

## EXPLANATORY NOTE

### Issue and Objectives

The proposed *Canada Not-for-profit Corporations Act* (NFPC) specifies that certain details of its regime be set out in regulation, including time periods, options for providing notice of members' meetings and absentee voting and service fees. The proposed *Canada Not-for-profit Corporations Regulations* will allow the NFPC to be brought into force.

### Description and Rationale

#### Background

Corporations Canada, a branch of Industry Canada, administers federal legislation governing non-financial corporations including business and not-for-profit organizations as well as cooperatives and boards of trades. Currently, not-for-profit organizations wishing to be a federal legal entity can incorporate under the *Canada Corporations Act* (CCA).

The CCA, which has not substantially changed since 1917, has been the main federal framework for the creation and governance of not-for-profit corporations. It is antiquated and lacks modern corporate governance rules. Its financial disclosure provisions are weak, the duties and responsibilities of directors are ill defined, it does not provide a proper defence against liability, and the ability of members to scrutinize the activities of the corporation is limited. Several issues, including remedies and internal governance, are not addressed directly in the Act, but through administrative policies established by the Director appointed under the *Canada Business Corporations Act* (the Director).

The proposed NFPC is modeled on the *Canada Business Corporations Act* (CBCA), one of the most modern corporate statutes in Canada for corporations with shares. The NFPC also benefited from the administrative policies developed under the CCA. The new NFPC contains leading edge provisions and will be modern framework legislation. The following proposed regulations are needed in order to bring the NFPC into force.

#### Proposed Regulations

The proposed regulations are modeled after the *Canada Business Corporations Regulations, 2001* (CBCR). A summary of the proposed regulations is in the Annex. This section describes only significant regulations (i.e., significant changes from the CCA, substantial changes from the CBCR or provisions not in the CBCR), in the order that they appear in the proposed regulations:

- Corporate Records and Registers;
- Corporate Names
- Electronic Documents;
- Notice of Meetings of Members;
- Absentee Voting;

- Public Accountant; and
- Fees.

### *Corporate Records and Registers*

The proposed regulations set out the information required to be kept in the register of members, directors, officers and debt obligation holders. The requirements are similar to the information in the CBCA securities register and in the corporate books kept under the CCA. The information includes the name, address, e-mail address and the date the person became and ceased to be associated with the corporation. For members and debt obligation holders, the address is a business or a residential address. For directors and officers, a residential address is required so that the person can be served with legal papers, if required. It also provides a contact point for the corporation other than the registered office address.

The proposed regulations also set out the information required to be recorded on a list of members or debt obligation holders (i.e., the name, address, class or group of membership and, for debt obligation holders, the aggregate principal amount of the debt obligation outstanding).

This section sets two time periods: one for retaining corporate records and one for permitting access to information on members or debt obligation holders. The time periods are similar to the CBCA and the CCA.

### *Corporate Names*

While the proposed regulations are worded differently than the corresponding regulations in the CBCR and the regulation under the *Canada Cooperatives Act*, the effect of the regulations will be the same as under those regulations and the existing corporate name rules under Part II of the CCA. The objective of the wording changes was to make the regulations clearer and simpler to understand and apply. There is no change in policy or procedure associated with the rewrite.

### *Electronic Documents*

The proposed regulations are similar to the CBCR. They fix the manner in which consent to electronic communication may be given (and revoked) and allow documents to be posted on websites provided the addressee receives notice about the location of the document. However, documents required by the NFPC to be sent to a specific place, such as a registered office, cannot be posted on websites. When documents must be sent to several addressees, the proposed regulations state that the documents must be sent to the addressees at the same time. Documents may also be sent electronically to a specific information system instead of a specific mailing address. Finally, the proposed regulations clarify that an electronic document is considered to have been received when it enters an information system, such as a server, or when it is accessed by the addressee if made available through a website or other electronic source.

This part of the proposed regulations does not apply to documents or information sent to or issued by the Director. The Director administratively specifies how this information is communicated.

### *Notice of Meetings of Members*

The proposed regulations set out four options for providing notice of a meeting of members, with the selected option or options being in the by-laws. If the by-laws do not select an option, there is a statutory default of sending a notice to each member, between 21 and 60 days before the meeting. Each option also includes the time period for providing notice. The four options are:

1. mail, courier or personal delivery, between 21 and 60 days before the meeting;
2. telephone or other electronic communication means, between 21 and 35 days before the meeting;
3. publication:
  - a. at least once a week for three weeks prior to the meeting if using a newspaper; or
  - b. between 21 and 60 days if using a publication of the corporation that is distributed to members; and
4. notice affixed to a notice board not less than 30 days before the meeting.

This section also requires notice of the meeting to be sent to the public accountant and directors of the corporation between 21 and 60 days before the meeting. The time periods determining whether further notice is required if a meeting is adjourned are similar to these in the CBCA.

