



# Securities Transfer Association of Canada

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Dear Sirs:

RE: Capital Markets Modernization Taskforce  
Consultation Report – July 2020 (the “Report”)

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The Securities Transfer Association of Canada (STAC) welcomes the opportunity to respond to the Capital Markets Modernization Taskforce Consultation Report that was published in July of 2020, and are pleased to have had the opportunity to be involved in the stakeholder consultations. We believe that the proxy system in Canada is broken and inefficient, and requires extensive work in order to function in such a way that it provides benefit to the parties that must use it. Most importantly, the proxy system does not currently serve the purposes of the two most important parties in the process: the issuer, who must communicate with and receive votes from their security holders, and the security holders, who must be able to vote to ensure that their voices are heard. STAC would be pleased to work with the Taskforce through the mechanics and reporting requirements as a key next step to implement an effective modernization program that will benefit issuers and security holders.

## **Background**

STAC is a non-profit association of Canadian transfer agents that, among others, has the following purposes:

- To promote professional conduct and uniform procedures among its members and others;
- To provide membership to firms engaged as transfer agents or registrars in the field of the issuance, transfer and registration of securities and associated functions;
- To study, develop, implement and encourage new and improved requirements and practices within the securities industry;
- To assist its members with problems of a technical or operational nature;

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- To develop solutions to complex industry-wide problems;
- To provide a forum and to act as a representative and spokesperson for the positions and opinions of its members, and, where appropriate, its clients and the holders of securities;
- To provide its members and others with information and comments of an educational and technical nature relating to the securities transfer and corporate trust industry;
- To exercise any and all powers required to meet the needs and the obligations of the association; and
- To ensure that its activities in relation to these purposes are communicated to all its members.

STAC is focusing this response on the specific items that are relevant to its members and their clients and security holders. We have used the numbering provided in the Report and included the question posed for ease of reference:

*9. Transitioning towards an access equals delivery mode of dissemination of information in the capital markets, and digitization of capital markets.*

STAC supports the implementation of an access equals delivery model as a way of streamlining communications with security holders and providing benefits and efficiencies to the process, including reduced printing and mailing costs, and reduced environmental impact. We also believe, however, that within the current system, certain forms of communication would be appropriate for an access equals delivery model, and others would not.

Material that could transition to an access equals delivery model would be any document that does not require the security holder to take some form of action or provide a response back to the transfer agent, issuer, or other mailing agent. This would include annual or quarterly financial statements and related Management Discussion and Analysis, management report of fund performance, and a prospectus, as proposed in the Report.

When the Canadian Securities Administrator (CSA) issued Consultation Paper 51-405 *Consideration of an Access Equals Delivery Model for Non-Investment Fund Reporting Issuers* (CP 51-405), the proposal was much broader and requested comments on the possibility of including documents such as rights offering circulars, proxy-related materials, and take-over bid circulars and issuer bid circulars. At the time, STAC issued a comment letter that included our concerns about including these types of documents, which is available [here](#). We agree with the initial approach proposed in the Report, where these documents have not been included at this point.

*26. Require the use of universal proxy ballots for contested meetings where one party elects to use a universal ballot, and mandate voting disclosure to each side in a dispute when universal ballots are used.*

STAC supports the use of a universal proxy for contested meetings. A universal proxy allows the security holder to easily vote for a combination of nominees from both the management and dissident slates without having to attend the meeting and vote in person.

STAC believes that it is important, however, that a universal proxy include proper and complete instructions to assist security holders with the execution of their proxies. Universal proxies can be confusing for security holders who are not familiar with some of the more detailed processes involved in proxy tabulation. These may include the nominee process, who will have the right to vote on amendments or new motions properly brought forward at the meeting, or how to ensure that the proxy is not spoiled by inadvertently voting for more nominees than there are positions available on the board.

