CSA Notice and Request for Comment

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

Proposed Companion Policy 62-105CP *Security Holder Rights Plans*

and

Proposed Consequential Amendments

March 14, 2013

INTRODUCTION

The Canadian Securities Administrators (the **CSA** or **we**) are publishing for a 90 day comment period proposed National Instrument 62-105 *Security Holder Rights Plans* (the **Proposed Rule**) and proposed Companion Policy 62-105CP *Security Holder Rights Plans* (the **Proposed Policy**).

We are also proposing to make related consequential changes (i) to National Policy 62-202 *Take-Over Bids – Defensive Tactics*[1] (**NP 62-202**) and National Policy 62-203 *Take-Over Bids and Issuer Bids* (**NP 62-203**), and (ii) consequential amendments to Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids* (**MI 62-104**), OSC Rule 62-504 *Take-Over Bids and Issuer Bids* (**OSC Rule 62-504**), National Instrument 41-101 *General Prospectus Requirements* (**NI 41-101**), and National Instrument 51-102 *Continuous Disclosure Obligations* (**NI 51-102**) (collectively, the consequential changes and amendments are referred to herein as the **Consequential Amendments**).

The Proposed Rule, Proposed Policy and Consequential Amendments (the **Proposed Materials**) relate only to security holder rights plans (**Rights Plans**). The Proposed Materials are a part of a broader and on-going CSA initiative to review defensive tactics issues, including, for example, the role of private placements during take-over bids. CSA staff will consider potential changes to NP 62-202 or the take-over bid regime as part of this broader review.

The Proposed Materials establish a regulatory framework for Rights Plans in all CSA jurisdictions. In general, the Proposed Rule will allow Rights Plans adopted by boards of

[1] In Québec, National Policy 62-202 *Take-Over Bids – Defensive Tactics* is known as *Notice 62-202 relating to Take-Over Bids – Defensive Tactics*.

directors of issuers to remain in place provided majority security holder approval of the Rights Plan is obtained within specified times. This approach would change the current regulatory treatment of Rights Plans. Currently, if a hostile bidder asks a Canadian securities regulatory authority to cease trade a Rights Plan to render it inoperative, that authority will generally do so after a specified time.

We intend the Proposed Rule to address concerns about the limited ability of an issuer to respond to an unsolicited or hostile take-over bid when adopting a Rights Plan, while ensuring that a majority of shareholders of the issuer are supportive of the Rights Plan measure proposed by the issuer's management. As is explained in the Proposed Policy, securities regulators do not anticipate intervening on public interest grounds to cease trade a Rights Plan that was adopted in compliance with the Proposed Rule unless the target issuer engages in conduct that undermines the principles underlying the Proposed Rule or there is a public interest rationale for the intervention not contemplated by the Proposed Rule. Therefore, if the Proposed Rule was in force, the principle that "there comes a time when the pill has got to go" would generally be no longer applicable to the review of Rights Plans by securities regulators.

Currently, Rights Plans are subject to stock exchange requirements that require approval of a Rights Plan by a majority vote of shareholders within six months of adoption. The securities regulators may also review Rights Plans under their respective public interest jurisdictions as a defensive tactic with reference to the guidance in NP 62-202 and principles derived from securities regulatory authorities' decisions that have applied NP 62-202 to Rights Plans. As a result, the adoption of the Proposed Rule and Proposed Policy will require consequential amendments to NP 62-202 to exclude Rights Plans from its general application and, to the extent necessary, amendments to stock exchange requirements applicable to Rights Plans. We are in discussions with the Toronto Stock Exchange (**TSX**) and the Toronto Stock Exchange – Venture (**TSXV**) on the timing and publication of any necessary amendments to the applicable listing provisions. We note that we may propose further changes to NP 62-202 at a future date in connection with our broader CSA initiative to review defensive tactics issues other than Rights Plans.

