CASSELS BROCK
LAWYERS

July 12, 2013

By e-mail

British Columbia Securities Commission
Alberta Securities Commission
Financial Services and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
New Brunswick Securities Commission
Superintendant of Securities, Prince Edward Island
Nova Scotia Securities Commission
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Yukon
Superintendent of Securities, Nunavut

Dear Sirs/Mesdames:

Re: Proposed National Instrument 62-105 *Security Holder Rights Plans*

Thank you for the opportunity to provide comments on proposed National Instrument 62-105 *Security Holder Rights Plans* (the **Proposed Rule**) in response to the Request for Comments published in the Ontario Securities Commission Bulletin on March 14, 2013.

We note that the status quo with respect to shareholder rights plans (**Rights Plans**) results in uncertainty for potential bidders. It is not clear when a Rights Plan will be cease traded, or in some cases, if a rights plan will be cease traded, particularly in light of different approaches to rights plan hearings in different jurisdictions. Several decisions, such as Pulse Data (In the Matter of Pulse Data Inc., 2007 A.B.A.S.C. 895) and Neo Materials (In the Matter of Neo Material Technologies Inc. (2009), 32 OSCB 6941), appear to give more powers to the target directors to "just say no" and maintain a poison pill indefinitely. In contrast, the decisions in Lions Gate (Icahn Partners LP, (Re) 2010 BCSECCOM 432) and in Baffinland (In the Matter of Baffinland Iron Mines Corp. (Re) (2010), 33 OSCB 11385) support the historical position that "there comes a time when the poison pill has got to go." The inconsistency is problematic and it is therefore appropriate that the CSA address this uncertainty.

General Comments

We note that the CSA indicates that the Proposed Rule is intended to harmonize and codify the CSA's approach to Rights Plans. We support a uniform approach to Rights Plans in all jurisdictions of Canada which provides certainty to both target companies and bidders. As well, we are generally supportive of the Proposed Rule. We feel that it represents a balanced approach by providing directors of target companies with the opportunity to consider alternative

transactions while also providing bidders with certainty as to the timing and process related to their bids, but ultimately leaving the final decision on a bid with the target shareholders. We provide the following comments and observations for your consideration.

Reduced need for traditional hearings but possible increase in other public interest hearings and proxy fights

We note that the Companion Policy to the Proposed Rule indicates that securities regulators do not anticipate intervening on public interest grounds to cease trade a rights plan that was adopted in compliance with the Proposed Rule unless the target engages in conduct that undermines the principles underlying the Proposed Rule or if there is a public interest rationale for the intervention not contemplated by the Proposed Rule. The CSA has asked whether commenters expect that the Proposed Rule will reduce the need for securities regulators to review Rights Plans through public interest hearings. We expect that the Proposed Rule may reduce the number of traditional regulatory hearings and staff interventions. However, we note that the CSA has still left the door open for hearings but has not provided any guidance as to when such hearings might be successfully used by bidders. It may be the case that there will still be a significant number of hearings but on different points than is currently the case. Hearings might be sought to determine whether a target company engaged in conduct that undermined the principles underlying the Proposed Rule or where a bidder asserts that there is a public interest rationale for a regulatory intervention that was not contemplated by the Proposed Rule.

We also expect that there may be an increase in proxy fights in connection with take-over bids with the result that there may be more litigation before the courts related to take-over bids. It may be that proxy fights will become a common part of M&A strategy and that unsolicited take-over bids may become a kick off for a proxy fight. This may be an acceptable result of the Proposed Rule, particularly if the litigation is with respect to the fiduciary duties and the business judgment rule, which are appropriate matters for review by the courts.

Time frame

The Proposed Rule will, by design, increase the time required to complete a take-over bid. For companies with Rights Plans with a "permitted bid" concept, and without a cease trade order, it currently takes a minimum of sixty days to complete a bid. If the Proposed Rule is adopted, we expect that "permitted bids" will be a minimum of ninety days and that take-over bids for companies with Rights Plans will take a minimum of ninety days to complete. We note that no data has been provided by the CSA to support the choice of ninety days.

From a bidder's perspective, ninety days may be perceived as a very long time and may result in significant additional financing costs (for example due to lenders' standby fees), uncertainty and in some cases, a decision not to pursue a take-over bid that might have been pursued under the existing regime. Ultimately, it is possible that potential bidders will launch fewer unsolicited take-over bids if they are deemed too expensive and uncertain to pursue.

From a target's perspective, additional time will be attractive. In theory, it may result in additional strategic alternatives becoming available or more possible, or at least in a fuller canvas of the market, and any such results can be communicated to shareholders in the circular sent with the request for approval of the Rights Plan. It may also have the effect of encouraging bidders to negotiate more fully with target companies before an unsolicited bid is launched in order to reduce the time to completion.

Could result in changes to how companies use rights plans

If implemented, the Proposed Rule could result in changes to how companies use Rights Plans, as issuers may be reluctant to seek annual approval of their Rights Plans. Although it may not appear onerous, our experience suggests that obtaining shareholder approval for a Rights Plan can be involved and time consuming, as proxy advisory firms frequently change their criteria for such plans without announcement, resulting in considerable last minute negotiation between the issuer, its counsel and the proxy advisory firm. Given that the proposed approach to tactical plans is clear, it may be that more companies will opt to simply adopt a tactical plan when faced with a bid, rather than deal with a Rights Plan on an annual basis. On the other hand, it is not clear whether proxy advisory firms will support such tactical plans.