It is important for a security holder to understand how to vote for the director nominees that they would like to see elected to the board. A universal proxy includes both the management and dissident nominees, so there are therefore more nominees on the proxy than there are board seats available. It is very easy for a security holder to vote for more nominees than they are allowed to, which may invalidate all votes on that motion. In January of 2016, STAC amended Proxy Protocol to include guidelines on tabulation of universal proxies, and as it is impossible to determine which votes should stand in this particular situation, the guidelines state that all votes are rejected.

Despite the use of the word “universal” in the name, universal proxies distributed by management and dissident groups will not be identical. The board nominees may be “universal” but many other aspects of the proxies are not. Some of the differences between management and dissident universal proxies include:

- The voting recommendations – these will vary, depending on whether a universal proxy was delivered by management or the dissident. As a result, a universal proxy that has been voted as recommended will have a different outcome, depending on whether it is a management or dissident form.
- The names of the appointees – the appointees are the individuals named on the proxy who are appointed as the proxyholder and will cast the votes at the meeting, as directed on the proxy. On a management universal proxy, these named individuals will be management appointees, and on a dissident universal proxy, they will be dissident appointees. A security holder who has fully executed a proxy must have their instructions followed, however if some motions are left blank or not completely voted (for example, only four director nominees have been voted for when there are six board seats to be filled) a management nominee may cast any discretionary votes in a different way than a dissident nominee.
- The proxy cut-off, the time by which a proxy must be deposited to be valid, will vary between the management and dissident universal proxy. The dissident group needs to ensure that any proxies delivered to them are reviewed and then provided to the official tabulator prior to the management proxy cut-off. As a result, the cut-off on a dissident universal proxy will be earlier than on the management universal proxy.
- The management or dissident universal proxy may have motions that are not included on the other proxy.

The proposal to mandate ongoing disclosure of voting tallies to issuers and dissidents is not as straightforward as it appears. In a dissident situation, the official tabulator, who is agent to the issuer, typically only has access to the management proxies that are returned. Dissident proxies

are generally deposited with the dissident group, and are not provided to the official tabulator until just before the management proxy cut-off. At that point in time, the tabulator must review and compare all proxies received and ensure that for registered security holders there are no duplicate votes received, and for intermediary positions, that there are no overvotes. Multiple proxies from a registered holder result in the latest dated valid proxy being tabulated, and overvoted intermediary positions are managed using the methodology approved by the meeting chair. If there is to be ongoing disclosure of voting tallies, this process of tabulating votes will fundamentally change, and, although there will be greater transparency for both sides, there may also be strategic concerns if the votes received are visible to each side throughout the process.

*29. Introduce rules to prevent over-voting.*

As stated in the Report, “Over-voting occurs when a meeting tabulator does not have documentation establishing that an intermediary submitting proxy votes is entitled to vote as of the meeting record date.”

Transfer Agents act as tabulator for the majority of public issuers’ security holder meetings. Tabulators establish the right to vote on record date by creating voting accounts for intermediaries based on documentation received, including omnibus proxies from CDS & Co. and the Depository Trust Company (DTC), the Canadian and US depositories, respectively. These omnibus proxies reallocate the voting rights from the depositories to the intermediaries that hold securities in the depository on record date. The voting rights that are allocated to intermediaries can then be further allocated to other intermediaries, if the tabulator receives the appropriate paperwork. There are a specific number of shares outstanding for a public issuer on record date, and a tabulator is responsible for ensuring that each holder or intermediary only votes the number of shares that are allocated to them. For registered security holders, where the transfer agent maintains the records, this is a straightforward process, as the records are fully reconciled on record date, and a position cannot be voted twice. Intermediary positions, however, represent multiple beneficial security holders, the details of which a transfer agent does not have access to, either for distribution of material or tabulation of votes. When valid proxies are received from an intermediary, the number of voting rights that have been allocated to that intermediary are drawn down. Is it not uncommon for more votes to be received than there are voting rights allocated, in other words, over-voting. Without visibility to the underlying beneficial security holder records, it is impossible for a transfer agent who is tabulating proxies to reconcile these votes and ensure that only beneficial security holders who held securities on record date are voting.

