July 11, 2013

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Gentlemen and Mesdames:

AMF Consultation Paper: *An Alternative Approach to Securities Regulators' Intervention in Defensive Tactics* ("AMF Consultation Paper") and CSA proposed National Instrument 62-105 *Security Holder Rights Plans* and related companion policy ("CSA Consultation Paper")

This letter is submitted in response to the AMF Consultation Paper and the CSA Consultation Paper both published on March 14, 2013. It reflects the views of a working group made up of issuers having a combined market capitalization of more than $35 billion (the **Working Group**). We thank you for affording us an opportunity to comment on this important topic.

General

In recent years, numerous unfriendly take-over bids have been launched on Canadian reporting issuers. The current regime undermines boards' ability to erect effective measures to protect corporations against opportunistic attacks.

The current interventionist approaches of the CSA to a board's exercise of its fiduciary duties raise concerns about how boards are regulated in the context of a take-over bid. The CSA should recognize that boards are constrained by their fiduciary duties and by the exercise of shareholder rights, including rights to submit proposals and to appoint new directors.

In that context, the Working Group supports the AMF proposal. It does not support the CSA proposal, which undermines board authority under corporate law. The authority of the board is one of the foundations of our corporate law. It should not be revoked lightly.

The Working Group is of the view that allowing shareholders to ratify the board's decision to adopt a rights plan in a shareholder vote is not a sufficiently hands-off approach. The Working Group believes that the CSA should allow boards of directors the discretion to act in what they determine to be the best interest of corporations. The Working Group is also of the view that Regulators should leave it entirely up to corporate law and the courts to determine whether defensive measures were taken in accordance with directors' fiduciary duties, as is the case in the United States.

It is to be reminded that in the United States, the Securities and Exchange Commission never intervenes in the area of take-over bid defenses and that more than 30 states have included anti-take-over provisions in their corporate laws. Should the CSA proposal prevail, Canadian businesses may turn themselves to finance ministers of Canada and its provinces to adopt provisions in corporate laws that would allow Canadian businesses to be on a level playing field with American businesses.

1. AMF Consultation Paper

You will find below comments on each question set forth in the AMF Consultation Paper with details of the views of the members of the Working Group. Some of our comments are repetitive due to the nature of the questions. We apologize for any redundancy.

1. *If proper safeguard measures to manage conflicts of interest are put in place and there exists no circumstance that demonstrates an abuse of security holders' rights or a negative impact of the efficiency of capital markets, do you agree that Regulators should give appropriate deference to the decision of target boards to implement a defensive measure?*

The Working Group agrees that appropriate deference should be given to the decision of target boards to implement defensive measures.

It is a foundational principle of corporate law that in the context of separation of ownership and control, boards be entrusted with the duty to direct the management of a corporation in accordance with their fiduciary duties. The decision in *BCE Inc. v. 1976 Debentureholders* (2008 SCC 69) (***BCE***) fleshed out the content of those fiduciary duties by providing that boards must mediate between the interests of the various corporate stakeholders, which include but are not limited to shareholders. Corporate law provides boards with the latitude to determine the course of action that is in the best interests of the corporation through the application of the business judgment rule, which effectively shields board decisions from second-guessing by the courts absent dishonesty, conflicts or lack of due diligence.

There is nothing about a take-over bid that is so inviolable to justify sidestepping the board, undermining its legitimate authority and giving shareholders the ultimate decision-making power over the corporation's future.

The decision to sell or not to sell a corporation is part of a business strategy. In that context, the board remains the best placed to determine how a take-over bid fits into a corporation's long-term strategy, and evaluate which stakeholder interests should prevail, in accordance with the *BCE* decision. This is especially true in light of the rise of merger arbitrage and the increasing conflicts between the short-term and long-term interests of a given shareholder base. Hence, the Regulators should give appropriate deference to the decision of target boards to implement defensive measures.