Shareholder voting issues

There are a number of issues relating to the use of shareholder votes to approve or terminate a Rights Plan: (i) since record dates for shareholder meetings are typically fixed 30 days or more before a shareholder meeting, the shareholders who are eligible to vote at the meeting may not be the same shareholders who will ultimately have an economic interest in the bid by the time the meeting occurs; (ii) the request for shareholders to approve a Rights Plan in the course of a take-over bid may result in confusion if shareholders believe that they simply need to tender or not tender their shares; (iii) as noted by commentators, there are questions surrounding the quality of votes obtained by the proxy voting system currently used in Canada. Consideration should be given to these points.

An exemption for foreign issuers is needed

As currently drafted, the Proposed Rule does not provide an exemption for Rights Plans adopted by foreign issuers. As a result, such Rights Plans will be subject to the Proposed Rule and foreign issuers will be required to obtain shareholder approval for their Rights Plans each year, regardless of the rules of their home jurisdiction. We believe that "SEC foreign issuers" and "designated foreign issuers" (each as defined in National Instrument 71-102 *Continuous Disclosure and Other Exemptions Relating to Foreign Issuers)* should not be subject to the Proposed Rule. Pulling foreign issuers into Rights Plan rules would be a new form of regulation for such issuers and we do not think this was intended, nor would it be consistent with the CSA's approach in other areas, such as continuous disclosure and corporate governance, where exemptions are provided to foreign issuers.

As an example, consider a Delaware company that is a Securities and Exchange Commission registrant with shares listed on the New York Stock Exchange (**NYSE**) and the Toronto Stock Exchange (**TSX**) that has a Rights Plan. Currently, such a Delaware company complies with the rules of its statute of incorporation (Delaware General Corporation Law) and the rules of the NYSE. The TSX Company Manual which provides an exemption in Section 602(g) from many of its rules for foreign issuers does not specifically provide an exemption for rules relating to the Rights Plans of foreign issuers. We have found that the TSX does not agree to list rights of a Delaware company if the plan is not approved by shareholders, but on the other hand, the TSX does not object to the existence of the Rights Plan. In such circumstances, the Rights Plan is put in place and the understanding is that if shares are ever issued on exercise of rights, the listing of such shares would need to be considered and discussed with the TSX. Currently, the Delaware company would not need to consider CSA rules with respect to its Rights Plan.

If an exemption from the Proposed Rule is not provided to a Delaware issuer, the issuer will be forced to obtain annual shareholder approval for its Rights Plan, even though this is not required by the laws of Delaware or the listing rules of the NYSE. We do not think that changing the approach to foreign issuer Rights Plans is an intended or desirable result. In fact, we not only encourage the CSA to provide an exemption for the Rights Plans of SEC foreign issuers and designated foreign issuers, we also encourage the CSA to discuss this matter with the TSX. We understand that the reason that the TSX does not list rights of such companies where there is no shareholder approval of the Rights Plan is that, as noted above, the TSX looks to Section 602(g) and does not find an exemption available for Rights Plans. It may be a good opportunity for the TSX and CSA to work together on a new exemption for Rights Plans in Section 602(g).

Prospectus exemption

We note that the Proposed Rule includes a prospectus exemption in Section 8 for both the distribution of rights to security holders and the distribution of securities on the exercise of rights. While it is not clear that this exemption is required given that rights have been distributed numerous times over the years without this exemption and without any objections from the CSA, we acknowledge that the exemption provides certainty that a prospectus exemption is available. Consideration might be given to placing this prospectus exemption in National Instrument 45-106 *Prospectus and Registration Exemptions* with the other prospectus exemptions when the opportunity arises rather than placing it in the Proposed Rule. However, this is a matter of form rather than substance.

Specific Comments

As well, you may wish to consider the following additional changes:

(a) In Section 2(2) a clarification may be desirable to address situations where an issuer changes its year end. In such a case, the issuer's year will be either longer or shorter than 12 months. Section 2(2) requires approval of the Rights Plan at

the annual meeting of securityholders in each financial year in all cases. It is possible that there may be a financial year in which there is no annual meeting.

(b) Consider adding a definition of "business day" to the Proposed Rule, consistent with the definition in National Instrument 54-101 and Multilateral Instrument 62-104 and a description as to how a period of days is computed for purposes of the Proposed Rule.

(c) In Section 2(7), consider clarifying that officers and directors of an issuer include officers and directors of an issuer's subsidiaries.

(d) The definition of "security holder approval" requires a class vote. Consider clarifying whether a vote to terminate a Rights Plan is also a class vote.

(e) Also, if there is a proxy fight to *terminate* a Rights Plan and all applicable classes vote against termination, does this count as security holder approval for that year? Does this approval need to occur at an *annual* meeting?

AMF Proposal

The AMF proposal would bring the Canadian regime regarding defensive measures more in line with the Delaware regime where boards can "just say no" to a hostile bid simply by implementing a Rights Plan. There is no requirement to have a shareholder vote in close proximity to a bid. While the AMF Proposal moves towards a fuller recognition of the directors' fiduciary duties in the context of mergers and acquisitions, it still permits intrusion into director judgment by provincial securities regulators to determine when the board of a target company is (or is not) acting in "the public interest". Although this approach may provide for greater regulatory nuance (e.g. to provide key Quebec companies with greater ability to just say no to protect the public interest), it also leaves the regime open to potentially conflicting determinations made across Canada resulting in deal uncertainty and an uneven playing field for merger and acquisition activity.

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Yours very truly,

Cassels Brock & Blackwell LLP

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