July 10, 2013

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

The Secretary
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Toronto, Ontario M5H 3S8
E-mail: comments@osc.gov.on.ca

-and-

Me Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
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Montréal, Québec H4Z 1G3
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Dear Sirs/Mesdames:

**Re: Notice and Request for Comment – Proposed National Instrument 62-105 *Security Holder Rights Plans*, Proposed Companion Policy 62-105CP *Security Holder Rights Plans* and Proposed Consequential Amendments (the "Proposed Rule")**

The Canadian Advocacy Council[1] for Canadian CFA Institute[2] Societies (the CAC) appreciates the opportunity to comment on the Proposed Rule.

[1]The CAC represents the 13,000 Canadian members of CFA Institute and its 12 Member Societies across Canada. The CAC membership includes portfolio managers, analysts and other investment professionals in Canada who review regulatory, legislative, and standard setting developments affecting investors, investment professionals, and the capital markets in Canada. See the CAC's website at

As a general comment, the CAC is in favour of re-examining the current regime related to shareholder rights plans. As a matter of good corporate governance, the CAC is concerned that minority shareholders do not have an effective voice in the face of a hostile take-over bid, and believe that the proposal is a good first step to help improve shareholder democracy.

We have also reviewed the consultation paper of the AMF entitled "An Alternative Approach to Securities Regulators' Intervention in Defensive Tactics". While for the most part we prefer the approach suggested by the CSA, there are elements of the consultation paper that we believe merit further discussion, as outlined in more detail in our responses below. In particular, we agree with the AMF's suggestions for amending the take-over bid regime to add an irrevocable minimum tender condition and subsequent extension of the bid. We think that these suggestions could be implemented in conjunction with the Proposed Rule.

We wish to reiterate the importance of harmonized rules in all Canadian jurisdictions. Harmonizing rules regarding take-over bids and defensive tactics would simplify the process for bidders and target companies in circumstances which are already highly charged and for which time is of the essence.

The CAC wishes to respond to the following specific questions for consideration:

1. *In your view, is the Proposed Rule preferable to the status quo, amending the bid regime to mandate "permitted bid" conditions and disallow Rights Plans, or amending NP 62-202 to provide specific guidance on when securities regulatory authorities would intervene on public interest grounds to cease trade a Rights Plan?*

   We are of the view that the Proposed Rule is preferable to the status quo or the alternatives noted above, although the Proposed Rule could be implemented in conjunction with mandating certain permitted bid conditions and providing guidance on when securities regulatory authorities would intervene on public interest grounds. The Proposed Rule would provide some certainty to both bidders and directors of target companies with respect to the process and timing for Rights Plans, and would help ensure consistent application across the country. As any public interest review is

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http://www.cfasociety.org/cac. Our Code of Ethics and Standards of Professional Conduct can be found at http://www.cfainstitute.org/ethics/codes/ethics/Pages/index.aspx.

[2] CFA Institute is the global association of investment professionals that sets the standard for professional excellence and credentials. The organization is a champion for ethical behavior in investment markets and a respected source of knowledge in the global financial community. The end goal: to create an environment where investors' interests come first, markets function at their best, and economies grow. CFA Institute has more than 113,000 members in 140 countries and territories, including 102,000 CFA charterholders, and 137 member societies. For more information, visit http://www.cfainstitute.org/.

by nature a facts based review and subject to the discretion of the panel adjudicating the specific file, such reviews add to both the costs and uncertainty of any hostile take-over bid.

2. *Do you think that implementing the Proposed Rule will reduce the need for securities regulators to review Rights Plans through public interest hearings? Please provide details.*

   While the Proposed Rule should reduce the need for regulators to review Rights Plans through public interest hearings, it is unclear to us from the Proposed Rule exactly when the regulators believe public interest hearings would be warranted. It would be helpful if additional guidance were provided in the Proposed Companion Policy on factors that would generally lead to a public interest hearing.

3. *Do you think the Proposed Rule will have any negative impact on the structure of take-over bids in Canada? Please provide details.*

   We do not think the Proposed Rule will have any negative impact on the structure of take-over bids in Canada, from the perspective of shareholders of target companies. While it is possible that a perpetual rights plan could have the immediate effect of entrenching management, it would always be open to either the bidder or other shareholders to take action to try to remove management or the rights plan in appropriate circumstances.

4. *Is the discretion given to a board of directors under the Proposed Rule appropriate*?