### *Absentee Voting*

The proposed regulations set out three options for absentee voting. The by-laws of the corporation determine which option or options, if any, will be used to allow members to vote. Each option also sets out the criteria for using that option. The options are:

1. voting by proxy with the criteria being similar to the CBCR;
2. voting by mailed-in ballots with the criteria being similar to the existing rules under the CCA; and
3. voting by telephone or other electronic means with the criteria being similar to the CBCA existing regulations, and the NFPC proposed regulations, for the holding of electronic meetings.

### *Public Accountant*

For the purpose of determining the permissible levels of financial scrutiny from which the members choose – audit engagement, review engagement or none – this section describes the limits for each type of corporation.

- For non-soliciting corporations with gross annual revenues less than \$1 million, the members can choose: not to appoint a public accountant; leave the level of review at the default of a review engagement; or raise the level of review to an audit engagement.
- For a non-soliciting corporation with gross annual revenues of \$1 million or more, the members have no choice other than an audit engagement.
- For soliciting corporations with gross annual revenues less than \$50,000, members can

choose: not to appoint a public accountant; leave the level of review at the default of a review engagement; or raise the level of review to an audit engagement.

- For soliciting corporations with gross annual revenues between \$50,000 and \$250,000, the members can leave the level of review at the default of an audit engagement or lower the level of review to a review engagement.
- For soliciting corporations with gross annual revenues of more than \$250,000, the members have no choice other than an audit engagement.

The dollar amounts for annual revenues are based on discussions with the Canadian Revenue Agency concerning the dividing line for large and small charitable corporations.

The other parts of this section establish time periods that are similar to the CBCA.

### *Fees*

The proposed fees for applications to the Director are set out in Schedule 1 to the Regulations. The amounts of these fees were determined using the cost of processing the relevant application and took into consideration fees for similar applications under other corporate statutes, such as the CBCA. The not-for-profit environment was also taken into account.

The estimated cost of the services under the NFPC is based on similar services under the CBCA. It is anticipated that the costs and the amount of work for the Director's staff under the CBCA and the NFPC will be similar since, in most cases, the requirements of the Acts are similar. Therefore, a study of the cost of activities carried out by Corporations Canada and of the cost of services for which fees are charged was undertaken. The parts of this study related to the CBCA were used as a guide in determining the cost of services under the NFPC.

The study used a costing model based on the principles set out in the *Guide to the Costing of Outputs* (Office of the Comptroller General, 1989). Specifically, it is based on identifying and costing the activities of the office of the Director, and includes the full cost of services, both direct and allocated. Allocated costs include program support, technology, corporate overhead, as well as costs charged by other government departments. The allocation was based on the relative time spent on each client service activity (i.e., client service activities that consume more staff time were allocated a greater proportion of allocated costs). The information was based on costs incurred in the fiscal year 2003/2004 and does not reflect any actual or planned changes to services made after March 31, 2004.

Because investments in information technology (IT) occur over an approximate five-year cycle, IT costs provided are the estimated costs for a specific moment in time. The amount of time spent by all staff on various activities was used to estimate the value of IT spending that should be allocated to those activities. This is consistent with the way that other program support costs were allocated. Since the study was focused on existing services and costs, it did not include an allocation of the cost of implementing a new electronic commerce system for the NFPC. This one time start up cost will be absorbed within the existing budget of the office of the Director.

Along with direct and allocated costs, the cost of a service must also reflect that some services

encompass other activities which have no fees associated with them. Some services have no associated fees because there is a need to encourage compliance with Act. For example, experience has shown that levying a fee for the filing of certain documents, such as the Notice of Registered Office, results in these notices not being filed promptly without the intervention of the Director. Therefore, the ultimate cost of processing a document is considered when setting fees for services.

In another instance, the incorporation process can set into motion several related activities, for which no fees are charged. These include filing notices of change of address and change in directors, discontinuance, dissolution and corporate name confusion activities. Having a fee that is higher than the initial incorporation cost helps cover the cost of related activities carried out by Corporations Canada over the life of the corporation.

### *Benefits and Costs*

Most of the proposed regulations are enabling rather than restricting, meaning that they would allow a corporation or a member to do or perform an action that could not be done otherwise. For instance, the NFPC allows electronic communications and the proposed regulations set out the requirements that must be met so that such communication can take place (e.g., how consent must be obtained, how voting must be conducted). These provisions are enabling because there is nothing in the NFPC or its proposed regulations that requires a corporation to use electronic means when communicating with members. Therefore, a corporation electing to use electronic communications could do so on the basis that the benefits of using electronic means exceed the costs of having to comply with the relevant sections of the proposed regulations. For instance, the proposed regulations specify that to hold an electronic vote, corporations must have an electronic voting system that ensures subsequent verification of the votes and that protects the identity of the voters.

The primary regulation that would put a cost on corporations is the fee regulation in Schedule 1. The fees have been set in accordance with the *User Fees Act*.

The proposed regulations, other than the fee regulation, do not impose any tangible costs since they provide the necessary details to make the NFPC operational. Most of the benefit and cost considerations were considered when the NFPC was being drafted. For example, it was decided that the benefits of expanding members' rights outweighed the costs that may be imposed on corporations. Therefore, the cost of not having the regulatory framework would be the denial of the rights of a corporation or person that are conferred on them by the NFPC.

