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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

Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
800, square Victoria, 22e étage
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Montréal, Québec H4Z 1G3

Dear Sirs/Mesdames:

Re: Request for Comment: Proposed National Instrument 62-105 - Security Holder Rights Plans, Proposed Companion Policy 62-105CP and Proposed Consequential Amendments (CSA Proposal)

This letter is in response to the above-referenced request for comment made by the Canadian Securities Administrators (**CSA**) on March 14, 2013, and contains suggested changes that build on the CSA Proposal, without requiring that significant drafting changes be made to it or to the existing statutory take-over bid regime. Although this response is limited to the CSA Proposal, it includes proposals that are influenced, in part, by the alternative proposal of the Autorité des marchés financiers (**AMF**) regarding defensive tactics published on March 14, 2013 (**AMF Proposal**). I appreciate the opportunity to comment and commend both the CSA and AMF for their comprehensive and well-written proposals.

The views expressed in this letter are those of the author alone and do not necessarily reflect the opinions of any other lawyers at Torys LLP or the firm as a whole.

Overview

The CSA Proposal presents a number of benefits for target issuers and their shareholders, for bidders and for market participants generally. It continues to adhere to the shareholder primacy principle present in National Policy 62-202 *Take-Over Bids - Defensive Tactics* (**NP 62-202**) by safeguarding the right of target shareholders to respond to a bid, but on a collective basis. Meanwhile, it does not unduly restrict the ability of bidders to make unsolicited take-over bids, thereby providing the benefits of such transactions as acknowledged by NP 62-202. By limiting regulatory intervention to exceptional circumstances, the CSA Proposal also leaves the ultimate decision about the adoption or termination of a rights plan (and by extension, the success of a take-over bid) with shareholders, rather than the regulators and courts, providing more certainty for all market participants.

The CSA Proposal aims to achieve its policy objective by requiring that the approval or termination of a rights plan be obtained at a shareholders' meeting, rather than by written consent or through another process. In what follows, I first set out some concerns with the shareholders' meeting requirement, and then describe an alternative approach which would still allow shareholders to collectively respond to a take-over bid (either positively, or negatively) 90 days after the bid is made, but without the need for a shareholders' meeting.

Shareholders' Meeting Requirement to Approve/Terminate Rights Plans

There are four concerns raised by the shareholders' meeting requirement to approve and terminate rights plans.

First, the proxy contests that would ensue under the CSA Proposal concurrently with a hostile bid will be costly and time-consuming, and will likely prove to be an unhelpful distraction for target boards and management whose primary focus during the bid process should be to evaluate the unsolicited offer, advise shareholders and seek, where appropriate, value-enhancing alternatives. The costs incurred during proxy contests may be considerable. The recent increase in the number of contested shareholders' meetings has been accompanied by an increased amount of voting and proxy-related litigation. Under the CSA Proposal, a concurrent proxy contest would also likely lead to more disputes before the regulators or courts regarding the shareholders' meeting process and/or related disclosure issues, defeating the CSA Proposal's objective of restricting the regulators' intervention to limited cases.

Second, the shareholder vote at the meeting will not necessarily reflect the views of the relevant decision-makers who will ultimately decide whether or not to tender to a bid, as determined by reference to the bid expiry date. The record date, which establishes the voting entitlement at the meeting, is fixed in advance of the shareholders' meeting and will not capture the changing identity and views of shareholders between the record date, the meeting date and the bid expiry date. In addition, some have commented on the problems surrounding Canada's current proxy voting system and the resulting impact on the quality of votes obtained at shareholders' meetings. By focusing the bid process on a meeting, the CSA Proposal may have the unanticipated consequence that those who vote do not have the real economic interest in the outcome of the meeting and the bid.

Third, the requirement for a shareholder vote under the CSA Proposal is a relatively inflexible mechanism for use during a hostile bid process in which developments often occur rapidly and frequently. For example, if a rights plan is tailored to, and approved by shareholders in response to, a specific bid, and the bidder subsequently changes or improves its offer or a competing bid emerges, an initial shareholders' meeting may become irrelevant and additional meetings in respect of a rights plan may be required (in the absence of a waiver of the rights plan by the target board). This may impose undue restrictions on a bidder by forcing it to formulate the terms of its offer prematurely at the start of the process, rather than enabling it to respond in real time to developments that may occur during the course of the bid. It also compounds the problems relating to the cost and time involved in calling and holding shareholders' meetings, as discussed above.

