

# Blakes Bulletin

## Securities Regulation

### Amendments Proposed to Improve Proxy Solicitation for Beneficial Owners

ROSS MCKEE

The Canadian Securities Administrators (CSA) have proposed changes to the proxy solicitation process. The changes include introducing the concept of providing proxy materials to beneficial owners through notice-and-access and improving the process by which a beneficial owner can be appointed a proxy holder to attend and vote at a meeting.

The amendments are proposed in a request for comments published with respect to National Instrument 54-101 – *Communication with Beneficial Owners of Securities of a Reporting Issuer* (NI 54-101) and consequential proposed amendments to National Instrument 51-102 – *Continuous Disclosure Obligations* and National Policy 11-201 – *Delivery of Documents by Electronic Means*.

#### NOTICE-AND-ACCESS PROCESS

For meetings that are not special meetings as defined in NI 54-101, reporting issuers would have the option of posting the information circulars on a website that is not SEDAR, such as the reporting issuer's own website or that of a service provider, and sending a notice to beneficial owners informing them that the proxy materials have been posted and explaining how to access them.

Use of the notice-and-access process is not mandatory. The notice-and-access process may be used if either the reporting issuer is sending proxy-related materials directly to non-objecting beneficial owners (NOBOs) or the materials are to be sent indirectly to beneficial owners through intermediaries. If a reporting issuer is sending the notice directly to NOBOs, it would also send a voting instruction form. If the notice is sent indirectly to beneficial owners through intermediaries, that intermediary will also send the voting instruction form.

These notice-and-access provisions in NI 54-101 would be limited to beneficial owners, because the ability to

use such a process for registered owners will depend upon whether that delivery method is allowed under the corporate law of the jurisdiction of incorporation of the issuer.

If a reporting issuer decides to use the notice-and-access method, the notices and voting instruction forms must be sent to beneficial owners at least 30 days before the meeting date. If a reporting issuer continues to send paper copies of the proxy-related materials, in lieu of notice-and-access, those paper copies must be sent to intermediaries on the current timing of at least three business days before the 21<sup>st</sup> calendar day before the meeting date. However, if a reporting issuer decides to send proxy-related materials to some beneficial owners through notice-and-access, while the materials are sent to other beneficial owners using paper copies, the paper copies must be sent on the same timing as the notice is sent for a notice-and-access process, i.e., at least 30 days before the meeting.

The proxy-related materials must be posted for access on the same day as the reporting issuer sends the notice.

Under the notice-and-access system, a news release must be issued at least 30 days before the meeting date providing the same information as is set out in the notice, and if notice-and-access is being used only in respect of some beneficial owners, an explanation of that decision.

A toll-free telephone number must also be provided for beneficial owners to request a paper copy of the information circular. Such request must be fulfilled within three business days of receiving the request.

If a reporting issuer sends proxy-related materials directly to NOBOs, the reporting issuer must maintain a record of each voting instruction form sent to the NOBO

CONT'D ON PAGE 2

#### Highlights

- Notice-and-access system optional for providing proxy materials to beneficial owners
- If used, notice and access must be provided at least 30 days before meeting date
- Expedited process for appointing beneficial owners as legal proxy

## Securities Regulation

CONT'D FROM PAGE 1

and the date and time of any voting instructions and proxy appointment instructions received.

Companion Policy 54-101CP will include tables illustrating the various methods of sending directly or indirectly to NOBOs and OBOs.

Reporting issuers that are SEC registrants will be permitted to use the U.S. notice-and-access procedures to satisfy these requirements.

The proposed amendments would not preclude a beneficial owner for consenting to the use of any other delivery method for proxy-related materials, such as receiving them by email.

### PROXY APPOINTMENTS FOR BENEFICIAL OWNERS

The proposed amendments would change the current process for obtaining a legal proxy for beneficial owners. Currently, if a beneficial owner wishes to obtain a legal proxy to attend and vote at a meeting, it must request the proxy from the intermediary. Then, when it receives the proxy form, the beneficial owner must sign and deposit it by the cut-off time.

