purposes of securities legislation.

Inaccuracies and Opportunity for Issuer Engagement

Based on years of assistance, and advice, to many issuers, it has been our experience that proxy advisory reports have on many occasions contained factually inaccurate information. In many cases, these are detected after being introduced into the market place (although sometimes with difficulty by issuers following the issuance of the report) requiring corrections. Often they are discovered when management investigates a significant, and unexpected, "no vote" on some matter, or a "withheld" vote for a director, which turns out to be based on inaccurate information in a proxy advisory report (which information was often correctly provided in the proxy circular, or would have been if the issuer had been aware of the significance of the information to the proxy advisory firm).

As well, in our experience, such errors can have a number of significant results. Firstly, inaccurate information is provided to investors regarding the issuer, nullifying the correct disclosure provided by the issuer. As well, incorrect information and analysis may lead to inappropriate advice regarding the election of the board of directors, an important decision. In some cases, recommending a “withhold” vote on a technically incorrect basis has a reputational implication for individuals. Thirdly, it may affect other aspects of governance, such as corporation’s compensation plans and policies. These matters affect all of the investors in the issuer, not just those who retain the proxy advisory firms.

A company’s management proxy circular is regarded as a “core” document under applicable securities legislation for the disclosure of information, evidencing that the disclosure in such proxy circulars is regarded under securities legislation as an important aspect of disclosure regarding issuers. Proxy advisory firms, as professional organizations, provide such disclosure, and analysis of it. For proxy circulars, materiality of disclosure may be determined by whether it would reasonably be expected to have a significant effect on a shareholder’s voting decisions. The disclosure and analysis prepared and provided by proxy advisory firms is for that very purpose. If such reports contain inaccuracies, including misrepresentations, one of the “means” under securities legislation, of timely, accurate and efficient disclosure of information, is thwarted.

This suggests that measures in some form designed to minimize the chances of misrepresentations regarding a reporting issuer in a proxy advisory report is appropriate.

Security regulators have also, primarily through the means of disclosure, attempted to promote awareness of corporate governance practices, pursuant to National Instrument 58-101 Disclosure of Corporate Governance Practices and related Corporate Governance Guidelines contained in National Policy 58-201. Disclosure of such practices is apparently of important concern to Canada Securities Administrators in fulfilling the purposes of the securities legislation. Apart from simply providing information and disclosure, it is evident proxy advisory firms are playing a more and more prominent role with respect to corporate governance practices, assessing these in relation to voting recommendations as to directors.

As well, proxy advisory firms provide services as to advice on substantive corporate decisions, being the election of directors, appointment of auditors, equity based compensation plans, compensation policies and practices through “say on pay” votes, and M&A transactions. These decisions, which have economic consequences, are of significant relevance to issuers. They therefore are relevant to all investors in those companies.

The directors are legally obligated under corporate law to supervise the management of the corporation – the most significant decision made by shareholders relates to the election of directors.

In addition to required corporate shareholder votes for arrangements, securities legislation itself requires in certain circumstances additional voting requirements for M&A transactions, such as under MI 61-101 Protection of Minority Security Holders in Special Transactions.

Accordingly, with a view to ensuring, so far as possible that disclosure, and the analysis of disclosure, regarding reporting issuers is accurate, both for its own sake as regards accurate disclosure regarding the issuer, but also in regard to disclosure that may affect aspects of corporate governance such as the election of directors, M&A transactions and compensation matters, consideration should be given to address in some manner codification of the prior review by issuers of draft reports and consideration of corrections, as a fairly non-intrusive method of improving disclosure and avoiding confusion and disruption. We understand that the proxy firms and their institutional investor clients believe this is usually done in any event, so a mandated "regularization" of that may not be overly intrusive given the benefits of enhanced accuracy in disclosure. At a minimum, such prior engagement would be useful in the event of a recommended "withhold" or "against" vote.