   We believe the discretion would be appropriate. Good corporate governance is vital for long term sustainability and integrity of companies, but the CAC does not favour either an exclusively principles-based nor exclusively rules-based approach. Effective corporate governance results from behavioral factors driven by directors and management. Directors already have a fiduciary duty to act in the best interest of the corporation and to recommend an appropriate course of action in the face of a bid. If shareholders (including the bidder) were of the view that directors have operated in an inappropriate manner, there are other avenues for redress available, such as pursuing a claim based on the oppression remedy. We note, however, that litigation is obviously an expensive endeavor that would not offer a resolution on a timely basis.

5. *In your view, would the increased leverage of target boards and greater shareholder control over the use of Rights Plans that would result under the Proposed Rule unduly discourage the making of hostile take-over bids? If you believe hostile take-over bids will be inhibited, please explain whether or not you support that impact or have concerns. If you believe that the Proposed Rule may unduly discourage hostile take-over bids, please explain how you would modify the Rule to address your concerns.*

   The cost to a bidder or to an activist shareholder of calling a meeting to cease trade a

rights plan or remove management would be substantially higher than the cost of requesting a regulatory hearing. As a result, it is possible that some bidders would be dissuaded from commencing a take-over bid in the face of an existing rights plan. However, given the plethora of reasons for a company to make a take-over bid, it is difficult to determine in advance whether the Proposed Rule would have a measurable impact on the number of hostile bids. While the costs to call a meeting or other action that could be taken by a bidder to remove a Rights Plan would be substantial, it would be a cost that could be pre-determined and worked into the overall economic model/costing of the hostile bid.

6. *Do you believe that other changes or consequential amendments to applicable securities legislation will be necessary if the Proposed Rule is implemented? Please explain.*

   The CAC does not have a view with respect to consequential amendments or conforming changes that would be required to effectively implement the Proposed Rule. While we agree with the concept of providing additional rights to shareholders, we are concerned with the effectiveness of the voting system in Canada as a whole, and would urge the CSA to continue its review of shareholder democracy and the voting process. Given the relatively high concentration of institutional and other large shareholders in the Canadian marketplace, as well as the proliferation of securities lending and derivative transactions which may confuse share ownership with economic exposure, it is unclear that the results of any shareholder vote are reflective of the actual views of the majority of shareholders.

7. *The Proposed Rule contemplates that Rights Plans are effective following adoption provided that they are approved by shareholders within 90 days.*

   a. *Is this timing appropriate? Should issuers have more or less than 90 days to obtain shareholder approval of a Rights Plan?*

      We are of the view that certainty is useful, and 90 days should provide most companies with sufficient time to call the necessary shareholder meeting.

   b. *Should the time period for shareholder approval be different depending on whether the Rights Plan was adopted in the absence of a proposed take-over bid or adopted in the face of a take-over bid?*

      We do not believe there is a compelling reason for the time period to differ depending on whether or not there is an active take-over bid.

8. *The Proposed Rule contemplates that a Rights Plan that is adopted after a take-over bid is made may remain in effect for a 90 day period pending security holder approval. We note that this 90 day period is longer than both the minimum 35 day period that a bid is required to be outstanding under applicable securities legislation*

*and the 45 to 55 day period by which securities regulators have historically ceased traded a Rights Plan when successfully opposed by a bidder. Please provide your comments on the effect of this extension of the time.*

Given the expected time required to call and hold a shareholder meeting, we do not have any concern with respect to this extension of time. Such an extension is also appropriate as the board will require time to appropriately review the bid. As noted above, there are opportunities to challenge the decision of directors in court, albeit an expensive and time-consuming process, in the appropriate circumstances if shareholders have concerns about directors' actions.

9. *While the Proposed Rule contemplates that Rights Plans are effective following adoption provided that they are approved by shareholders within the specified 90 day period, it does not mandate that a shareholder meeting be held within this 90 day period. This means, in effect, that a Rights Plan can remain in place for 90 days even if the board of directors choose not to hold a meeting. Should the Proposed Rule address the circumstance where an issuer does not take steps to call a shareholder meeting after a Rights Plan has been adopted?*

   It is not necessary for the Proposed Rule to address the circumstance where an issuer does not take steps to call a shareholder meeting after a Rights Plan has been adopted, as the Proposed Rule already provides that the Rights Plan could not remain in place after such time.