In an ideal solution, the Working Group is of the view that the AMF Proposal should go one step further and prevent any intervention from the Regulators with regard to defensive measures. This area should be exclusively governed by corporate law, as is the case in the United States where the Securities and Exchange Commission does not intervene in this regard and leaves it to the courts to decide whether defensive measures were properly adopted by the board. Canadian courts are no less capable than American courts to deal with these cases, especially considering that many provincial jurisdictions have courts with specialized commercial divisions.

2. *Do you think giving appropriate deference to directors in the exercise of their fiduciary duty will negatively impact the ability of target security holders to tender their securities to an unsolicited take-over bid?*

Giving greater deference to the target board to set up defensive measures in the exercise of their fiduciary duty will inevitably limit the ability of target shareholders to tender their securities in the context of a hostile take-over bid. However, this fact alone is not necessarily negative and should not warrant restricting deference to the board in such a context.

A board's decision to take defensive measures might be otherwise beneficial for the other corporate stakeholders and the target corporation's long-term interests. As discussed in the answer to the previous question, boards have a fiduciary duty to act in the best interests of the corporation, which includes but is not limited to shareholders' short-term interests.

In addition, a board's ability to refuse a proposed transaction may be a powerful negotiation tool in obtaining a better price for all shareholders. As demonstrated by the recent acquisition by Berkshire Hathaway of Heinz, a company with a head office in one of the strongest anti-take-over regime (Pennsylvania), such transaction may offer a significant premium to shareholders. One may wonder if the premium would have been so high in Canada, where a board does not have the ultimate decision making authority.

Furthermore, in the U.S. or under the AMF's proposals, shareholders are not without recourse in the event that they are dissatisfied with a board's decision to take defensive measures in the face of an unsolicited take-over bid. They always have the opportunity of removing board members at the corporation's annual general meeting or after calling a special meeting at any time. They may launch a proxy fight and present an alternative slate of directors favourable to removing defensive measures. In addition, dissatisfied shareholders can always sell their shares in the market. Shareholders also have the option of taking legal action against directors who do not exercise their fiduciary duties adequately. As previously mentioned, Canadian courts are more than capable of dealing with these issues, the same way American courts are.

Channelling dissatisfaction of shareholders through these mechanisms instead of involving them directly in the decision to accept or not accept a bid is beneficial, as it gives board members sufficient leeway to evaluate the situation in accordance with their fiduciary duties, prevents shareholders from making precipitate (and arguably less informed) decisions about whether or not to tender their shares and allows for a more organized and thoughtful reaction to a take-over bid. At the same time, the exercise of shareholder rights, including rights to submit proposals and to appoint new directors, should prompt board members to consider shareholders' interests in discharging their fiduciary duties.

3. *Should directors, in the exercise of their fiduciary duty, be able to implement a rights plan or any other defensive measure to fend off an unsolicited take-over bid?*

The Working Group is of the view that directors should be able to implement a rights plan or any other defensive measure to defend the corporation from a hostile take-over bid.

As previously mentioned, the Working Group observes that Canadian reporting issuers have recently been the targets of numerous hostile take-over bids. The current regime does not allow these issuers to defend themselves effectively against opportunistic and value-destroying bids, and forces issuers that are "in play" to auction off the corporation to the highest bidder. According to certain sources, since January 2002, 78% of hostile take-over bids launched in Canada resulted in a change of control, often into the hands of a foreign buyer.[1] The inadequacy of the current regulatory framework is a direct contributor to the serious decline in the number of corporate headquarters in Canada, which detrimentally affects the Canadian economy.

[1] Institute of Corporate Directors, Quebec Chapter, *The Ability for the Board of Directors to "Just say no"*, February 2013 at p. 7.

Giving boards the power to implement defensive measures is necessary to recalibrate the current regulatory imbalance that unduly favours hostile bidders, at the expense of the Canadian economy. It would also put Canadian issuers on a level playing field with the United States, where boards have great latitude to implement defensive measures within the scope of their fiduciary duties. One should remember that when Alcan Inc. was put in play by the take-over bid of Alcoa, Alcan could not replicate by a take-over bid on Alcoa, as Alcoa was protected by the anti-take-over provisions of its home jurisdiction (Pennsylvania).