Surely it is desirable to take some practical, minimal mandated steps to ensure a higher degree of accuracy in proxy advisory reports and thus have greater, not less, accuracy concerning disclosure relating to reporting issuers. Apart from detracting from the goal of accurate disclosure, inaccurate reports are highly disruptive to issuers, meaning other investors in the company bear the cost of such disruption and the time and cost of correcting errors after reports are published, which could have been relatively easily avoided to begin with.

Corporate Governance Implications

The Consultation Paper raised as a potential concern perceived corporate governance implications, being that proxy advisory firms may have become *de facto* corporate governance standards setters. As a matter of our experience, we can attest to the fact that issuers in many cases seek to understand the criteria used by proxy advisory services in formulating policies or practices which relate to matters that will be subject to shareholder approval – which includes corporate governance practices generally, as these are used for determining director election votes.

However, we recognize that the shareholders who utilize proxy advisory services, as a matter of corporate law, as between themselves, the corporation and other shareholders, typically have the right to vote their shares on whatever basis they wish. (We recognize that the obligations of the institutional investors to their own clients may impose other standards). This being the case, the role for others in the formulation of these policies is legitimately limited.

Having said that, there is likely a useful role for mandatory consultation with other market participants, such as reporting issuers, regarding voting guidelines, so that, in developing policies which will ultimately guide votes of the shareholders who contract with proxy advisory services, both the proxy advisors and their clients can be aware of, and take into account as they see fit, issuers' perspectives and input with respect to such policies. Again, while we appreciate that this imposes some additional burden, we think it is minimally intrusive given what proxy advisory firms state they already do, and would provide benefits to all participants.

Conflict of Interest and Lack of Transparency

Our experience has also been that issuers have felt compelled to use the advisory services offered by proxy advisory firms – in some cases, perhaps because they believe (rightly or wrongly) they have to "buy" the recommendation. However, perhaps more realistically, and significantly, given the criteria and models used for matters such as compensation plans, and compensation policies subject to a "say-on-pay" vote, this may be the only practical way an issuer can determine whether there will be a favourable proxy advisory recommendation, which may be critical to determining levels of possible approval, which in turn is necessary for corporate decision-making as to types of plans, and compensation matters, to be put forward to shareholders for approval. This, accordingly, is to buy, not the result, but to buy, in effect, knowledge of the likely outcome as only that proxy advisory service may have the criteria and models needed to determine that information.

Accordingly, the concern regarding "conflict of interest" is of importance not just to the institutional investors who purchase the services of proxy advisory firms. If issuers, as a practical matter, find it appropriate to purchase the service of proxy advisory firms in connection with approval of corporate measures which require shareholder approval or for which such approval is sought (such as compensation plans or say-on-pay votes), shareholders, others than those who have contracted with the proxy advisory firm, are affected. Their funds are used to buy the services. The compensation policies, practices and plans to be adopted by the companies in which they have invested will be shaped by the proxy advisor's report. As well, the type of plans put forward may in whole or in part be shaped by the proxy advisory service's advice to the issuer.

A possible solution to this "conflict" may be found in addressing a related, separate concern identified in the Consultation Paper, relating to a lack of transparency on the voting recommendations. For example, it may be useful to consider some codification of practices such that proxy advisory services be mandated to disclose publicly all of their criteria and policies with sufficient clarity and information that an issuer can reasonably determine what a proxy advisor's recommendation may be, without being required to purchase their services.

Our experience has also been that proxy advisory firms have recommended "for" votes for certain plans or corporate actions, and, in the same proxy season, changed their recommendation for issuers who adopted identical plans or proposals to those which were supported. This leads to disruption and cost to issuers, their directors, and their shareholders and can be avoided by consistent application of disclosed policies.

It would appear to be not unreasonable, as a practical step, to mandate public disclosure of proxy advisor policies and practices sufficient for a reporting issuer to be able to determine a proxy advisor's recommendation on relevant matters, and to mandate that such policies and criteria be consistently applied, so that issuers can develop their plans and policies accordingly and allow issuers to appropriately describe to their shareholders their reasoning where their approach differs from the proxy advisory firms' voting guidelines. This would as a practical step would appear to benefit all market participants.

Yours very truly,

John M. Tuzyk

JMT/mtp

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