Finally, the CSA Proposal expressly recognizes that a hostile bidder wishing to terminate a rights plan would need to resort to a proxy contest. Unless a shareholders' meeting has been called to consider the renewal of a rights plan, a bidder would require a toe-hold or the co-operation of supportive shareholders to meet the necessary shareholding requirement under corporate law to requisition a shareholders' meeting. Acquiring a toe-hold may not be desirable or available for many reasons, including because a bidder may not wish to trigger early warning reporting or pre-bid integration requirements. Shareholders may also be unwilling to assist a bidder in requisitioning a shareholders' meeting to remove the rights plan, notwithstanding their support for the bid.

Alternative - Permitted Bid Provisions in Rights Plan/6-Month Shareholders' Meeting Requirement

I would like to raise for your consideration varying the CSA Proposal to introduce the following changes which address the above concerns. These changes would entail minimal drafting modifications to the CSA Proposal:

1. add a requirement that all rights plans include, or be deemed to include, permitted bid provisions;

2. maintain the proposed requirement for shareholder approval of a rights plan, but change the 90-day period to 6 months (consistent with current Toronto Stock Exchange (**TSX**) requirements); and

3. remove the ability of target shareholders to terminate a rights plan at any time by majority vote.

Details of this approach are set out below.

1. All rights plans to include permitted bid provisions

The terms of Canadian rights plans have been largely influenced by the TSX requirement that rights plans be approved by shareholders within 6 months of implementation. In order to gain the support of shareholders, Canadian companies have generally conformed their rights plans to standards acceptable to institutional shareholders, such as those published by Institutional Shareholder Services. As a result, virtually all rights plans adopted by Canadian target issuers contain permitted bid provisions.

Under the alternative proposal, all rights plans would be required to include, or be deemed to include, the following permitted bid provisions which, if met, would not trigger the application of the rights plan:

(a) A minimum period of time for the bid to remain open, not to exceed 90 days.

(b) An irrevocable minimum tender condition requiring that more than 50% of the target's shares held by independent shareholders be deposited to the bid (including a partial bid).

(c) A mandatory 10-day extension period if the 50% minimum tender condition is satisfied so as to give shareholders that have not deposited their shares time to deposit them during the extension.

By mandating the inclusion of permitted bid provisions in rights plans, the CSA would simply be codifying existing practice, which one would expect to largely continue following implementation of the CSA Proposal. The above permitted bid provisions would also meet aspects of the AMF Proposal. However, the inclusion of these provisions in rights plans, rather than their mandatory application to all take-over bids (as proposed in the AMF Proposal), would give target boards the flexibility of opting into a permitted bid regime, through their decision to adopt a rights plan.

Since permitted bid provisions would be included in all rights plans, the need for an immediate shareholders' meeting to approve or terminate a rights plan would become unnecessary. Instead, a majority of independent shareholders would be able to determine, through the tender to the bid, whether a bid was acceptable or not within 90 days of the bid being made. Shareholders would otherwise have a final say on the rights plan (whether or not adopted in the face of a bid) within 6 months (consistent with TSX requirements) and annually after that.

Target boards that wish to protect against creeping acquisitions (through normal course transactions or private agreement transactions that are otherwise exempt from the formal take-over bid requirements) and offshore acquisitions of securities (from shareholders outside Canada that may not be caught by Canadian take-over bid legislation) can continue to adopt a rights plan, but it must always include permitted bid provisions so as to not unduly restrict a bidder from acquiring shares if a majority of independent shareholders support the bid.