The CSA should thus follow the recommendations of the Competition Policy Review Panel, mandated by the Government of Canada to study competitivity in our country. In its report, the committee recommended that:

> "38. Securities commissions should repeal National Policy 62-202 (Defensive Tactics).
>
> 39. Securities commissions should cease to regulate conduct by boards in relation to shareholder rights plans ("poison pills")
>
> 40. Substantive oversight of directors' duties in mergers and acquisitions matters should be provided by courts.
>
> 41. The Ontario Securities Commission should provide leadership to the Canadian Securities Administrators in making the above changes, and initiate action if collective action is not taken before the end of 2008."[2]

It is useful to point out that the recognition by Delaware courts that boards could unilaterally implement defensive measures including a poison pill has been far less consequential than its detractors first argued. The potentially pernicious effects of the poison pill were kept in check by other mechanisms such as greater directorial independence and potential civil actions for breach of fiduciary duties. It should also be noted that market participants did not push for regulatory intervention to invalidate rights plans and corporations did not reincorporate outside Delaware (in fact, Delaware is still overwhelmingly popular as about 80% of US corporations are incorporated in that state).

There is no reason to think that defensive measures could seriously exacerbate the conflicts of interest that could affect target boards in Canada, considering that corporate governance in Canada is in many respects more robust than in the United States. To give only one example, unlike in the United States, Canadian issuers cannot have staggered boards, which generally ensures that directors are more sensitive to shareholders' concerns.[3]

4. *Is it appropriate for Regulators to provide guidance as to appropriate safeguard measures generally recognized as effective in mitigating the inherent conflicts of interest of directors facing an unsolicited take-over bid?*

In an ideal solution, the CSA would never intervene in that field. It would leave boards free to act in what they believe to be the best interest of corporations. However, to the extent that the CSA does intervene, the Working Group believes that it is important for Regulators to provide guidance, in order to enhance business certainty, facilitate compliance and allow issuers to predict the circumstances in which a Regulator could intervene.

If you agree, are you of the view that these measures should be in a policy or in a rule?

The Working Group is of the view that such measures should be in the form of a policy, in order to ensure greater flexibility and allow the specifics of each case to be taken into account.

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[2] Government of Canada, Competition Policy Review Panel, *Compete to win report*, June 2008, p. 78.

[3] See new rules on director election under sections 461.1 to 461.4 of the TSX Company Manual.

5. *Do you have any suggestions of effective measures to manage conflicts of interest of directors?*

The Working Group is of the view that the examples listed on page 15 of the AMF Consultation Paper are effective measures for managing conflicts of interest of directors in the context of a take-over bid. These measures take adequate account of key elements for minimizing conflicts of interest such as independence, reliance on experts and disclosure to shareholders. These measures are in line with current best practices.

6. *Do you believe that security holders generally have the appropriate tools to discipline directors?*

The Working Group believes that security holders generally do have the appropriate tools to discipline directors. Recent experience shows that shareholders are increasingly willing to make active use of the ever-growing arsenal available to them. Among other things, shareholders have the power to change the composition of the board at any time, as discussed in the answer to question 2. The increasing use of majority voting among Canadian issuers, as recommended by the Canadian Coalition for Good Governance further reinforces shareholders' voice in electing directors. Shareholders may also take legal action against directors or the issuer through actions for breach of fiduciary duty, class actions, oppression remedies and derivative actions. Canadian courts are every bit as competent as American courts and are fully able to deal with corporate law cases. Canadian shareholders arguably have more tools than their American counterparts as they can submit shareholder proposals at a 5% level of ownership.

The threat of exit is a powerful tool to align directors' interests with those of the issuer. Shareholders also have the power to convene meetings, submit proposals and solicit proxies in relation to any matter properly put before a meeting.

