INVESTMENT INDUSTRY ASSOCIATION OF CANADA
ASSOCIATION CANADIENNE DU COMMERCE DES VALEURS MOBILIÈRES

Andrea Taylor
Legal and Policy Counsel

SENT VIA E-MAIL

June 27, 2008

Winnie Sanjoto
Senior Legal Counsel, Corporate Finance Branch
Ontario Securities Commission
20 Queen Street West, Suite 1903
Toronto, ON M5H 3S8

Dear Ms. Sanjoto:

Re: National Instrument 54-101 ("NI 54-101") Stakeholder Consultations

The Investment Industry Association of Canada ("IIAC") is writing this letter on behalf of our members to follow up on the discussions that took place at the stakeholder consultation meetings we attended on January 29, 2008 and June 11, 2008.

At the meetings, the IIAC NI 54-101 Working Group (the "Working Group") and the attendees from Broadridge Investor Communications Inc. ("Broadridge") identified a number of issues that greatly impede the effectiveness of NI 54-101 and that create inefficiencies throughout the investment process for both registrants and securityholders. While this letter may make reference to some of the statistics provided to the CSA and the IIAC by Broadridge, we do not purport to represent the interests of Broadridge, although we do recognize that we share their concerns in a number of areas. The identification of issues and recommendations made below reflect the observations and expertise of the Working Group, whose members represent most of the largest securities dealers in Canada.

Basic Principles of NI 54-101

In general, the IIAC believes that the following principles (as enumerated in the Companion Policy to NI 54-101) are important in guiding the review of the rule and should be the driving force behind any changes contemplated by the CSA:

- all securityholders, whether registered or beneficial, should have the opportunity to be treated alike;
- efficiency should be encouraged; and
- the obligations of each party in the shareholder communication process should be equitable and clearly defined.

We would add the following fundamental principles:

- securityholders should be entitled to choose how their personal information is used and disseminated, and they should determine the type and form of information they would like to receive;
- securityholders should not be penalized for choosing to protect their personal information, by paying for the mailings that would otherwise be paid for by the issuers;
- once made on an informed basis, securityholder choices should be respected and protected by every party in the shareholder communication process;
- issuers, not securityholders or intermediaries, should bear the cost of communicating with securityholders; and
- wherever possible, efficiency should be enhanced through the use of electronic technology to increase access to information and decrease waste.

It is the IIAC's contention that there are elements within NI 54-101 that do not follow these basic principles, resulting in reduced efficiency and effectiveness. We will identify the main areas in which we believe that inefficiencies have had the greatest impact on our members and their clients, and will provide recommendations on how these problems might be addressed by amending portions of NI 54-101.

We believe that all of these issues are interrelated and that it would be most practical for the CSA to broadly consider all of the inefficient aspects of NI 54-101 as it is currently drafted. If the CSA enacts changes that correct only some of the identified problems, the effectiveness of the changes may be reduced or negated entirely, and an opportunity to vastly improve upon the shareholder communication process in Canada may be wasted.

Unwanted Mailings Affect the Efficiency of the Beneficial Shareholder Communication Process

The Issue

Prior to the CSA's decision to review NI 54-101, IIAC members had already expressed their collective frustration with the unwanted mailings being delivered to their clients by issuers, despite the explicit instructions of those clients declining to receive shareholder materials. A letter from a member firm to the IIAC put this problem into perspective by disclosing the results of an informal experiment conducted by one of its advisors, who collected over 25 pounds of shareholder communications materials in a single month for an account that was coded to receive no materials.

In general, the portion of these unwanted mailings that can be traced back to Canadian issuers can be directly attributed to provisions contained in NI 54-101 (sections 2.10 and 4.3), which allow reporting issuers and intermediaries to send securityholder materials against the instructions of beneficial holders who have elected on their Client Response Forms to decline all shareholder mailings. Essentially, these provisions allow the reporting issuer to override the explicit instructions of the securityholder. It is not clear whether issuers consciously choose to override the instructions of securityholders, or whether unwanted mailings may be the unintended result of a lack of understanding on the part of reporting issuers, their counsel and their transfer agents as to how NI 54-101 works in practice, and the effect of their mailing decisions on beneficial securityholders.