The text of the Proposed Materials is contained in Annexes A to H of this Notice and will also be available on websites of CSA jurisdictions, including:

www.lautorite.qc.ca
www.albertasecurities.com
www.bcsc.bc.ca
www.msc.gov.mb.ca
www.gov.ns.ca/nssc
www.nbsc-cvmnb.ca
www.osc.gov.on.ca
www.fcaa.gov.sk.ca

BACKGROUND

1. Nature and Purpose of Rights Plans

Rights Plans are a defensive tactic often adopted by company boards in anticipation of or in response to hostile take-over bids.[2] A typical Rights Plan provides for the issuance of rights that permit shareholders of the target company, other than a potential bidder, to acquire additional shares of the target company at a deep discount to market price if a specified share ownership threshold is triggered (usually 20% of a class of equity shares). A Rights Plan deters potential bidders from making a take-over bid because the exercise of the rights makes it prohibitively expensive for the bidder to acquire the target company shares. As a result, where a Rights Plan exists, a bidder can take-up shares under the bid, as a practical matter, only if the target company board waives or redeems the rights issued under the Rights Plan or a court or regulator rescinds or cease trades the Rights Plan. Generally, a hostile bidder in Canada will apply to securities regulators to cease trade a Rights Plan because their practice has been to cease trade a Rights Plan within a certain period of time after the bid is launched.

In Canada, most Rights Plans contain “permitted bid” conditions that allow a take-over bid to be made to target company shareholders without triggering the Rights Plan if: (i) the bidder keeps the take-over bid open for a minimum period of time (usually 60 days), (ii) the bidder is not entitled to acquire shares under the take-over bid unless a majority of shares owned by persons other than the bidder are tendered, and (iii) the bidder is obligated to extend the bid for an additional 10 days following the bidder’s initial take-up under the take-over bid.

Rights Plans may have different purposes. First, they serve to restrict creeping acquisitions of the target company’s securities through normal course transactions or private agreement transactions that are otherwise exempt from the “formal bid” requirements of securities legislation.

Second, Rights Plans may be used to encourage potential hostile bidders to make bids that conform to “permitted bid” conditions in the Rights Plan.

Third, Rights Plans may be used to delay a hostile take-over to give the target board more time to respond to the bid and to maximize shareholder value.

Fourth, Rights Plans give the target board some leverage to negotiate with the bidder.

Fifth, a Rights Plan that does not contain “permitted bid” conditions would, absent regulatory intervention, otherwise require the bidder to launch a proxy battle to replace the target’s board of directors and elect new directors that may be more willing, subject to their fiduciary duty to the target, to redeem the rights issued under the Rights Plan and permit the bid to be put to target shareholders for their consideration.

---

[2] A reference to a “hostile take-over bid” in this Notice means generally that the bid is unsolicited and is not supported by the target company’s board of directors.

2. Current Canadian securities regulatory framework for Rights Plans

(a) Overview of Position of Stock Exchanges and Regulators

In Canada, the adoption of a Rights Plan is subject to applicable stock exchange requirements that require shareholder approval of the Rights Plan within a specified time. However, if an issuer adopts a Rights Plan in anticipation of, or in the face of, a hostile take-over bid, then stock exchanges will generally defer their review pending the securities regulators' consideration of the matter. The ability of a target company board to maintain a Rights Plan in response to a hostile take-over bid, whether or not the target company has obtained shareholder approval, may, if requested, be subject to review by the securities regulators based on guidance in NP 62-202 regarding defensive tactics and principles derived from their decisions applying NP 62-202 to Rights Plans.

(b) Stock Exchange Requirements

Because Rights Plans involve the potential issuance of equity securities, Canadian stock exchanges regulate, in some respects, and approve the adoption of Rights Plans by listed issuers. Under sections 634 – 637 of the Toronto Stock Exchange (TSX) Company Manual, the TSX[3] will consent to the adoption of a Rights Plan by a listed issuer provided:

(i) the listed issuer has filed a draft of the Rights Plan with the TSX together with a letter setting out specified information about the circumstances under which the Rights Plan is being adopted and its terms;

(ii) the Rights Plan will be submitted for approval by a majority of shareholders at a meeting held within six months following adoption of the Rights Plan; and

(iii) shareholder approval is obtained by both a majority vote that excludes a shareholder exempted from the operation of the Rights Plan and a vote that includes such shareholder.

