



April 01, 2003

Mr. Douglas Hyndman
Chair, Canadian Securities Administrators
c/o British Columbia Securities Commission
PO Box 10142
Pacific Centre
701 West Georgia St.
Vancouver, BC
V7Y 1L2

Dear Mr. Hyndman

**Re: National Instrument 54-101 - Communication With Beneficial
Owners of Securities of a Reporting Issuer**

On behalf of the Ontario Teachers' Pension Plan, I am writing in response to National Instrument 54-101 – Communication with Beneficial Owners of Securities of a Reporting Issuer. The Ontario Teachers' Pension Plan is responsible for the retirement income of 154,000 elementary and secondary school teachers, 89,000 retired teachers and their survivors, and 91,000 former teachers with entitlements in the plan. The plan had net assets of CDN \$66.2 billion at the end of 2002 and a long-term rate of return of 10.6% per year since 1990.

Teachers' has considered the impact of the changes introduced by National Instrument 54-101 (NI 54-101) to the shareholder communication and proxy processes. We understand that the changes to the processes were intended to give issuers greater access to their shareholders and increased control over the communication process. But we are very concerned that these aims may be achieved at the cost of reduced corporate governance standards. Two areas of the national instrument cause us particular concern:

- a) The disparate treatment of beneficial owners of shares depending on whether investors choose to remain anonymous¹ or consent to the disclosure of their names, addresses and shareholdings to issuers and third parties²; and
- b) Allowing issuers to use NOBO lists for sending proxy-related materials and tabulating votes for meetings after September 1, 2004.

¹ Investors who choose to remain anonymous under the National Instrument are termed Objecting Beneficial Owners (OBOs) because they object to the publication of their identities on a shareholder list.

² Investors who consent to the disclosure of this information are termed, for obvious reasons, Non-Objecting Beneficial Owners (NOBOs) under the National Instrument.

Different Treatment of NOBOs and OBOs:

The predecessor to NI 54-101, National Policy 41, was the CSA's response to a market environment in which a substantial majority of shareholders held their shares through an intermediary and, as non-registered shareholders, were being disenfranchised. NP 41 achieved its goals and ensured all shareholders received shareholder information and proxies from the companies in which they had invested, regardless of whether the investors were registered or non-registered shareholders. It did not discriminate in its treatment of beneficial owners based on whether they were OBOs or NOBOs. This approach complies with current international standards of corporate governance, such as the OECD *Principles of Corporate Governance* that mandate shareholders' rights to equal treatment with respect to receiving information and voting at shareholder meetings.

NI 54-101 treats the rights to shareholder information and proxies of NOBOs and OBOs differently³. NI 54-101 mandates that issuers must pay for delivery of proxy-related materials to NOBOs. However, NI 54-101 is silent about who must pay for delivery of shareholder information to OBOs, the natural inference being that OBOs will not get materials unless they agree to pay for delivery themselves. We believe that this disparate treatment takes Canadian compliance with international standards a step backward. A recent survey of international institutional investors conducted by McKinsey Consulting showed that sophisticated investors avoided markets where corporate governance standards were perceived to be weaker. This change in NI 54-101 may result in Canada being viewed negatively if all shareholders of Canadian securities are **not** treated equally

Further, the active involvement of shareholders in overseeing corporate decision-making has been widely recognized as an effective discipline on the corporate governance practices of public companies. (See, for example, the Myners Report: *Institutional Investment in the United Kingdom* and the US Securities and Exchange Commission initiative on disclosure of voting by investment companies) Effective investor activism requires shareholders receive relevant and timely information about important corporate actions and have the ability to take action by voting and asking questions at shareholder meetings.

Teachers' has come to the conclusion that the new National Instrument reduces the ability of the market to discipline corporate governance practices by disenfranchising OBOs not prepared to pay for the delivery of proxy-related materials. The latest study conducted by Fairvest⁴ indicates that, for the 2001 proxy voting season, the average voter turnout was approximately 63.3% of the eligible votes for companies in (what was) the TSE 300 Index. Past surveys have also shown that voter turnout at non-TSE 300 companies is even lower, ranging from 46% to 52%. Proxy returns in Canada are low already and this new Instrument may only reduce these numbers further. Larger investors tend to be OBOs, in order to trade in securities without causing undue market effects. As reported by a prominent service provider, OBOs own between 50% and 80% of the voting shares of most TSX-listed reporting issuers. The effect on proxy voting at some companies could be profound.

