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

c/o
The Secretary
Ontario Securities Commission
20 Queen Street West
19th Floor, Box 55
Toronto, Ontario M5H 2S8
comments@osc.gov.on.ca

-and-

Me Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
800, square Victoria, 22e étage
C.P. 246, Tour de la Bourse
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consultation-en-cours@lautorite.qc.ca

Dear Sirs / Mesdames,

Re: Comments on Proposed National Instrument 62-105 – Security Holder Rights Plans, Proposed Company Policy 62-105CP – Security Holder Rights Plans and Proposed Consequential Amendments (collectively, "Proposed NI 62-105").

We submit the following comments in response to the Notice and Request for Comments published by the Canadian Securities Administrators (the "**CSA**") on March 14, 2013 ((2013) 36 OSCB 2643) with respect to Proposed NI 62-105.

TORONTO
MONTREAL
OTTAWA
CALGARY
VANCOUVER
NEW YORK
LONDON
SYDNEY

Thank you for the opportunity to comment on Proposed NI 62-105. We view this effort by the CSA as extremely timely, given the seemingly inconsistent approach of regulatory decisions involving security holder rights plans ("**Rights Plans**"), particularly in light of the decisions that have been released, including and subsequent to, *Pulse Data* (2007). Moreover, we agree with the CSA's position that the current approach to the regulation of Rights Plans may result in securities regulators "pre-empting the discretion of (i) target company boards to act in what they perceive to be shareholders' best interests by implementing a Rights Plan or maintaining it in place, and (ii) target shareholders to approve or retain a Rights Plan if they consider that to be in their best interests".

This letter represents the general comments of certain individual members of our securities practice group (and not those of the firm generally or any client of the firm) and are submitted without prejudice to any position taken or that may be taken by our firm on its own behalf or on behalf of any client.

Comments on Proposed NI 62-105

(a) Scope

By way of a more general comment, we strongly urge all CSA members to avoid a "stop-gap" approach to the regulation of defensive tactics and to take this opportunity to re-vamp National Policy 62-202 – *Take-Over Bids – Defensive Tactics* ("**NP 62-202**") in its entirety and to enunciate a clear approach to securities-related defensive tactics in general and not just Rights Plans. Since NP 62-202 was enacted in 1986 there have been dramatic changes to the marketplace, including the rise of arbitrageurs and activist shareholders, the development of more robust corporate governance regulation, and the decision in *BCE Inc. v. 1976 Debentureholders* (2008). While we recognize that Rights Plans are the most prevalent form of defensive tactic, NP 62-202 is outdated and, to the extent that securities regulators intend to continue to intervene in connection with the adoption of other securities-related defensive tactics under their "public interest" powers, then it is appropriate to take a boarder approach than just dealing with Rights Plans. We view the time as ripe to clarify the approach to be taken with regard to other securities-related defensive tactics (notably share issuances in the face of hostile bids) in parallel with the regulation of Rights Plans, particularly in view of the recent decisions in *Petaquilla Minerals* (2012) and *Fibrek* (2012).

(b) Composition of Shareholder Base

While the landscape has changed drastically since the enactment of NP 62-202, it appears that the assumptions underlying that policy are largely reflected in Proposed NI 62-105, with the main focus being shareholder-centric. We would urge the CSA to give further consideration to this focus, given the rise of arbitrageurs and activist shareholders in the market. For instance, given the increased presence of arbitrageurs in the shareholder base of a company that often follows the announcement of a hostile transaction, it may be more difficult for a target company to pass a resolution approving a Rights Plans.

(c) Corporate Law Concerns

There are issues arising from Proposed NI 62-105 with respect to the interplay between securities laws and corporate law that merit further consideration by the CSA.

Corporate statutes generally provide that "[t]he holders of not less than five percent of the issued shares of a corporation that carry the right to vote at a meeting sought to be held may requisition the directors to call a meeting of shareholders for the purposes stated in the requisition". This provision raises two related issues.

- First, only holders of shares that carry the right to vote at a meeting sought are permitted to requisition such a meeting. Under Proposed NI 62-105, a bidder is excluded from the vote to approve or reject a Rights Plan. As a result, a bidder may not be determined to hold shares that carry a right to vote and, consequently, may not be permitted to requisition a shareholders meeting to vote down a Rights Plan under applicable corporate law.

- Second, only holders of not less than 5% of the outstanding shares that carry the right to vote are permitted to requisition a meeting. This would require a bidder to purchase a "toehold" of at least 5% of the outstanding shares before it could be in a position to requisition a shareholders meeting to vote down a Rights Plan.

With respect to the second point immediately above, we would suggest that the CSA give further consideration as to whether any modifications to the bid integration rules are required in order to permit a bidder to acquire the minimum required number of outstanding shares in order to be in a position to requisition a shareholders meeting in connection with a vote on whether to retain a Rights Plan.

In addition to the foregoing points, under most corporate statutes, target companies have a measure of discretion of when to hold a requisitioned meeting and such discretion may be used as a form of defensive tactic to defeat a hostile take-over bid. Securities regulatory authorities may therefore find themselves regularly having to intervene on the basis of their public interest jurisdiction with respect to matters that they are not commonly faced with (i.e., intervention to preclude certain actions taken by target boards to delay the holding of a requisitioned meetings).

In connection with the above-noted concerns, we would suggest that the CSA consider including a requirement for a target to hold a shareholders meeting within a stipulated period of time if requested by a shareholder or bidder.

We would also make note of the interplay of the 5% requisition threshold under corporate law and the early warning regime. If the current proposal to reduce the threshold for initial early warning reports from 10% to 5% is implemented, then this would line up with corporate requirements and a target would have knowledge of individual shareholders entitled to requisition a meeting and could plan accordingly. It may, however, also discourage the exercise of these and other rights available to a 5% holder.

(d) Other

As this is common in the U.S., should a right to acquire preferred shares or other securities also be included in the definition of a rights plan?

In s. 2(2), what if an issuer defers or does not hold its AGM?

(e) International Reciprocity

In considering its approach to poison pills, the CSA should consider addressing the issue of reciprocity with other jurisdictions. While it may not be a factor for policy or rule-making, the CSA should at least consider the issue of the relative ease or difficulty for a Canadian company to acquire a foreign company and vice-versa. It may be appropriate to adopt a different approach depending on the bidder's jurisdiction.

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Thank you for the opportunity to comment on these proposals.

Regards,

(Signed) "Simon A. Romano"

Simon A. Romano

(Signed) "Jeremy S. Ehrlich"

Jeremy S. Ehrlich