We should add that the rational apathy and collective action problems usually associated with the exercise of shareholder rights are of less importance in Canada, where institutional investors own on average more than half of the shares of every company on the S&P/TSX 60 Index. Reliance on such shareholders' ability to discipline directors acts as an effective safeguard against the possibility of director entrenchment and other conflicts of interest in the context of a take-over bid.

7. *Do you agree that our proposed changes to the take-over bid regime to add the irrevocable minimum tender condition and the extension of the bid would contribute to allow target security holders to make a voluntary, undistorted collective decision to sell?*

The Working Group generally agrees that adding an irrevocable minimum tender condition and extending the bid by ten days once this threshold is reached would contribute to allowing target shareholders to make a voluntary, undistorted collective decision to sell. The irrevocable minimum tender condition acts like a referendum among equity holders, while the ten-day extension allows undecided shareholders to tender.

8. *Do you believe that the AMF Proposal would enhance investor protection against unfair, improper or fraudulent practices and promote the efficiency of capital markets?*

The Working Group believes that the AMF Proposal would enhance the efficiency of capital markets by limiting regulatory intervention, correcting current regulatory imbalances that unduly favour bidders and allowing boards to prevent the completion of value-destroying bids.

The AMF proposal would also enhance investor protection to the extent that, by implementing an irrevocable minimum tender condition and extension of the bid, it would reduce the pressure and coercion to which target shareholders can be subjected.

9. *Are there other amendments to address gaps in our take-over bid regime that we should contemplate?*

The Working Group believes that the AMF Proposal is an appropriate answer to current problems and gaps.

2. CSA Consultation Paper

You will find below comments on each question set forth in the CSA Consultation Paper with details of the views of the members of the Working Group. As with the comments on the AMF Consultation Paper, some of our comments are repetitive due to the nature of the questions.

General

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?*

The members of the Working Group do not approve the proposals described in the CSA Consultation Paper (the **Proposed Rule**). The Proposed Rule is better than the status quo only insofar as it reduces regulatory intervention, and clarifies the weight that will be given to a shareholder vote with regard to a rights plan. But it is unsatisfactory as it mandates undue shareholder interference with legitimate board decisions, thus undermining the authority of the board and going against fundamental principles of corporate law rooted in the separation of ownership and control. It also prevents the board from discharging its fiduciary obligations toward stakeholders, as mandated in the *BCE* decision. More comments on why the Working Group believes the discretion given to the board under the Proposed Rule is inappropriate are provided in the answer to question 3 of the AMF Consultation Paper.

Amending the bid regime to mandate “permitted bid” conditions and disallow Rights Plans would be worse than the Proposed Rule as it would further limit the board’s ability to implement a rights plan. For reasons stated in the answer to question 3 of the AMF Consultation Paper, the Working Group believes that it is crucial that directors have the authority to implement a rights plan in accordance with their fiduciary duties. That being said, most members of the Working Group are in favour of making minimum tender conditions mandatory as suggested by the AMF proposal in order to allow target security holders to make a voluntary, undistorted collective decision to sell. More comments on this matter were provided in the answer to question 7 of the AMF Consultation Paper.

The last alternative, which is to amend NP 62-202 to provide specific guidance on when securities regulatory authorities would intervene on public interest grounds to cease trade a rights plan, is the best among the unsatisfactory options suggested. Such guidance would at least provide more clarity and business certainty with regard to the validity of a rights plan. The Working Group hopes that it would leave the board sufficient latitude to decide whether or not to implement a rights plan, and reduce regulatory intervention to a minimum. However, as previously mentioned, it should be noted that the Working Group is of the view that in an ideal solution, the Regulator should not intervene at all with regard to defensive measures, and that this area should be left exclusively to corporate law.

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.*

Although the Working Group is not in favour of the Proposed Rule, it believes that it would normally reduce the need for securities regulators to review Rights Plans as the decision to implement, amend or maintain a rights plan would essentially be in the shareholders’ hands.