Although we appreciate the proposal that an intermediary must not submit proxy votes unless it has confirmed that vote entitlement documentation has been provided to the reporting issuer’s meeting tabulator, the reality is that an intermediary does not generally cast votes on behalf of the beneficial holders. Most intermediaries have outsourced the distribution of proxy material and tabulation of beneficial security holder votes to a third party agent, Broadridge, and the beneficial holder submits voting instructions directly to Broadridge. An intermediary does not know when a beneficial holder has cast their vote.

STAC believes mandatory reconciliation of all security holder records on record date is key. If this critical change is implemented, it will assist with the elimination of over voting. Any entity holding records of investors should be required to reconcile their data on record date. This includes not just reconciliation to their internal books, but also reconciliation to the positions held either as a direct participant in a depository, or indirectly in a depository through another intermediary. This

process would also include a requirement for any intermediary holding shares on behalf of another intermediary to provide proper documentation reallocating the appropriate number of voting rights. STAC does not believe that reconciliation is consistently occurring at this level, as evidenced by the levels of over-voting that continue to occur at meetings held by issuers in Canada including Ontario. Although reconciliation of records is covered in Section 4.3 of the Companion Policy to National Instrument 54-101 *Communication with Beneficial Owners of Securities of a Reporting Issuer* (NI 54-101), there is no direct obligation or enforcement connected with reconciliation, or any type of certification to be provided to the issuer that it has taken place. The reconciliation process should also require that any lent share positions are appropriately flagged, and the entity that holds the voting right is identified. This would ensure that only security holders who have an economic interest in the company are provided with meeting material and the right to vote. It will also ensure that each security holder on record date has a position allocated to them that represents the number of shares that they hold on record date, against which their vote, and only their vote, will be tabulated. This position cannot be “lent” or “reassigned”, ensuring that only the party that holds economic interest in the securities has the right to vote.

It is also important to note that NI 54-101 allows beneficial holders to indicate the type of material they wish to receive. They can be coded either as A – receive All Material, S – Receive material for Special meetings only, or D – Decline to receive all material. For a typical annual meeting, this means that material is only provided to beneficial holders with the “A” coding on their account, and any holder coded with “S” or “D” does not receive material. This does not mean that these holders have declined their right to vote or authorized its reallocation. These holders can contact their intermediary to receive material and vote, and they must continue to have the number of securities they own allocated to them on the record date list, to ensure that their voting rights are still available to them. Without transparency to the beneficial security holder records, the issuer and their agent have no way of knowing how these positions are being managed.

STAC supports the concept of a communication process when a tabulator cannot tabulate votes because an intermediary position has been over-voted, often referred to as vote confirmation, however if mandatory reconciliation is implemented, as discussed above, the incidents of over-voting should decrease dramatically. CSA Staff Notice 54-305 *Meeting Vote Reconciliation Protocols* (SN54-305) sets out voluntary best practices to be followed in this situation; however, the reality is that a manual process of notification, which is currently all that is available, is not viable when tabulators and intermediaries are managing multiple meetings concurrently. Often, even if notifications do occur, there is insufficient time for research and corrections to be completed by the intermediary and tabulator prior to proxy cut-off. We would also note that the proposal, as set out, does not specify whether notifications should occur immediately upon identification, or post meeting, both of which are referenced in SN54-305.

The past work by the CSA has placed responsibilities for managing over-voted positions with the party that is tabulating the voting results on behalf of the issuer, which is, in the majority of cases in Canada, the transfer agent. The transfer agent is involved in the beginning of the process, assisting the issuer with certain processes that facilitate the mailing of material to beneficial holders, and at the end of the process, tabulating votes returned by the intermediaries on behalf of the beneficial security holders. Transfer agents do not, however, have any insight into the records that are behind the intermediary and are therefore not in a position to identify why the over-vote occurred.