However, what is clear is that between July 2007 and May 2008, over 472,000 securityholders who elected not to receive mailed materials were in fact sent materials by over 550 reporting issuers who chose to override the securityholders' decisions.[1] This causes frustration and confusion among the investing public, and wastes valuable money, time and resources to create and mail documents which are often discarded as soon as they are received.

We are also greatly concerned by the information disclosed at the June 11 meeting that one Canadian transfer agent does not factor the investor's choice relating to mailings into its process, and routinely mails out all materials to all shareholders, regardless of what has been recorded on the Client Response Form.[2] In our opinion, such a blatant disregard of investor choice as allowed under NI 54-101 is not acting within the spirit or intent of the rule and should not be allowed to continue.

Loss of Investor Confidence

IIAC members have identified a discernable link between this issue and a drop in investor confidence, as evidenced by the Working Group's collective experience dealing with client complaints about unwanted mailings. The sending of unwanted mailings is highly detrimental to the relationship between the client and the advisor, as the client misinterprets the receipt of materials as a failure on the part of the advisor, the investment firm, and its employees to correctly identify and carry out the client's instructions. In the experience of our members, investors who choose not to receive materials are aware of the consequences of their choices, and in their frustration will follow up with complaints to their advisors, who may be their only point of contact in the investment industry.

The reality is that the decision to override the instructions of the investor is made by the reporting issuer, and the advisor is powerless to stop the unwanted mailings or to influence the mailing decision of the reporting issuer. However, this is a difficult and cumbersome explanation to make to investors who, despite the language included on the Client Response Form (which may have been completed months or years earlier) may not remember, understand or care that the reporting issuer has been given the right to override their mailing choices.

Investors take the fact that they continue to receive an abundance of shareholder communications as a clear indication that the industry and its regulators are not listening to their concerns, and raises a question in the mind of the investor as to whether or not other instructions are being followed or disregarded by the advisor. Consequently, the investor loses confidence in the investment industry as a whole, a situation that could, when viewed in the aggregate, have a widespread adverse effect on the marketplace.

Obligations of Intermediaries

The IIAC recognizes the CSA's concerns about situations in which special business may require the attention or action of the beneficial securityholder, or where securityholders that have opted not to receive mailings decide that they would like to receive materials or

[1] "National Instrument 54-101: IIAC's Areas of Interest", presentation by Broadridge Investor Communication Solutions Canada to the IIAC and CSA, June 11, 2008, p. 8.
[2] *Ibid.* at p. 8.

vote on a special matter. In this matter, we respectfully submit that Section 4.7 of the Companion Policy to NI 54-101, reiterates the obligation that intermediaries have to the beneficial owners holding through them which "arise from the nature of the relationship between the intermediary and the beneficial owners". Our members take very seriously their obligation to advise their clients about the commencement of special matters such as take-over bids, issuer bids, and other events, and are often the first point of contact for beneficial owners who are seeking shareholder materials or information about extraordinary circumstances that have come to the attention of the shareholder, whether through the advisor or through another avenue, such as the media.

Our members have voiced their concerns about their inability to assist these shareholders because of the cumbersome nature of the omnibus proxy process that requires non-objecting beneficial shareholders to deal directly with transfer agents to obtain legal proxies. Where omnibus proxies have been granted to the reporting issuer through the requirements of NI 54-101 to vote on behalf of shareholders, a provision has been granted that shareholders may request a legal proxy from the reporting issuer, though its transfer agent. Our members have reported that they have received numerous complaints from clients who have been denied legal proxies through a lack of understanding of the process, poor service from transfer agents, or insufficient time to process the request prior to the shareholder meeting.