Fifteen years after the introduction of NP 41, and in a market environment where all institutional shareholders are pressing for higher corporate governance standards and greater adherence to international best practices, we are greatly concerned that this Instrument can have the effect of reducing some shareholders' ability to exercise their right to vote.

³ This information is defined as "proxy related materials" in NI-54-101 and includes "security holder material relating to a meeting that the reporting issuer is required under corporate law or securities legislation to send to the registered holders of the securities".

⁴ Fairvest: An ISS Company. Corporate Governance Review, v.14, no. 1 – December/January 2002.

Issuer Use of NOBO Lists for Sending Proxy-Related Materials to Shareholders:

For shareholder meetings after September 1, 2004, issuers may use NOBO lists to mail proxy-related materials directly to this class of beneficial owners. In our view, this practice will cause two serious corporate governance problems: (1) The anonymity of voting, which all beneficial owners currently enjoy, will be eliminated, and (2) The involvement of a valuable independent party in the process of sending proxy related materials and tabulating votes will also be effectively removed. The new Instrument effectively removes the checks and balances currently in the system that enhance the integrity of the proxy solicitation and vote tabulation process.

Under NP 41, all beneficial owners could vote their shares through their intermediaries with assurance that only aggregate voting information was disclosed to issuers. Asset managers, that otherwise might have a conflict of interest between their duty to clients and their desire not to antagonize a potential business source, could vote without fear that the issuer would know that the manager voted against a corporate proposal. After September 1, 2004, NOBO votes may go directly, on a disclosed basis, to the issuer and voting confidentiality will be lost. Again, we believe this change will put these conflicts of interest back into play and may increase the number of institutional investors that do not vote. Other shareholders may find themselves under pressure to change votes that do not support management positions.

Where the issuers send proxy-related material directly, they will also be responsible for tabulation of the votes received. Only OBOs who choose to pay for their own materials will have their votes tabulated by an independent party with no interest in the outcome of the voting process. Formerly, all beneficial owners got the benefit of this independence. The new National Instrument creates two classes of shareholders. It will also introduce significant additional complexity to the vote tabulation and reconciliation process, exacerbating the possibility of double counting of votes. This will only serve to further reduce the integrity of the voting process.

This change would put Canadian practices out of alignment with the comparable rules in the United States, where NOBO lists are accessible, but cannot be used for direct mailing of proxy-related materials by issuers. If this National Instrument is not amended significantly before September 2004, it will be impossible for Canadian regulators and market participants to make the case that Canadian corporate governance standards are equivalent to those in the U.S and elsewhere.

Summary

These changes to the manner by which Canadian beneficial shareholders receive proxies and have their votes tabulated are not consistent with international trends and do not improve corporate governance in Canada. There is a risk that this will damage the improving reputation of Canadian corporate governance standards in the eyes of global institutional investors. A key consideration in the investment decision-making process of institutional investors is an assessment of the quality of corporate governance practices – both at the corporate and country level. Any decline in Canadian standards should be avoided, especially by regulators.

Action

We believe that the CSA should undertake an immediate review of NI 54-101 to correct these issues that challenge shareholder rights, efficient proxy voting and effective corporate governance in Canada. We would welcome an opportunity to participate in that review process. In order to

minimize the damage that the new Instrument may cause until such a review can be completed, we would ask you to take immediate action to:

- a) Make it clear that it is the issuer's responsibility to ensure all shareholders have an equal opportunity to get proxy-related materials at no cost to the investor. In the absence of agreement from the intermediaries to pay for delivery, the issuer should be made responsible for those costs; and
- b) Do not implement the use of NOBO lists for direct mailing of proxy-related materials but, rather, extend the September 1, 2004 implementation date until the review is complete.

Sincerely,



Claude Lamoureux,
Chief Executive Officer

cc: Mr. Stephen Sibold,
Alberta Securities Commission
Canadian Coalition for Good Governance