### **Consultations**

Consultations on the proposed regulations will be done while the NFPC bill is before Parliament. The proposed regulations were posted on Corporations Canada's website and will be made available to Members of Parliament during their committee deliberations. Comments received either directly by Corporations Canada or made during hearings on the Bill will be considered before the proposed regulations are pre-published for public comment in the *Canada Gazette*, Part I.

## **Implementation and Enforcement**

Like its CBCA model, the NFPC will be a self-enforcing statute where interested parties can resolve their disputes through the courts, without having to involve the Director. However, the Director can intervene in cases where the public's interest is at stake. With respect to the administration of the NFPC (e.g. issuing certificates and filing of annual returns), the Director already has procedures and mechanisms in place to ensure compliance with the CBCA and its associated regulations. The new NFPC and its associated regulations will require similar, if not identical, procedures and mechanisms. Therefore, the proposed regulations will only require minor changes to the existing compliance procedures under the CBCA.

## **Contact**

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## Annex

<b>Part of the Proposed Regulations</b>	<b>Description</b>
Interpretation	Only the Act is defined.
Part 1 – General	<p><i>Electronic Documents</i> – See Description and Rationale section above.</p> <p><i>Dispensation Circumstances Prescribed</i> – The Director may relieve a corporation from a requirement to send a notice to the Director only if the exemption would not prejudice any of the members or the public interest.</p>
Part 2 – Time Periods	Time limits and other similar requirements are set in the proposed regulations. In the CBCA, some of these periods are in the Act and some in the regulations. In most cases, the proposed period is the same as the one in the CBCA or CBCR. Having the periods in the regulations would allow a quick response to a changing environment because there would not be a need to go to Parliament to make statutory changes of this nature (e.g. time periods). Not all the time periods are in Part 2. Where a time period relates to the subject matter of another Part, the time periods are in that part (e.g., Part 4 – Members).
Part 3 – Corporate Names	See Description and Rationale section above.
Part 4 – Meetings of Members	<p><i>Time Period for Annual Members Meetings</i> – This section is similar to the CBCR and the rules in the CCA.</p> <p><i>Record Date</i> – This section is similar to the CBCR with the record date being no more than 60 days before the action being taken and, in the case of a notice of meeting, not less than 21 days.</p> <p><i>Notice of Members Meetings</i> – See Description and Rationale section above.</p> <p><i>Member Proposals</i> – This section is similar to the CBCR provisions and the Saskatchewan <i>Non-Profit Corporations Act</i>, except the time period for submitting a proposal is between 90 and 150 days before the anniversary of the previous annual meeting of members.</p> <p><i>Quorum for Meetings of Members</i> - This section establishes the criteria for setting the quorum as a fixed number, percentage or a formula.</p> <p><i>Communication Facilities for Members Meetings</i> - The proposed regulations specify that members may also vote by telephone or electronic means, provided that the voting mechanism allows a verification of the votes cast while preventing the corporation from finding out how a particular member voted. This is similar to the existing policy under</p>

	<p>the CCA.</p> <p><i>Requisition of Meeting of Members</i> – This section is similar to the CBCA with 5% of the voting interests being needed to require a meeting.</p> <p><i>Unanimous Member Agreements</i> – This section is similar to the CBCA with 30 days being the period for rescinding the transaction.</p> <p><i>Absentee Voting</i> – See Description and Rationale section above.</p>
Part 5 – Financial Disclosure	<p><i>General</i> – The requirement for Canadian GAAP is similar to the CBCR. The time periods for sending financial statements to members are similar to the CBCA.</p> <p><i>Contents of Financial Statements</i> – This section is similar to the CBCR and the CCA.</p>
Part 6 - Public Accountant	See Description and Rationale section above.
Part 7 – Fundamental Change	This Part, similar to the CBCA, sets the dollar amount for giving notice to creditors at \$1,000. Also, the period for a creditor to object to an amalgamation is 30 days. If the Governor in Council orders a corporation under another federal statute to continue under the NFPC, that corporation has 15 months to apply for continuation.
Part 8 – Rules of Procedure for Applications for Exemptions	This Part is similar to the CBCR. The changes relate to the new exemptions by setting the time of filing those applications.
Part 9 – Cancellation of Articles and Certificates	<p>This Part is similar to the CBCR. The conditions under which the Director may cancel the articles and related certificates of a corporation are: (a) where the error is obvious; (b) where the error was made by the Director; (c) where ordered by a court; or (d) where the Director lacked the authority to issue the articles and related certificate.</p> <p>The circumstances under which the Director can cancel a certificate at the request of the corporation or an interested party are: (a) where there is no dispute among the directors and/or members on the circumstances of the application; or (b) where the corporation has not used the articles and related certificate, or, if it has, where anyone dealing with the corporation on the basis of the certificate has consented to the cancellation.</p>
Part 10 – Prescribed Fees	This Part is similar to the CBCR.
Schedule 1 - Fees	See Description and Rationale section above.