



July 12, 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  
Ontario Securities Commission  
20 Queen Street West, 19th Floor, Box 55  
Toronto, Ontario M5H 3S8  
E-mail: [comments@osc.gov.on.ca](mailto: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  
Montréal, Québec H4Z 1G3  
E-mail: [consultation-en-cours@lautorite.qc.ca](mailto:consultation-en-cours@lautorite.qc.ca)

Dear Sirs/Mesdames:

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

Thank-you for the opportunity to comment on this “Proposed Rule”, “Companion Policy” and “Proposed Policy.” Alberta Investment Management Corporation (AIMCo) is one of Canada’s largest and most diversified institutional investment fund managers, with an investment portfolio of approximately \$69 billion. We are a Crown Corporation and we invest globally on behalf of 28 pension, endowment and government funds in the Province of Alberta.

AIMCo upholds the principles of shareholder democracy, transparency and good corporate governance. Accordingly, AIMCo supports the purpose of 62-105 to address concerns about the limited ability of an issuer to respond to a hostile bid, to ensure that minority shareholders have a voice in the face of a hostile take-over bid, and to ensure that a majority of shareholders are supportive of the Rights plan measure proposed by the issuer's management. As a long term investor, AIMCo supports a regulatory framework that provides stability and maximizes shareholder value.

## **AMF Consultation Paper**

We have also reviewed the AMF's consultation paper: "An Alternative Approach to Securities Regulators' Intervention in Defensive Tactics". We overall approve of the AMF's proposals to i) require an irrevocable minimum tender condition of 50% plus 1 and ii) a subsequent extension of the bid by ten days after arriving at the mandatory minimum condition. We thank the AMF for this meaningful contribution and we suggest these proposals be incorporated within the proposed rules for rights plans.

AIMCo would like to emphasize the importance of the harmonization of regulations regarding take-over bids and defensive measures in general across all Canadian jurisdictions.

AIMCo's responses follow:

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 Proposed Rule provides more certainty to both the bidders and to the boards of directors of target companies with respect to process and timing for Rights Plans. This should in turn reduce the need for regulatory intervention, decreasing systemic costs, and promoting efficiency. The Proposed Rule attempts to balance the rights of shareholders with the fiduciary duty of the board to act in the best interests of the corporation.

We would support proposals to amend NP 62-202 to provide guidance on when securities regulatory authorities would intervene on public interest grounds to cease trade a Rights Plan. Such guidance would provide more clarity and business certainty with regard to the validity of a Rights Plan.

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 it would appear to reduce the need for public interest hearing, the conditions that would generally lead to a public interest hearing have not been detailed. In select cases, the 'bona fide' interests of shareholders could variously be interpreted to be at odds with the interests of management, and/or with the bidder or bondholders or even with the interests of the general public.

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.

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

The Proposed Rule strives to achieve an appropriate balance between the boards' discretion in adopting a Rights Plan and the ultimate approval to be exercised by shareholders, as owners of a corporation. Boards are given more time to respond to a bid, more control over the terms under which they will accept a bid, and a greater range of alternatives. If shareholders believe that the directors have operated unprofessionally, they may collectively decide whether they wish to receive the hostile bid, by majority vote; or a dissident shareholder can seek to terminate the pre-approved rights plan without launching a proxy contest.

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.*

It is unlikely that the increased leverage would unduly discourage hostile take-over bids. While the bidder's costs to call a meeting to remove a Rights Plan could be daunting, these costs would likely be worked into the overall economic model and costing of the hostile bid, and/or remove unlikely contenders from the bidding process.

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.*

While AIMCo supports the overall aims of the Proposed Rule to uphold shareholder rights, we are of the opinion that greater efforts must be made to improve the transparency, effectiveness and reliability of the voting system in Canada as a whole. There is an issue of questionable vote confirmation for the end to end audit process for any given vote, as the vote tabulation process is unregulated. There is also the question of ease of access of the bidding information to shareholders and the impact of potential shareholder voting activity/non-activity for shareholders who retain voting rights not commensurate with any economic ownership in the issuer. Empty voting and hidden voting are realities of the market that the Proposed Rule does not address.

AIMCo suggests the need for full and open dialogue amongst investors to properly define equity equivalent derivatives and the impact of securities lending within the context of economic ownership, and/or applicable voting rights, along with the requisite reporting for Canadian entities. At present it is unclear whether the results of any shareholder vote are reflective of the actual views of the majority of shareholders.

As previously mentioned, the AMF proposal for a 50% irrevocable minimum tender condition and a 10-day bid extension once this threshold is reached are desirable additions to the take-over bid regime, and mitigate the coercion effect.

The alternatives considered under the consequential amendments (i.e. to keep the status quo, leave defensive tactics to the courts, and to permit only standard, cookie cutter Rights plans) are certainly not preferable to the Proposed Rule.

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?*

The 90 day period is appropriate and gives the board and its shareholders time sufficient time to adequately assess a proposed offer.

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?*

No comment.

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.*

This extension seems appropriate as management and provides the board with sufficient time to appropriately review the bid.

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 chooses 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 would appear overly prescriptive to address the circumstance of when 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?*

This 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?*

There does not appear to be a compelling reason for the time period to differ in the absence of a proposed 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?*

AIMCo does not see any reason in principle to disenfranchise management with respect to their ability to vote relating to the approval of a Rights Plan or otherwise. Any potential conflict faced by management should in principle be negated for those who are also significant shareholders.

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?*

If a shareholder chooses to support a bid by signing an irrevocable lock-up agreement, they should still 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?*

The application of the Proposed Rule to material amendments to a Rights Plan appears appropriate. It would certainly be helpful for the Proposed Companion Policy to address a definition of what exactly would constitute 'material amendments.'

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?*

We are of the view that applicable corporate law provides sufficient recourse to dissident shareholders and bidders; whereas dispensing with minimum ownership requirements or

otherwise encouraging challenges to pre-approved Rights Plans beyond the allowances of current corporate law would impede the overall benefit of consistency provided by the Proposed Rule.

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 the manner in which an issuer becomes a reporting issuer is a compelling reason to limit the exception as described; however giving the securities regulators the ability to grant exceptions may be appropriate under unusual circumstances.

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

The proposed transition period should provide issuers with sufficient time to put in place a rights plan, and/or to call and hold a meeting to seek shareholder approval.

### **Concluding Remarks**

Thank you again for the opportunity to comment, and for considering our input. Do feel free to direct any questions you may have to us.

Yours sincerely,



Leo de Bever  
*Chief Executive Officer*



Darren Baccus  
*Associate General Legal Counsel*



Alison Schneider  
*Manager, Responsible Investment*