It is our contention that a more thoughtful and effective way of dealing with this disenfranchisement is for the CSA to review and amend the process that currently takes place between depositories, intermediaries, reporting issuers and their transfer agents, to ensure that the beneficial shareholder has one point of contact where the shareholder engages directly in the voting process, and enough time to successfully request and receive a legal proxy. Preferably, this point of contact should be the advisor with whom the investor typically communicates. Sending unwanted mailings to all shareholders is not an effective answer to this problem, especially where the beneficial shareholders will likely be confused as to why the mailing is being received, and as to the process that will have to be undertaken to actually vote on the matter or attend the meeting.

Environmental Impact

A related issue that is increasingly important to investors is that of the environmental impact of unwanted mailings. In an era where Canadians are striving to reduce their environmental footprint, the amount of unwanted mailings – leaving aside for the moment the issue of providing electronic access to those beneficial holders that want to receive the information – represents a huge waste of raw materials and energy. In addition, reports are often packaged in plastic shrink-wrap that cannot be recycled. The Canadian investment industry and its regulators have an obligation to take a principled stand on this matter and reduce the amount of waste that is generated by its participants. One way to begin this process is by eliminating the amount of unwanted mailings currently sent to investors.

Inherent Inefficiency of NI 54-101

The ability of the reporting issuer to override the instructions of the investor also represents a gross inefficiency created by the inconsistency in the rule itself, as a large portion of NI 54-101 Part 3 and Form 54-101F1 is designed to obtain the beneficial owner's instructions. The reporting issuer should not be able to simply instruct

intermediaries to ignore these instructions once they have been given freely by an investor who is informed of the consequences of the choice. It is absurd to require the investor to take the time to complete the Client Response Form, provide the investor with the opportunity to decline securityholder materials, while simultaneously including language in the Form that a reporting issuer may still send the investor the materials in any event, despite the choices that the investor has just made.

It is not apparent why the sections allowing the reporting issuer to override the mailing choices of investors were included in NI 54-101 (and in its predecessor National Policy Statement 41 *Shareholder Communication*), and what purposes they intend to serve. While an argument can be made that these provisions allow reporting issuers to ensure that their securityholders are made aware of crucial information, this argument is weakened by the fact that many investors who have chosen not to receive mailings have relationships with full service investment firms, and have developed relationships with trusted advisors. These investors expect to receive notice and guidance on important matters from their advisors, and trust that when they choose not to receive materials, that these choices will be respected and followed. Why should a reporting issuer have the ultimate authority over whether the beneficial investor receives the information when the investor has already declined in accordance with the Forms provided by NI 54-101?

The Recommendation

We recommend that sections 2.10 and 4.3 of NI 54-101 simply be amended by removing the clauses that allow reporting issuers to override the choices of investors. This will allow the rest of the rule and the forms to remain in place, and will eliminate the provisions that permit offending unwanted mailings to emanate from Canadian reporting issuers. If an investor completes the Client Response Form and chooses not to receive securityholder materials, or chooses to receive only certain materials, this instruction must be followed by those parties carrying out the mailing of materials, including the reporting issuer.

Specifically, we recommend amending section 2.10 as follows:

> 2.10 Sending securityholder materials against instructions – Except as required by securities legislation, no reporting issuer that uses a NOBO list to send securityholder materials directly to NOBOs on the NOBO list shall send the securityholder materials to NOBOs that are identified on the NOBO list as having declined to receive those materials. ~~unless the reporting issuer has specified in the request for beneficial ownership information sent under section 2.5 in connection with the sending of materials that the securityholder materials will be sent to all beneficial owners of securities.~~

We also recommend amending section 4.3 as follows:

> 4.3 Sending securityholder materials against instructions – An intermediary that receives securityholder materials that are to be sent to a beneficial owner of securities shall not send the securityholder materials to the beneficial owner if the beneficial owner has declined in accordance with this Instrument to receive those materials. ~~unless the reporting issuer has specified in the request for beneficial ownership information sent under section 2.5 in connection with the sending of~~

~~the securityholder materials that the securityholder materials shall be sent to all beneficial owners of securities.~~

The removal of these provisions would require a corresponding amendment to Form 54-101F1. Specifically, in the "Explanation to Clients", the Note at the end of the section entitled "Receiving Securityholder Materials" would have to be removed.

