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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
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Nunavut

Dear Sirs/Mesdames:

Proposed National Instrument 62-105 – *Security Holder Rights Plans*

We appreciate the opportunity to comment on the Canadian Securities Administrators' (the "CSA") proposed National Instrument 62-105 – *Security Holder Rights Plans* (the "Proposed Rule"), proposed Companion Policy 62-105CP – *Security Holder Rights Plans* (the "Proposed Policy"), and the related consequential changes to National Policy 62-202 – *Take-Over Bids – Defensive Tactics* ("NP 62-202"), National Policy 62-203 – *Take-Over Bids and Issuer Bids*, Multilateral Instrument 62-104 – *Take-Over Bids and Issuer Bids*, OSC Rule 62-504 – *Take-Over Bids and Issuer Bids*, National Instrument 41-101 – *General Prospectus Requirements* and National Instrument 51-102 – *Continuous Disclosure Obligations* (collectively, the "CSA Proposal").

We understand that the CSA Proposal is part of a broader ongoing CSA initiative to review defensive tactics and that the CSA will consider potential changes to NP 62-202 or the take-over bid regime as part of this broader review. We support the CSA's initiative in this regard. The current uncertainty regarding how long a shareholder rights plan will be permitted to remain outstanding is problematic for both bidders and targets. Recently, commissions in different jurisdictions have arrived at different results based on similar facts, resulting in a patchwork regime across Canada. Furthermore, decisions by individual commissions have become inflexible, too often arriving at similar results even when the facts are very different and may warrant different results. We agree that the time has come to address these issues.

The Autorité des marchés financiers (the "AMF") has concurrently published a consultation paper inviting comments on an alternative approach to that contemplated by the CSA Proposal. The comments that the CSA and the AMF receive in response to their respective proposals will play an important role in identifying potential changes to the current take-over bid regime that can benefit both targets and bidders. Our Montreal office will be submitting comments on the AMF consultation paper.

We understand that, consistent with many years of Canadian commission decisions, the CSA has taken the position that the ultimate decision regarding the maintenance of a rights plan must belong to shareholders, and that a board of directors should not be able to prevent shareholders from responding to a bid. While we acknowledge that there is a debate ongoing as to whether Canadian securities regulators should be more deferential to decisions of boards of directors in determining how to respond to unsolicited bids, in formulating our comments on the CSA Proposal we have accepted the shareholder primacy approach advocated by the CSA and have not undertaken a discussion of the merits of this approach or other potential approaches.

Mandatory Provisions in Rights Plans

The current take-over bid regime in Canada does not mandate any of the terms of rights plans, leaving the design of rights plans to target boards with the ultimate terms of rights plans that are put to a shareholder vote to be determined through the shareholder primacy model favoured by the CSA. We are concerned that some aspects of the Proposed Rule would unnecessarily limit the discretion that historically has been afforded to boards and shareholders to determine the rights plan structure that is the most beneficial in the context of each issuer. For example, we see no reason why the Proposed Rule should mandate that all rights plans include a "waive for one waive for all" provision. The Proposed Rule also mandates that a rights plan cannot be triggered except "as a result of a takeover bid or the acquisition by any person or company of securities of the issuer". We understand the intention is that a rights plan not be triggered by gathering voting support or proxy solicitation activities, which would support a bidder's access to and use of the requisition mechanism and shareholder vote to terminate the rights plan, and also ensure that rights plans do not impair shareholder action outside of the take-over bid context. However, we submit that the CSA should not dictate whether lock-up agreements (either hard or soft) can be capable of triggering a rights plan. From a shareholder primacy perspective, shareholders, through their vote to approve or maintain a rights plan, should be allowed to determine the terms of the rights plan, rather than have such terms be dictated by securities regulators.

Requisitioning of Shareholder Meetings

The Proposed Rule relies on the right of shareholders to requisition a meeting to consider whether to terminate a rights plan. However, an important consideration is whether the requisition regime in Canadian corporate law is sufficient for purposes of the Proposed Rule.

The typical share ownership threshold required to requisition a meeting is 5% (10% in some provinces). It may be challenging for a bidder to build a pre-bid stake of that size for a variety of

reasons, including public disclosure requirements (which may soon require disclosure at the 5% threshold), lack of sufficient liquidity in the target's shares, pre-bid integration rules and, possibly, insider trading restrictions. Enlisting the support of other shareholders for a requisition strategy prior to announcement of a bid also may be challenging for a bidder, as doing so would broaden the scope of those with knowledge of the bid and increase the risk of a leak. Being approached on a confidential basis to support a planned requisition also may be unpalatable to target shareholders, if they then would be precluded from trading shares of the target and the bidder pending announcement of the bid. In practice, therefore, bidders will likely not seek support of other shareholders for a requisition until after the bid is announced, which will certainly place additional risk on the bidder. It would remain to be seen whether the Proposed Rule's reliance on the requisition process would have a dampening impact on Canadian change of control activity.

