Caisse de dépôt et placement du Québec

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ENGLISH TRANSLATION

Mtre. Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
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Re: Consultation paper of the Autorité des marchés financiers (the "AMF"): *An Alternative Approach to Securities Regulators' Intervention in Defensive Tactics* (the "AMF Proposal");

And

Notice and request for comment of the Canadian Securities Authorities (the "CSA") – Proposed National Instrument 62-105 *Securities Holder Rights Plans* (the "CSA Proposal").

Dear Mtre. Beaudoin:

The Caisse de dépôt et placement du Québec (hereafter the "**Caisse**") has taken cognizance of the CSA proposal as well as the AMF proposal (collectively the "**Proposals**").

The Caisse would like to thank the CSA and the AMF for the opportunity to comment on the Proposals.

About the Caisse

Under its constituting statute, the Caisse manages funds for its depositors, mainly public and private pension and insurance funds. It is one of the largest institutional fund managers in Canada and manages its holdings for the long term.

The Caisse is a shareholder of more than 180 public companies in Canada (as of December 31, 2012) and therefore pays close attention to any regulatory initiative to improve the governance and performance of such companies and to preserve its rights as a shareholder.

It pays special attention to oversight of take-overs, which constitute a major event in the life of a corporation.

The two Proposals illustrate opposing visions of directors' duties in the case of transactions involving a change of control, which the Caisse, as a long-term shareholder, has tried to reconcile.

The AMF Proposal, which is supported by the Institute of Corporate Directors (ICD) and the Institute for Governance of Private and Public Organizations (IGPPO), aptly reflects the concerns of boards of directors regarding short-term shareholders in the context of proposals involving a change of control. This phenomenon was definitely less in evidence when National Policy 62-202 was adopted. This Proposal, like the proposal to reduce the early warning disclosure threshold from 10% to 5%, is a good example of a trend favouring reporting issuers over shareholders, which, after all, finance companies.

We would also like to point out that it is important for an institutional investor not to be hindered in its ability to dispose of its shares as in the case of companies with a controlling shareholder that always has the ability to sell its shares.

The Caisse's point of view on shareholder rights plans ("poison pills")

First, it should be noted that the Caisse has never been in favour of poison pills and that it was even the origin of Canada's first lawsuit on this matter when it publicly opposed the plan put in place by Inco. The Caisse's argument at the time was that such plans hindered its ability to trade its shares freely, and this argument is still valid.

Even so, over the years the Caisse has developed a policy as well as voting criteria regarding shareholder rights plans or poison pills We are generally in favour of the terms and conditions of the new generation of shareholder rights plans developed in response to certain concerns on the part of institutional investors. Most often, the Caisse opposes shareholder rights plans for the following reasons:

- The triggering threshold is less than 20% of the shares outstanding;
- The plan allows no exemption for private placements.

Indeed, an exemption for private placements protects the right of large shareholders to freely carry out private transactions, which are allowed under the

rules governing take-over bids. Shareholders should not be deprived of such an exemption.

In exceptional cases, the Caisse supports a plan even though its terms and conditions do not correspond to voting criteria, if its adoption is favourable to shareholder interests.

For example, we are in favour of a plan that protects share value in the case of a company in a consolidating sector or a vulnerable position (such as the technology sector and the mining sector).

The board's role

That being said, the Caisse is also of the opinion that the fact that an offeror announces a bid for a public company should not change the directors' fiduciary obligations and should not automatically put the company in play, because a change of control is not necessarily the best option for the company, its shareholders and its other stakeholders. Indeed, even though it is true that the shareholders must be free to sell their shares, the board should have a role to play in such an important transaction. In this sense, one can ask whether the objective of 62-202, namely to maximize shareholder value, is still appropriate because the words missing from the sentence are "over the long term".

This issue is central to the discussion because companies supported by the ICD and the IGPPO are concerned about "tourist" shareholders whose main objective, in contrast to the Caisse, is not to promote the long-term development of companies.

Moreover, when a company decides that a change of control is the solution, one can imagine a scenario in which the board decides that a lower bid is better because it would safeguard more jobs and local suppliers.

The recent BCE decision would today make it possible to arrive at such a conclusion even though few boards would have the courage to do so, because both the BCE decision and the People decision did not directly concern a hostile take-over bid.

Moreover, it is curious that, in all major transactions affecting a company, it is accepted and required that the board play an important role, whereas in the case of a take-over bid, the board plays a very minor role even though the transaction has a major impact on the company's future. The difference between a take-over, an arrangement and a merger is often merely one of form rather than substance.

The Caisse's position

For that reason, the Caisse has decided that it is in favour of the AMF's initiative because it is based on a deeper consideration of the issues surrounding take-overs. The purpose of this support is not to protect underperforming companies. We are aware of the fact that the transferring responsibility for deciding such matters to the

courts does not guarantee that the right decisions will be made, and it is clear that commercial chambers whose judges are familiar with the business environment will be a vital component of its success. In our opinion, however, that would be preferable to the current situation, whereby securities commissions are arbitrators not of matters involving securities regulation but of matters involving directors' fiduciary duty.

Moreover, it is not certain that the courts possess all the required tools because the rules of the game are vague regarding what boards may do. This situation calls for amendments to the applicable laws regarding corporations. We understand that the Government of Québec has created a committee to examine these matters.

In addition, a number of institutional investors have raised the matter of conflicts of interest on the part of boards of directors and management when a take-over bid is triggered. The conflicts go both ways: the board and management may want to remain in place or, on the contrary, their options may encourage them to want a transaction involving a change of control. It is therefore not possible to generalize and say that all boards of directors will systematically want to prevent the sale of their companies.

Lastly, if the AMF proposals were adopted, it would be essential to carry out a review covering a number of years to assess the impact of such changes, in the same way that 62-202 is being scrutinized today. Some studies suggest that companies in U.S. jurisdictions, where there are impediments to hostile take-over bids, perform less well. In other words, the threat of a take-over bid prevents complacency on the part of boards of directors and management, and that is a positive thing.

Yours truly,

Marie Giguère
Executive Vice-President
Legal Affairs and Secretariat