90-Day Permitted Bid Period

In relation to (a) above, 90 days, rather than the more common 60-day period in Canadian rights plans, would be consistent with the 90-day period available to target boards under the CSA Proposal which appears to have been adopted in response to the CSA's proposed shareholders' meeting requirement. While 90 days might provide target boards with sufficient time to call and hold a meeting, the period of time chosen should be driven by the time period necessary for the board to evaluate an unsolicited offer, advise shareholders and seek, where appropriate, value-enhancing alternatives. As a result, while this alternative suggests a maximum 90-day permitted bid period, I would encourage the CSA to consider whether another period of time would be appropriate based on the feedback received from other market participants during the comment period.[1]

In addition to considering whether 90 days is the appropriate length of time for a permitted bid, the CSA should also consider whether the minimum permitted bid period should be abridged to a shorter period of time (a) where there is a board-supported transaction outstanding at the same time as the permitted bid (such that the permitted bid could expire on the earlier of 90

[1] Under this alternative proposal, a target board could adopt a rights plan with permitted bid provisions that have a minimum period of time that is less than 90 days (but not more). In circumstances where a rights plan is adopted without permitted bid provisions, the rights plan would be deemed to include all the permitted bid provisions and the minimum deposit period would be deemed to be 90 days.

days and the expiry date or meeting date of a board-supported transaction), or (b) where there is an earlier permitted bid (such that the second competing permitted bid could expire on the earlier of 90 days and the expiry date of the first permitted bid). Such an abridgement provision would be consistent with the competing permitted bid provision typically included in Canadian rights plans. It also enhances the effectiveness of the “waive for one, waive for all” provision in section 4 of the CSA Proposal, which would not apply to board-supported amalgamations or arrangements nor assist a hostile bidder in circumstances where the waiver by the target board is only granted in favour of a board-supported take-over bid immediately prior to the first take-up.

50% Irrevocable Minimum Tender Condition

In relation to (b) above, the inclusion of the irrevocable minimum tender condition in all rights plans is a more flexible mechanism than requiring a shareholders' meeting to approve or terminate a rights plan. As stated in the AMF Proposal, a 50% minimum tender condition by independent shareholders would allow shareholders to essentially “vote” on a take-over bid and act as an “effective substitute to the security holders’ approval of a rights plan, or of an amendment to an existing rights plan, under the CSA Proposal”. This minimum tender condition would eliminate the need for a concurrent shareholders' meeting to approve or terminate a rights plan, and allow the current shareholders’ “approval” of the bid to be assessed in real time as at the expiry of the bid. Furthermore, the inclusion of this minimum tender condition in the permitted bid provisions in rights plans as opposed to the take-over bid statute (as contemplated by the AMF Proposal) addresses a potential drawback of the AMF Proposal. Under the AMF Proposal, the satisfaction of the 50% minimum tender condition would not lead to the removal of a rights plan without a waiver from the target board, unless the AMF is intending that the regulators would intervene in such circumstances to prohibit the continued operation of the rights plan.

Under this alternative proposal, if the 50% minimum tender condition was met in relation to a bid, the effect of the rights plan would be neutralized in respect of that bid only and not in respect of other bids. The rights plan would remain in place with respect to all other bids until a majority shareholder vote on the plan within 6 months of its adoption by the target board (see second proposed amendment below). The continued maintenance of the rights plan against other bids may provide a target board with more flexibility than its termination as it would, for example, prevent the accumulation of blocking positions.

Target shareholders would equally benefit from this flexibility as it would allow them to respond more readily to changing bid dynamics. For example, if multiple bids were made for the target, shareholders would be free to collectively support the bid of their choice, without having to make a decision about whether or not to approve or terminate a rights plan that applies to all bids.

A bidder would also benefit from increased flexibility and would be motivated to comply with the permitted bid provisions. As long as a bidder makes a permitted bid or amends its bid to comply with the permitted bid requirements (if the bidder did not initially make a permitted bid and the target issuer subsequently adopted a rights plan in response to its bid), the bidder would be able to acquire shares tendered to the bid provided it had the support of a majority of independent shareholders. A bidder could choose not to comply with the permitted bid provisions and time its bid launch in circumstances where it knows when the rights plan will be considered for approval by shareholders (e.g., at the target issuer’s next annual meeting). However, in those circumstances, a target board would be allowed to adopt a second rights plan (although such rights plan would also be required to contain the permitted bid provisions).[2] As a result, a bidder that chose not to make a permitted bid would, as a practical matter, need to initiate a proxy contest to replace the board with directors who are supportive of its bid.