If the CSA is contemplating more comprehensive changes to NI 54-101, we would recommend that any revision of the rule must take into consideration these proposed amendments, and not allow for mailings (either in paper or electronic form) to those beneficial shareholders who have chosen not to receive mailings on a Client Response Form. If the CSA is of the opinion that beneficial shareholders must receive mailings in relation to special business, we would recommend that an alternative model of communication, consisting of a one-page notice advising the investor of the special business, and acknowledging that the mailing is being sent against the wishes of the investor because of the special nature of the business, be utilized as a reasonable alternative to the voluminous mailings currently being produced (see Alternative Methods of Material Delivery, below).

The IIAC acknowledges that in addition to this Canadian component, there is a large volume of shareholder materials delivered from U.S. issuers to their Canadian securityholders (over 4.7 million proxy packages in the past year alone[3]), however, we believe that it is up to the CSA to begin the process of reducing the amount of unwanted mailings to Canadians by making the proposed amendments.

NI 54-101 Creates Unintended Obstacles for Beneficial Shareholders Who Wish to Participate in Shareholder Meetings

The Issue

As mentioned above, the IIAC also strongly believes that where beneficial shareholder clients choose to opt into the communications and voting process, these clients are entitled to receive shareholder materials. Investors are increasingly interested in protecting their personal information, which means that they are opting to be "objecting beneficial owners" (OBOs). According to Broadridge, 54% of beneficial securityholders are now designated as OBOs, compared with only 38% in 2005.[4]

Currently, NI 54-101 is silent with respect to which party should pay for the sending of shareholder materials to OBOs who would like to receive the materials if both the reporting issuer and the shareholder opt not to pay for the mailing. In these instances, there are typically two results that occur – either the intermediary pays for the mailing to its OBO client, or the intermediary decides not to pay for the mailing, in which case, the OBO does not receive the materials. The rule in effect almost ensures that the OBO will not receive the materials, by leaving doubt as to how the situation should be handled. It is only in cases where intermediaries (who are not required to pay for the mailings) agree voluntarily to pay for the mailing costs that these OBOs receive any materials at all.

[3] *Ibid*. at p.7.

[4] *Ibid*. at p. 10.

Ironically, NI 54-101 quite clearly states in Section 2.14 that the reporting issuer must pay for mailings that are sent to OBOs who have declined to receive materials, allowing reporting issuers to send (and pay for) unwanted mailings to securityholders who do not want to engage in the voting process, while simultaneously disenfranchising others who do want to receive materials, but only wish to limit the dissemination of their personal information.

Respectfully, there is no reason why the rule should be silent in this regard, when in all other instances, the reporting issuer pays for the mailing. Rule 14a-13 under the U.S. Securities Exchange Act of 1934 clearly requires U.S. registrants to pay the "reasonable expenses for completing the sending of (proxy soliciting) material to beneficial owners",[5] and it is our contention that NI 54-101 should be amended to follow this model. Where an OBO chooses to receive material but suppresses the distribution of his or her personal information, there is no reason why the reporting issuer should not also be responsible for paying for the mailing. Neither the securityholder nor the intermediary would be charged for the mailing in any other circumstance, so to force either of them to pay in this case would be patently unfair in light of the other provisions.