Under the amendments, if a beneficial owner instructs the reporting issuer or intermediary who holds the proxy, as applicable, that the beneficial owner wishes to be appointed as the proxy holder, the reporting issuer or intermediary must arrange, without expense to the beneficial owner, to appoint the beneficial owner or its nominee as the proxy holder and to deposit the proxy by the cut-off time.

### ADDED DISCLOSURE IN INFORMATION CIRCULAR

Two items of disclosure have been added to the management information circular. First, if a reporting issuer does not pay for intermediaries to send proxy-related materials to objecting beneficial owners (OBOs), this must be disclosed in the information circular along with disclosure that it is the responsibility of the OBOs to make arrangements with its intermediary to exercise its voting rights.

Second, if a reporting issuer uses notice-and-access only in respect of some, but not all, beneficial owners, this must be disclosed in the information circular together with an explanation of this decision.

### STRICTER PROHIBITIONS ON USE BY THIRD PARTIES OF NOBO INFORMATION

Third parties will no longer be allowed to use the NOBO information and the indirect-sending procedures for "any other matter relating to the affairs of the reporting issuer." Instead, they will be limited to using that information and those procedures only for matters connected to an attempt to influence security-holder voting or an offer to acquire securities of the reporting issuer.

Other privacy concerns relating to notice-and-access would be addressed by prohibiting a reporting issuer from using any means to identify a person who has accessed the website address where the proxy-related materials are located. If a beneficial owner (either NOBO or OBO) requests a paper copy of the information circular, a reporting issuer would be prohibited from obtaining any information about the person making the request, other than its name and address, or disclosing or using that name and address other than for sending the paper copy.

### PROXY SOLICITORS MAY REQUEST BENEFICIAL OWNERSHIP INFORMATION

Under the proposed amendments, when a reporting issuer requests beneficial ownership information, it may do so through either a transfer agent (as currently) or another person who is in the business of providing services to assist companies soliciting proxies, if the reporting issuer has reasonable grounds to believe that the person has the technological capacity to receive the beneficial ownership information.

### REQUEST FOR COMMENTS

The CSA have set an unusually long comment period—until August 31, 2010. In addition to asking for comments on the amendments as proposed, the CSA have also posed a series of related questions around the choices reflected in the draft. In addition, the CSA have taken the opportunity to invite comment on all aspects of the entire proxy process by which votes are solicited, submitted and tabulated, including the integrity of the proxy voting system as a whole, and whether there are any particular areas that require attention or reform.

If you have any questions concerning the proposed amendments, please contact Ross McKee at 416-863-3277 or [ross.mckee@blakes.com](mailto:ross.mckee@blakes.com) or any other member of our Securities Group.

Go to [blakes.com/english/subscribe.asp](http://blakes.com/english/subscribe.asp) to subscribe to other Blakes Bulletins.

Blakes periodically provides materials on our services and developments in the law to interested persons. If you do not wish to receive further bulletins or other materials from Blakes, please contact Blakes Marketing Department at 416-863-3036 or [dorothy.byers@blakes.com](mailto:dorothy.byers@blakes.com). For additional information on our privacy practices, please contact us at [privacyofficer@blakes.com](mailto:privacyofficer@blakes.com). *Blakes Bulletin* is intended for informational purposes only and does not create a lawyer-client relationship. The transmission of this information does not suggest Blakes or any of its lawyers are practising law of any jurisdiction other than Canada. The information provided in this bulletin is summary in nature and does not constitute legal advice. We would be pleased to provide additional details or advice about specific situations if desired. For permission to reprint articles, please contact Blakes Marketing Department at 416-863-2403 or [lynn.spencer@blakes.com](mailto:lynn.spencer@blakes.com). ©2010 Blake, Cassels & Graydon LLP.