STAC supports the proposal to require a reporting issuer to obtain the DTC omnibus proxy and provide it to the proxy tabulator. The lack of a DTC omnibus proxy results in the rejection of a majority of votes received from intermediaries in the United States because of the inability of the tabulator to create the intermediary voting positions. This is a simple case of missing paperwork, which continues to be an ongoing issue.

*30. Eliminate the non-objecting beneficial (NOBO) and objecting beneficial owner (OBO) status, allow issuers to access the list of all owners of beneficial securities, regardless of where securityholders reside, and facilitate the electronic delivery of proxy-related materials to securityholders.*

STAC supports the proposal to remove the NOBO / OBO status in Canada and allow issuers to have access to certain details of all of the beneficial owners of their securities, and solicit voting instructions from them directly. STAC also supports the proposal to require the pass through of any email addresses and consent to delivery of material electronically to the mailing agent that has been selected by the issuer.

Prior to the creation of securities depositories to hold intermediary positions, and the move toward beneficial ownership, issuers had the ability to know who their security holders were, and could communicate with them directly. Trading volumes necessitated the creation of depositories for market efficiencies; however, the processes for communicating with security holders were not prioritized. As a result, the process in place under NI 54-101 that issuers must use when completing mandatory communications with their beneficial holders is complex and inefficient, and issuers are required to use service providers that they do not contract with directly. In addition, when a beneficial holder wishes to vote, that information must work its way back through the system to the issuer, and that process is fraught with difficulties, and reliant on the tabulator's receipt of paperwork from depositories and intermediaries that is beyond the control of the security holder, issuer, or tabulator. As discussed previously, this results in Canadian issuers and their tabulators dealing with over-voting of many intermediary positions, and therefore over-voting on many holder meetings. The result is that security holder votes are not being tabulated.

Under the current system, in order for an issuer to communicate to their investors about their voting rights, and, in turn, receive the investor's voting instructions, they must go through multiple steps, and work with parties that they do not have the ability to contract with directly. The intermediaries who hold the beneficial holder records can either provide material and solicit votes directly from their clients, or outsource the process by selecting the mailing provider that they want to work with. Although NI 54-101 imposes obligations on the issuer, depository, and intermediaries, some of the responsibilities connected to the obligations of the intermediaries have been outsourced, and these agents, and the fees they charge for data and mailings, are not regulated. In Canada, the vast majority of intermediaries outsource their mailings to Broadridge. As the beneficial holder data passes through Broadridge this allows them to set fees for the data at the rate that they unilaterally deem is appropriate. STAC proposes that the fee for data must be regulated and set at a reasonable rate, allowing issuers to effectively access this information, or the system must be set up in such a way as to ensure that there is open competition for mailings, which will allow the market to determine the appropriate fee for the data.

The move toward electronic communications with security holders has also been rendered inefficient when issuers opt to mail directly to their NOBO holders. If an intermediary has received a consent for electronic delivery, Broadridge does not pass this through to the issuer or their


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agent, as the consent has not been made to these parties. This eliminates the option of an issuer electronically delivering material to NOBO holders, which results in higher print and mailing costs, and reduced security holder satisfaction, as they are no longer receiving material in the way they have selected.

The current system allows beneficial holders to elect for the types of mailing they want to receive, and STAC does not believe there is any reason that should change. It allows beneficial holders to select to receive all mailings, only mailings for special meetings, or decline to receive all material. The issuer has the ability to override these options and distribute material to all beneficial holders, and that option should remain. STAC believes that issuers should have the option for distributing material directly to all beneficial holders for M&A events such as a plan of arrangement, offer, or take-over bid, but specific processes will be required to ensure that beneficial holders can make the appropriate elections. Their shares will continue to be held through an intermediary account at a depository, which requires any elections to be made through the intermediary. A beneficial holder cannot make elections directly to their issuer or their agent, as they are not in possession of a share certificate or direction registration advice.

STAC appreciates the opportunity to provide our comments on this Report, and we would be pleased to respond to any further questions the taskforce may have.

Sincerely,



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