Most Canadian corporate statutes do not specify a period of time within which an issuer must hold a requisitioned meeting. To the extent that such parameters are established, whether by the CSA, the securities commissions (through decisions or otherwise) or the courts, it will be important to ensure that a target is not required to hold the meeting too soon, or allowed to hold the meeting too late. If a target board were required to call and hold a meeting before the 90th day following commencement of a bid, this would undercut the timing objective of the Proposed Rule. However, allowing a target board to delay the meeting for too long in the face of a bid would deny target shareholders the right to decide for themselves whether to accept the bid and would be inconsistent with the shareholder primacy approach. If the CSA intends to fix the period of time within which a requisitioned meeting must be held, it should consider whether this defined period should be the greater of (i) 90 days following commencement of a formal bid, and (ii) 75 days following receipt of a proper requisition, or some longer period (which would give issuers with shareholder approved rights plans a timing advantage relative to issuers adopting tactical rights plans). However, the rules should also be clear that any such prescribed time period should not relieve a board of directors from responding more swiftly to a requisition if their fiduciary duties to the corporation would require them to do so in the particular circumstances in which the requisition is submitted.

We note that in certain provinces the corporate statute specifies a period of time within which an issuer must hold a requisitioned meeting. Target companies subject to these corporate statutes could (depending on the timing of delivery of the requisition) be required to hold a meeting dealing with termination of the rights plan before the 90th day following commencement of a formal bid which, as indicated above, would undercut the timing objective of the Proposed Rule. Regulatory intervention may be required to ensure timing consistency across Canada.

Under most Canadian corporate statutes, an issuer is not required to call a meeting if the record date for a meeting has already been fixed, or if the board has already called a meeting and given the required notice. We note that these events may happen many months prior to the actual scheduled meeting date. These exceptions thus allow a target board to refuse to call a meeting (despite having received a requisition) in circumstances where the next shareholder meeting is

many months in the future. This is a significant potential limitation on a prospective bidder's access to a timely meeting, if such access is based solely on applicable corporate law.

Timing and Transition

The Proposed Rule would require shareholder approval of a rights plan within 90 days of adoption, in the absence of a take-over bid. We see no reason for this change to the status quo of six months in circumstances where no formal bid has been commenced.

The transition provision of the Proposed Rule would require an issuer to seek shareholder approval of any existing rights plan at the issuer's next annual meeting (if the annual meeting is more than 90 days after the effective date). Most, if not all, pre-existing rights plans will not contemplate this requirement of the Proposed Rule; they will not provide for annual confirmation by shareholders, or for termination of the rights plan if such approval is not obtained. Furthermore, many rights plans will not give the board discretion to terminate the rights plan, meaning that if an issuer does not wish to seek shareholder confirmation of the existing rights plan, regulatory action would be required to terminate the rights plan. We submit that the Proposed Rule should include a provision that would automatically cease trade the applicable rights if the rights plan is not approved by shareholders in accordance with the transition provision of the Proposed Rule.

Ongoing Role for Commissions

We agree with the CSA's expectation that the CSA Proposal will reduce the number of applications to cease trade rights plans and lead to fewer rights plan hearings, given that securities commissions would intervene in more limited circumstances. However, if the CSA Proposal were adopted, we would expect commissions would be required to continue to play a significant role in the regulation of rights plans and in the regulation of shareholders' meetings called to consider rights plans through hearings, if the circumstances warrant doing so.

We note, however, that the Proposed Rule contains two different standards for intervention: (i) "conduct that undermines the principles underlying the instrument", and (ii) activities that would give rise to "a public interest rationale for the intervention not contemplated by the instrument". We submit that adopting a single standard for intervention would be appropriate and that the standard should be the public interest standard.

Reliance on Shareholder Voting

Under the CSA Proposal, shareholder voting would be one of the key instruments for the determination of whether shareholders should have an opportunity to respond to a hostile bid. As we have highlighted in our 2010 paper "The Quality of the Shareholder Vote" assessing the Canadian shareholder voting process, which can be found at www.shareholdervoting.com, there are a number of issues with the proxy voting system that are widely acknowledged to compromise (or have the potential to compromise) the quality of shareholder voting in Canada,

leading to the risk that voting results may not accurately reflect the views of shareholders. Adopting a shareholder primacy approach to the regulation of rights plans and relying on shareholder voting to capture the views of shareholders underscores the need for regulators to prioritize the improvement of the proxy voting system and the applicable regulatory framework.

By increasing the importance and relevance of shareholder voting, the CSA Proposal also has the potential to increase the role and influence of proxy advisors in the market for corporate control. If the CSA Proposal were to be adopted, the approval or rejection of a rights plan by shareholders in the context of a take-over bid may effectively represent a collective decision on whether to accept the bid. Recommendations regarding acceptance or rejection of a bid inevitably must be made primarily based on a value assessment of the bid relative to the target's other options. However, value assessment is not an area where proxy advisors generally have meaningful expertise or qualifications. The role and influence of proxy advisory firms will become issues of even more importance if the CSA Proposal is adopted and the role of proxy advisory firms in the M&A context expands.

Maintaining the Status Quo

If the status quo is maintained notwithstanding the CSA Proposal, the CSA could focus its efforts on bringing consistency to the regulation of rights plans. For example, the CSA could consider giving their decision-making panels clear guidance on when and how to intervene in order to promote consistent decisions. The CSA could also consider reviving the practice of holding joint hearings on rights plans (and other defensive tactics) to promote consistency among the provinces.

Please note that the following members of our firm have participated in the preparation of this letter and may be contacted directly in the event you have any questions concerning our submissions:

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Yours very truly,

"Davies Ward Phillips & Vineberg LLP"