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BY E-MAIL

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
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19th Floor, Box 55
Toronto, Ontario M5H 2S8

Anne-Marie Beaudoin
Corporate Secretary
Authorité des marchés financiers
P.O. Box 246, 22nd Floor
800 Victoria Square
Montréal, Québec H4Z 1G3

Dear Sirs/Mesdames:

Re: Request for Comments - Proposed NI 62-105 Security Holder Rights Plans, Proposed Companion Policy 62-105CP and Proposed Consequential Amendments

We are pleased to submit this letter in response to the request for comments of the Canadian Securities Administrators (the "**CSA**") published March 14, 2013 on the proposed National Instrument 62-105 *Security Holder Rights Plans* (the "**Proposed Rule**") and proposed Companion Policy 62-105CP *Security Holder Rights Plans* as well

as the related consequential amendments to (i) National Policy 62-202 *Take-Over Bids - Defensive Tactics* ("**NP 62-202**") and National Policy 62-203 *Take-Over Bids and Issuer Bids*, and (ii) 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*.

GENERAL

The CSA note that the Proposed Rule serves to address concerns about the limited ability of a target board to respond to an unsolicited bid. In particular, the CSA raise the concern that some market participants are of the view that (i) the current approach of Canadian securities regulators to unsolicited take-over bids favours bidders, limits board and security holder discretion and may not maximize value for security holders, and (ii) securities regulators may be intervening too early when cease-trading a shareholder rights plan (a "**Rights Plan**"). The CSA also note a concern under the current take-over bid regime that shareholders are unable to act collectively through a shareholders' vote.

The Canadian securities regulators' current approach to Rights Plans favours the overarching principle that shareholders ultimately should be free to tender to a take-over bid, often referred to as a "shareholder primacy" model. Since this policy approach was adopted, the Supreme Court of Canada's decision in BCE has made clear that a board of directors must consider the long-term best interests of the corporation and, in making any corporate decision, the board must be mindful that "there is no principle that one set of interests — for example the interests of shareholders — should prevail over another set of interests". Accordingly, while the BCE decision purports to provide the board with greater latitude in responding to a take-over bid, the current approach of the securities regulators to Rights Plans has the effect of potentially limiting the scope and effectiveness of potential board responses when faced with an unsolicited bid.

RESPONSES TO QUESTIONS

1. *(a) In your view, is the Proposed Rule preferable to the status quo?*

One advantage of the current approach, in comparison to the Proposed Rule, is the relative flexibility afforded by the regulatory hearing process in dealing with defensive tactics on a case-by-case basis; however, this case-by-case approach also gives rise to the criticism of some market participants that Rights Plan decisions have been inconsistent. To the extent that predictability is a principal objective of the CSA, then the approach taken in the Proposed Rule would be an improvement. The means used to achieve this greater predictability may, at the same time, be viewed as a blunt instrument. In that regard, under the Proposed Rule security holders may be hesitant to adopt a Rights Plan which could effectively provide a board, subject to the proper exercise of its fiduciary

duty, with the ability to reject any unsolicited bid for up to one year. If security holders are of this view, the likely effect of the Proposed Rule would be to increase the minimum bid period from the current 45 to 55 days to 90 days.

(b) In your view, is the Proposed Rule preferable to amending the bid regime to mandate "permitted bid" conditions and disallow Rights Plans?

In our view, amending the bid regime to mandate "permitted bid" conditions would not wholly replace the objectives of Rights Plans.

The "permitted bid" definition typically found in Rights Plans is intended to address the collective action problem by requiring, among other things, that an offer (i) be made to all target security holders, (ii) be open for at least 60 days from the commencement of the bid, (iii) prohibit take-up by the offeror until at least 50% of the then outstanding voting securities subject to the bid have been deposited by security holders other than the offeror, and (iv) be extended for a 10-day period subsequent to a mandatory public announcement by the offeror confirming that a majority of the voting securities subject the bid have been tendered by target security holders other than the offeror.