Mandatory 10-Day Extension Period

The last permitted bid provision in (c) above would address the bid "coercion" effect referred to in the CSA Proposal and the AMF Proposal. The automatic 10-day extension would give shareholders who had not tendered to the bid the opportunity to do so once the 50% minimum tender condition had been satisfied, so as not to be left behind with a minority position in a potentially less liquid stock.

The CSA should consider making technical amendments to the statutory take-over bid regime to facilitate delayed proration calculation and payment without triggering withdrawal rights for shareholders that have tendered as at the initial expiry date of a partial bid. This would give meaningful effect to the proposed mandatory 10-day extension in the case of partial bids by ensuring that shareholders tendering during the extension will always have their shares taken up on the same pro rata basis as those shareholders who tendered prior to the initial expiry date.

2. Change 90-day shareholder approval requirement to 6 months

It is noted that the CSA considered whether to provide issuers with a longer period of time, for example, up to 6 months, to obtain shareholder approval if a rights plan was adopted when the issuer's board was not aware of any anticipated bids or if no bid had been made. TSX rules presently require shareholder approval of a rights plan within 6 months of adoption by an issuer. In the absence of the proposed permitted bid mechanism that would allow shareholders to demonstrate their support for a bid by tendering to the bid within 90 days, a six-month period to seek shareholder approval of a rights plan would likely be perceived by bidders as too lengthy, given the potential impact on the bidder's offer, and, in particular, its financing arrangements, and changing market conditions.

However, the 90-day permitted bid provisions in rights plans coupled with a six-month requirement to obtain shareholder approval of a rights plan (whether or not adopted in the face of a bid) would represent an appropriate compromise for all parties involved:

(a) bidders, target boards and management would not be drawn into costly and time-consuming proxy contests in the first 90 days of an offer;[3]

(b) target boards would be given more time (at least 90 days) to consider and evaluate a take-over bid and seek alternative proposals if appropriate;

(c) target shareholders would preserve their ability to respond to the bid (and any changes made to the bid) through the bid tender process;

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[2] In order to give effect to this, an amendment should be made to subsection 7(4) of the CSA Proposal to clarify that a new rights plan adopted after a bid is announced or commenced will be effective whether adopted before or after the relevant non-approval date of the first rights plan.

[3] Although the CSA Proposal permits a target issuer to avoid a proxy contest by electing not to call and hold a shareholders' meeting to approve a rights plan, it would result in the termination of the rights plan on the 90th day and allow a bidder to acquire any shares tendered to its bid even if less than a majority of independent shareholders supported the bid.

(d) a bidder could acquire target shares under its bid on the 90th day if a majority of independent shareholders accepted the offer; and

(e) shareholders would ultimately have the final say on whether the rights plan should remain in place within six months of its adoption and annually after that.

3. Remove shareholders' ability to terminate a rights plan at any time

Under this alternative approach, the right of target shareholders to terminate a rights plan at any time would be unnecessary; the inclusion of permitted bid provisions in rights plans would allow shareholders to decide whether or not to support a bid during a 90-day bid period, rather than through a shareholder vote. A 50% tender to a bid by independent shareholders would be an effective substitute for a shareholder decision not to maintain the rights plan, thereby achieving the same effect as if the plan was terminated through a majority shareholder vote.

In addition, if shareholders did not approve the rights plan within 6 months of adoption (rather than 90 days), or annually after that (under the proposed framework of the CSA Proposal), the rights plan would terminate and the target would be prohibited from adopting a new plan for a period of 12 months, unless a new take-over bid was made.

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In summary, the alternative proposal described above would achieve the CSA's policy objective of permitting target boards to keep a rights plan in place with majority shareholder support, but with a more efficient and dynamic mechanism than a shareholder vote at a meeting. Independent shareholders' decision not to tender to a bid would effectively be a vote in favour of the continued deployment of the rights plan and preclude a bid from proceeding. At the same time, shareholders would have the final say on whether the rights plan should remain in place within six months of its adoption, and annually after that.

I appreciate the opportunity to comment on the CSA Proposal and would be pleased to discuss any aspect of this submission with you.

Yours truly,

John Emanoilidis