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

The Proposed Rule could affect the timing of take-over bids. For example, bid offers could be made for 90 days. There would also be uncertainty if a rights plan was adopted just before an annual meeting.

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

The Proposed Rule unduly restricts boards' discretion in adopting a rights plan by subjecting their decision to shareholder approval.

As mentioned in the answer to question 1 of the AMF Consultation Paper, the separation of ownership and control is at the core of our corporate law. It involves leaving the power to direct the management of a corporation in the hands of the board, in accordance with its fiduciary duties. Those duties entail mediating between the interests of various stakeholders pursuant to the *BCE* decision. The business judgment rule applies to give the board sufficient latitude to make the decisions it considers appropriate in the circumstances, without fear of being constantly second-guessed.

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?*

Although the Working Group does not agree with the Proposed Rule, the Working Group does not believe that it would unduly discourage the making of hostile take-over bids. American boards have had the authority to adopt rights plans for a few decades now, and hostile bids still occur routinely. The Proposed Rule would just give greater leverage to the target board, for a limited period of time only, in its negotiations with a bidder.

Even if the Proposed Rule resulted in diminishing the number of hostile bids, the Working Group does not believe that this should be a concern. It should be borne in mind that the line between a friendly and a hostile take-over is often blurred in practice; a bid that is hostile at first often becomes friendly after discussions between the target board and the bidder. As previously discussed, our corporate law provides several mechanisms to ensure that directors adequately evaluate take-over bids, such as fiduciary duties, director independence and the free exercise of shareholder rights. Therefore, a decrease in the number of hostile bids may not necessarily mean that the market for corporate control is any less efficient.

If you believe hostile take-over bids will be inhibited, please explain whether or not you support that impact or have concerns.

[Not applicable.]

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.

[Not applicable.]

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.*

If the Proposed Rule were to be implemented, the Working Group would suggest adopting a 50% irrevocable minimum tender condition and a 10-day extension of the bid once this threshold is reached, as put forward in the AMF Proposal. Such addition would be useful where a rights plan has not been adopted by the board or approved by the shareholders. It would contribute to allowing target shareholders to make a voluntary, undistorted collective decision to sell. In this regard, please refer to the comments for question 7 of the AMF Consultation Paper.

Specific

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?

As previously discussed, the Working Group is of the view that rights plans should not be subject to shareholder approval.

If the Proposed Rule were to be adopted, the Working Group is of the view that 90 days is a minimum period of time for a rights plan to be submitted to shareholders' approval. The board and its shareholders need time to adequately assess the situation and consider what is at stake. With global transactions, come very complex tax and regulatory issues. Such issues often take time to resolve. The 90 days period represents an improvement compared with the current period after which a rights plan is typically cease traded.

   (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?

If the Proposed Rule were to be adopted, the Working Group does not consider that it would be necessary to provide for different time periods depending on whether the rights plan was adopted inside or outside a take-over bid situation.

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.*

Please refer to the comments for question 7(a), above.

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?*

The Working Group does not support the Proposed Rule and does not agree with subjecting the adoption of a rights plan to shareholder approval. Thus, the Working Group does not believe that provisions should be added to account for the situation where a board has not taken steps to call a shareholders' meeting 90 days after a rights plan is adopted. In addition, it might be legitimate for a board not to call a shareholders' meeting to approve a rights plan if, for example, it began negotiations with a white knight and knew that the latter would submit an offer within the prescribed 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?

The Working Group does not support the Proposed Rule, as it believes that shareholders should not have the ultimate say on the implementation and the maintaining of a rights plan. This decision should be left exclusively to the board.

If the Proposed Rule were to be adopted, the Working Group would suggest that shareholder approval of a rights plan be kept at every three years. Yearly voting on a rights plan would unnecessarily put shareholders in constant soul-searching mode. It would discourage boards from adopting rights plans annually in favour of tactical rights plans.

(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?

The Working Group is of the view that the same rules should apply.