In addition to addressing the collective action problem, Rights Plans have additional objectives, including preventing creeping bids and regulating the terms of lock-up agreements. These additional objectives can prove beneficial to a target board when negotiating with a hostile bidder. If securities regulators were to disallow Rights Plans, these additional objectives would be lost unless they were to be addressed through legislative change.

(c) In your view, is the Proposed Rule preferable to 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 assume this question proposes that, in lieu of adopting/enacting the Proposed Rule, NP 62-202 would be amended to incorporate the principles underlying the Proposed Rule.

Depending on the wording of the specific guidance, we would anticipate that this approach would maintain flexibility similar to that inherent in the current regime; however, we presume that, absent agreement between a bidder and the target board to waive the Rights Plan, a regulatory hearing would still be required to cease-trade a Rights Plan. Accordingly, we believe that one of the stated objectives of the proposed reform would not be satisfied. In addition, while the risk of inconsistent decisions through such an approach may be mitigated, we do not believe it would be eliminated.

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.***

We believe that implementing the Proposed Rule would likely reduce the number of Rights Plans hearings, given that the Proposed Rule provides a bright line test for the termination of a Rights Plan; however, securities regulatory authorities may well be asked to intervene in contested bid situations on other issues such as disclosure matters, lock-up agreements, permitted bid conditions, the use of other potential defensive tactics or other unusual terms or circumstances.

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 assume that the reference to "structure" in this question is intended to refer principally to the duration of a bid. In that regard, the likely impact of the Proposed Rule on take-over bids in Canada will be to increase the minimum time required to complete an unsolicited bid from the current 45 to 55 days to 90 days. The potential increase in minimum bid duration could adversely impact a potential bidder's interest in launching a bid on an unsolicited basis. For example, if the consideration consists of securities of the offeror, a longer bid duration subjects the bid consideration value to increased volatility risk. Cash bids may also be impacted due to potentially increased financing costs.

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

Under corporate law, a board of directors has broad discretion in responding to an unsolicited bid, subject to the proper exercise of its fiduciary duties. The Proposed Rule clearly affords a target board more time in which to exercise its discretion given that the securities regulators will only intervene to cease-trade a security holder-approved Rights Plan (or, in the case of a Rights Plan that has not been approved by security holders, within the first 90 days after adoption by the board) in limited circumstances, where the substance or spirit of the Proposed Rule is not being complied with or there is a public policy interest rationale for the intervention that is not contemplated by the Proposed Rule. The exercise of the board's discretion during this period would continue to be subject to the proper exercise of its fiduciary duty which would, in turn, be subject to scrutiny by courts.

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.

As noted in our response to Question 3, the Proposed Rule may discourage some offerors due to the additional time it will take to complete an unsolicited bid. To the extent that there is concern of unduly discouraging the making unsolicited bids, the CSA may wish to consider ensuring that bidders have a clear and consistent process and timeline on the requisitioning and convening of a security holder meeting to vote on the termination of the Rights Plan.

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.***

A clear objective of the Proposed Rule is to limit the circumstances in which a securities regulator will intervene to cease-trade a Rights Plan. As a consequence, in the event that a target issuer has adopted a Rights Plan, the recourse for a bidder who is unable to come to agreement with the target board presumably will be to requisition a security holder meeting to seek approval to terminate the Rights Plan. Due to inconsistencies in corporate legislation[1] and differences among the constating documents of non-corporate entities, different rules may apply to bidders seeking to requisition a meeting of security holders of a target issuer. Accordingly, a clear and consistent process for requisitioning and convening security holder meetings to terminate Rights Plans would be worthy of consideration by the CSA.

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 proposed 90 day timeframe should be sufficient to call and hold a security holder meeting; however, depending on the particular facts of a bid, 90 days may or may not be sufficient time for a board to respond to a bid. Please refer to our response to Question 7(b) below.