10. *The Proposed Rule contemplates that all Rights Plans must be re-approved by shareholders by no later than the date of the issuer's annual meeting in each financial after the issuer first obtained security holder approval.*

    a. *Is this timing appropriate?*

       Yes, the timing is appropriate and helps provide certainty to bidders and shareholders.

    b. *Should Rights Plans that were adopted in the absence of a proposed take-over bid be effective for a longer period of time than Rights Plans that were adopted in the face of a take-over bid?*

       We do not believe there is a compelling reason for the time period to differ depending on whether or not there is an active take-over bid.

11. *The definition of "security holder approval" in the Proposed Rule does not exclude votes cast by management of the issuer. Please explain whether or not you believe this is appropriate. Does your answer depend on whether the security holder approval is being sought in respect of a Rights Plan that was adopted in the absence of a proposed take-over bid as compared to one that was adopted in the face of a take-over bid? Would you like to see any other any other voting issues addressed?*

We believe it is appropriate that the Proposed Rule does not exclude votes cast by management. It would not be suitable to disenfranchise individuals in their capacity as shareholders simply because they happen to also be employees of the company.

With respect to other voting issues, consideration could be given as to whether it would be appropriate for companies with large shareholder blocks (including control block holders) to require a majority of the minority vote on matters such as the approval of Rights Plans, to ensure that the minority voice of shareholders is heard. We recognize that such consideration is outside the specific scope of the Proposed Rule and could require changes to corporate legislation as well, but such a review could form part of other projects involving shareholder democracy issues.

12. *Section 3 of the Proposed Rule limits the effectiveness of rights plans to take-over bids and the acquisition of securities of an issuer by any person. Does this limitation unduly restrict the potential applications of rights plans? Should rights plans be permitted to be effective against irrevocable lock-up agreements?*

    We do not believe there would be any utility for Rights Plans to be effective against irrevocable lock up agreements. If a shareholder chooses to support a bid by signing an irrevocable lock-up agreement, they should be permitted to freely exercise their voting rights.

13. *Do you agree with the application of the Proposed Rule to material amendments to a Rights Plan? Do you believe that the nature of what may constitute a material amendment should be more fully addressed in the Proposed Rule or the Proposed Policy?*

    Yes, the application of the Proposed Rule to material amendments to a Rights Plan is appropriate, in order to help avoid situations where a new Rights Plan is effectively implemented through amendments without the requisite shareholder consideration. It would be helpful for the Proposed Companion Policy to provide additional guidance in this regard.

14. *Should the Proposed Rule or Proposed Policy facilitate the ability of dissident shareholders or a bidder to challenge a pre-approved Rights Plan beyond the provisions of applicable corporate law by, for example, setting a minimum time period within which a meeting must be held or by dispensing with minimum ownership requirements?*

    As set out above, we are of the view that there are a number of improvements that could be considered for Canada's proxy voting system, but we do not believe changes such as those suggested would provide additional helpful recourse to dissident shareholders and bidders. If the CSA were to facilitate challenges to Rights Plans through the Proposed Rule, the effectiveness and consistency provided by the Proposed Rule would be greatly diminished.

15. *Section 5 of the Proposed Rule provides a general exception from security holder approval for new reporting issuers. Should this exception be limited or subject to conditions depending on the manner by which the issuer becomes a reporting issuer or the circumstances of the transaction (for example, if the new reporting issuer is a spin-out of another reporting issuer)?*

    We do not believe there is a compelling reason to limit the exception. Regardless of how an issuer became a reporting issuer, it would not be feasible for it to call a meeting immediately to seek approval of an existing Rights Plan, nor would it be necessary if the requisite disclosure has already been provided to shareholders.

16. *The Proposed Rule includes a transition provision in section 10. Is the time period contemplated in this provision appropriate?*

    We believe a transition period of 12-18 months would provide issuers with sufficient time to put in place a rights plan, if they so chose, and to call and hold a meeting to seek the requisite approval. Such a transition period would put companies on a level playing field.

**Concluding Remarks**

We thank you for the opportunity to provide these comments. We would be happy to address any questions you may have and appreciate the time you are taking to consider our points of view. Please feel free to contact us at chair@cfaadvocacy.ca on this or any other issue in future.

(Signed) *Ada Litvinov*

**Ada Litvinov, CFA**
**Chair, Canadian Advocacy Council**