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.*

If the Proposed Rule were to be adopted, the Working Group believes that this measure would be appropriate. There should be no discrimination between shareholders of the issuer, with the exception of the bidder. Furthermore, it is important to note that it is considered a corporate governance best practice for management to hold shares of an issuer in order to align management's interest with that of shareholders and incentivize the creation of shareholder value. The issuer's management should not be penalized and treated as second-class shareholders in the context of a take-over bid for having complied with best practices.

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?

No, the previous answer applies in all situations.

Would you like to see any other voting issues addressed?

The Working Group is of the view that the proxy voting system could be improved, in order to further enhance the effectiveness of the exercise of shareholder rights. Among other things, the current system is overly complicated and opaque. Tracking of administrative or technological errors is difficult given that there are various parties involved and no system of interaction has been properly established. Proxy agents are unregulated and it is almost impossible for investors to verify how their voting instructions were handled with regard to a particular meeting. The system also allows for empty voting, which gives a voice to persons that wish to further a personal agenda often unrelated to an issuer's best interests.

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?*

The Working Group does not believe that this limitation unduly restricts the potential applications of rights plans, as in any event, rights plans are not meant to be exercised in practice. The Working Group is aware of only one case where an issuer "swallowed" the poison pill (bid for Selectica by Trilogy and Versata in 2010 in the United

States). Under normal circumstances, rights plans are never actually triggered and only serve as a tool for directors to find better alternatives, gain time and repel undesirable bidders.

Should rights plans be permitted to be effective against irrevocable lock-up agreements?

The Working Group believes that rights plans should be effective against irrevocable lock-up agreements, in order to give rights plans their full defensive effect and prevent bidders from circumventing a board's defensive measures. Boards' decisions to implement rights plans should prevail over shareholders' decisions to enter into lock-up agreements with a bidder. The board is better placed to evaluate an offer in the context of an issuer's long-term corporate strategy and take into account the interests of all relevant corporate stakeholders. Such authority would be undermined by allowing irrevocable lock-up agreements to stand against a rights plan that was legitimately adopted by a board.

13. *Do you agree with the application of the Proposed Rule to material amendments to a Rights Plan?*

The Working Group does not believe that shareholders should have the ultimate say with regard to the amendment of a rights plan. This decision should be left exclusively to the board, as should the decision to implement and maintain 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?

If the Proposed Rule were to be adopted, further guidance on the nature of what may constitute a material amendment would surely be helpful. It would allow issuers to be more fully aware of their duties and facilitate compliance with the regulation.

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?*

The Proposed Rule or Proposed Policy should not facilitate the ability of dissident shareholders or a bidder to challenge a pre-approved Rights Plan. The decision to establish a rights plan should be left exclusively to the board. If shareholders are dissatisfied with a board's decision to implement a rights plan, they may change the composition of the board, sell their shares in the market or take legal action against the directors, as discussed in greater detail in the answer to question 2 of the AMF Consultation Paper. The Proposed Rule should not duplicate or give more rights to dissident shareholders than what they are already granted under corporate law.

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)?*

The Working Group does not support the Proposed Rule, and believes that no issuer should have to submit its rights plan to shareholder approval.

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

As the Working Group does not support the Proposed Rule, it does not wish to comment on this question.

Conclusion

In short, members of the Working Group believe that the AMF's proposal is superior to the CSA's. The CSA proposal puts a focus on shareholder sovereignty that is undue in light of fundamental principles of corporate law, which confer on the board the authority to direct the management of a corporation, the recent *BCE* decision, which mandates a focus on the various corporate stakeholders, and the prevailing context where merger arbitrageurs and short-term-oriented shareholders are actively involved in control transactions and often contribute to the conclusion of opportunistic bids. It is also restricted in scope, as it only concerns rights plans. Conversely, the AMF proposal offers a comprehensive plan to address current regulatory imbalances with regard to defensive measures, while recognizing the legitimate authority of the board, thus realigning securities law with core principles of corporate law, at last.

Thank you for allowing us to comment on this subject.

Yours truly,

(s) Norton Rose Fulbright Canada LLP