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[1] For example, under the *Business Corporations Act* (Ontario) and the *Canada Business Corporations Act*, a shareholder meeting may be requisitioned by shareholders holding not less than 5% of the issued and outstanding voting shares of an issuer, whereas under the *Business Corporations Act* (Québec) the threshold is not less than 10%.

(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?

Under the Proposed Rule security holders who approve a Rights Plan effectively provide the board with the ability to reject unsolicited bids for a period of one year, subject to the proper exercise of the board's fiduciary duty. As we noted in our response to Question 1(b), Rights Plans typically have objectives in addition to mandating "permitted bid" provisions such that there may be merit in considering alternatives that combine elements of the Proposed Rule with the current approach. One alternative would be to consider adopting a regime where a Rights Plan adopted by a board without security holder approval is permitted to remain in place until the earliest of (i) 90 days following the commencement of a bid, (ii) a specified period of time following board adoption (such as the current six-month time-frame under the current regime), and (iii) a security holder vote to terminate the Rights Plan at a duly convened meeting.

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.***

The effect of this extension of time will depend significantly on the target issuer and the circumstances under which the bid is made. Please see our responses to Questions 3 and 5 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?***

A board has a fiduciary duty under corporate law to act in the best interests of the corporation. In the exercise of its fiduciary duty, a board may determine that there are legitimate reasons to decline to call a security holder meeting to approve a Rights Plan.

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 [year] after the issuer first obtained security holder approval.***

(a) Is this timing appropriate?

Linking the timing of security holder approval of a Rights Plan with an issuer's annual security holder meeting is logical. One alternative would be to allow the board, with security holder approval, to determine the frequency at which re-approval must be provided.

(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?

Please see our response to Question 7(b) above.

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?***

To the extent that the CSA were to adopt a proposal to exclude the votes of management in connection with the approval of Rights Plans, we would expect the CSA to look to the *de minimis* concept found in the definition of "collateral benefit" in Multilateral Instrument 61-101 - *Protection of Minority Security Holders in Special Transactions*.

If the Proposed Rule is adopted, the results of the security holder vote on any Rights Plan will take on increased significance. Accordingly, ensuring the integrity of the voting process will be of paramount importance. In this regard, we note that in its recently announced statement of priorities, the Ontario Securities Commission committed to improving shareholder democracy and protection by, in part, identifying the key proxy voting infrastructure issues.

12. ***(a) 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?***

Such a limitation would be consistent with our understanding of prevailing market practice with respect to Rights Plans.

We note that the Proposed Rule would not preclude a party from seeking the intervention of the securities regulators in the event that a Rights Plan is expanded beyond its traditional scope or is being improperly used.

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

Currently, most Rights Plans include securities that are subject to irrevocable lock-up agreements in the definition of "beneficial ownership".

We note that the Proposed Rule would not preclude a party from seeking the intervention of the securities regulators in the event that a Rights Plan is expanded beyond its traditional scope or is being improperly used.

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?***

To the extent that the Proposed Rule is implemented, imposing security holder approval requirements for material amendments to Right Plans would be consistent with prevailing market practice. It may be of assistance to market participants to have illustrative examples included in the Proposed Policy (rather than the Proposed Rule) of what is and what is not considered material.

The CSA could also consider permitting a board to adopt a new Rights Plan or an amendment to an existing Rights Plan without security holder approval in the face of a material adverse amendment to an existing take-over bid, such as a decrease in the consideration being offered or the addition of conditions to the take-up of securities under the bid.

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?

Please see our response to Question 6 above.

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 believe that disclosure provided under a prospectus or other offering document is generally sufficient to provide potential security holders with adequate information about the issuer (including the Rights Plan) to make an informed decision about their purchase of securities under the prospectus or other offering document.

* * *

Thank you for this opportunity to comment on the Proposed Rule, Proposed Policy and the Consequential Amendments. Should you wish to discuss any of our comments, please contact Richard Steinberg (416.865.5443), Aaron Atkinson (416.865.5492) or Alex Nikolic (416.865.4420).

Yours truly,

Fasken Martineau DuMoulin LLP