The Side Effect of Costs to Intermediaries

An unintended, but substantial, side effect of the silence in NI 54-101 as to the payment for mailing to non-declining OBOs is the increasing cost to intermediaries who frequently pay for the mailings, despite the fact that they are not required to do so under the rule. Between July 2007 and May 2008, intermediaries paid for mailings to over 278,000 investor accounts where neither the investor nor the reporting issuer was willing to pay for the costs.[6] Over this same period, over 136,000 investor accounts received no mailings and were effectively shut out of the beneficial communication process. And since these numbers reflect only investor *accounts* which likely contain multiple holdings, these numbers may actually be much larger in terms of cost to intermediaries and lost votes from investors.

The Recommendation

NI 54-101 must endeavour to treat NOBOs and OBOs similarly regarding shareholder communications and must explicitly set out that payment for OBO mailings is the responsibility of the reporting issuer who wishes to communicate with its investors.

Specifically, we recommend amending section 2.14 as follows:

> 2.14 Fee for sending materials indirectly – (2) A reporting issuer that sends securityholder materials, indirectly through a proximate intermediary, to OBOs ~~that have declined in accordance with this Instrument to receive those materials~~, shall pay to the proximate intermediary, upon receipt by the reporting issuer of a certificate of sending to OBOs in accordance with the instruction specified by the reporting issuer in the request for beneficial information
>
> (a) a fee for sending the securityholder materials to the OBOs;

[5] Rule 14a-13 (a)(5).
[6] Broadridge, June 11, 2008 at p. 11.

(b) the actual cost of any postage incurred by the proximate intermediary in sending the securityholder materials to the OBOs in accordance with any mailing instructions specified by the reporting issuer in the request for beneficial ownership information; and

(c) if the securityholder materials were sent by mail other than first class mail in accordance with the mailing instructions specified by the reporting issuer in the request for beneficial information, the reasonable additional handling costs associated with the preparation by the proximate intermediary of the securityholder materials for mailing to OBOs.

The IIAC believes that amending this provision as recommended will not only benefit our members by reducing the burden of paying for mailings which rightfully should be paid by reporting issuers, it will improve the effectiveness of NI 54-101 by allowing OBOs to take part in the communication and voting process. Again, if the CSA is contemplating more comprehensive changes to NI 54-101, we would recommend that any revision of the rule consider and incorporate these proposed amendments.

Alternative Methods of Material Delivery

The IIAC is supportive of the CSA's exploration of alternative methods of delivering materials to beneficial shareholders, including the investigation of the U.S. Notice and Access Model and "Householding", and the encouragement of e-delivery. We would likely endorse any model that reduces waste, increases investor participation and speed of delivery and ensures the integrity of the voting process. However, this endorsement would assume that any new model of delivery being considered by the CSA would also respect the basic tenets that we set out at the beginning of this submission. Any new model of delivery must ensure:

- that investor instructions relating to the receipt of materials is respected and followed, including the choice of the investor not to receive materials;
- that the cost of sending materials to beneficial shareholders is to be borne by the reporting issuer sending the communications, regardless of method of delivery; and
- that the beneficial shareholder's private information should be controlled by the intermediary with whom the shareholder has an established relationship, and not by the reporting issuer.

In closing, the IIAC and the Working Group would like to thank the CSA for allowing us to provide our input and recommendations during the stakeholder consultation process. We would be happy to provide the CSA with any other information or clarification required as the review process continues during the upcoming months.

Sincerely,

"Andrea Taylor"

Andrea Taylor
Legal & Policy Counsel
Investment Industry Association of Canada

Cc: Celeste Evancio, Alberta Securities Commission (via e-mail)
Lucie Roy, Autorité des marchés financiers (via e-mail)
Alison Dempsey, British Columbia Securities Commission (via e-mail)
Donna Gouthro, Nova Scotia Securities Commission (via e-mail)
Ian Russell, IIAC (via e-mail)
Morag MacGougan (via e-mail)
Michelle Alexander, IIAC (via e-mail)
Patricia Rosch, Broadridge Investor Communications Inc. (via e-mail)
IIAC NI 54-101 Working Group (via e-mail)