The TSX defers its decision to consent to a Rights Plan if it was adopted in response to a specific take-over bid that has been made or is contemplated on the basis that securities regulators may be asked to intervene under NP 62-202. The listed issuer cannot amend a Rights Plan without the listed issuer filing a summary of the proposed changes to the Rights Plan with the TSX and obtaining the TSX's consent.

Stock exchange staff may also monitor and evaluate the terms of Rights Plans from a market integrity perspective. For example, the TSX Company Manual sets out additional requirements where issuers adopt Rights Plans with triggering thresholds of less than 20% (the take-over bid threshold) in order to address concerns that the Rights Plan may be used for an inappropriate purpose such as thwarting a potential proxy contest or

---

[3] The TSXV provides similar requirements for Rights Plans.

preventing the disposition of a block of securities that is above the lower triggering threshold.

(c) CSA approach to Rights Plans

The current CSA approach to Rights Plans is based on the guidance in NP 62-202 and the principles derived from the decisions applying NP 62-202 to Rights Plans. Rights Plans typically come before securities regulatory authorities when a bidder applies to cease trade the Rights Plan on public interest grounds. The securities regulatory authority of the jurisdiction in which the target company's head office is located will apply the guidance in NP 62-202 and applicable case law when considering the bidder's application and will hold a hearing if necessary.

(i) NP 62-202

The CSA adopted NP 62-202 in 1986.[4] The policy provides guidance on the circumstances in which securities regulators would intervene on public interest grounds to protect the *bona fide* interests of target company shareholders when a take-over bid is made. NP 62-202 addresses the over-arching concern that, in the context of a hostile take-over bid, the interests of management of the target company may not coincide with those of shareholders and that management may implement defensive measures that deny shareholders the ability to respond to a bid.

NP 62-202 sets out a number of key principles concerning the take-over bid regime and the role of defensive tactics, such as:

- take-over bids play an important role in the economy by acting as a discipline on management and in reallocating economic resources to their best use;
- in considering a bid, there is a possibility that the interests of target management will differ from those of the target shareholders;
- the primary objective of bid legislation is to protect the *bona fide* interests of target shareholders and a secondary objective is to provide an open and even-handed environment for take-over bids;
- a specific set of rules for board conduct would not be appropriate but regulators will intervene in specific cases that may be abusive of shareholder rights;
- unrestricted auctions produce the most desirable results in take-over bids and regulators will intervene if defensive tactics are adopted that will likely deprive shareholders of their ability to tender to a bid or a competing bid; and

[4] NP 62-202 is the successor policy to National Policy Statement No. 38 *Take-Over Bids – Defensive Tactics* which was rescinded in 1997.

- prior shareholder approval will generally allay concerns with respect to a defensive tactic.

NP 62-202 applies to a broad range of defensive measures and does not specifically address a particular type of defensive measure such as a Rights Plan. However, NP 62-202 has been applied most often by securities regulators to the use of Rights Plans by target company boards.

(ii) Application of NP 62-202 to Rights Plans

Securities regulators have generally applied NP 62-202 to intervene and cease trade a Rights Plan upon application by a bidder if no competing bid or transaction is likely to arise or where the board of the target company is not soliciting competing bids or transactions. The current approach of securities regulators as reflected in written decisions is that a Rights Plan "must go" once it has accomplished its "legitimate" purpose of maximizing shareholder choice and value by encouraging competing bids or transactions.

The main issue at regulatory hearings typically concerns how much additional time a target company board should have to solicit competing bids or transactions beyond the minimum deposit period required under securities legislation (currently 35 calendar days). Securities regulators have identified a number of factors relevant to deciding that question.[5]

Although the primary focus of analysis at regulatory hearings has been on the best interests of target shareholders, securities regulators have recognized that the legal framework applicable to Rights Plans should be reasonably transparent and predictable so that market participants, including issuers, investors and potential bidders, can make informed decisions when a hostile take-over bid is made.[6]

At the same time, the framework must be flexible enough to address particular circumstances and to allow a target company board to fulfill its fiduciary duties.[7]

We have recently seen a number of cases in which securities regulators have granted a target company board more time to facilitate an auction than was typically granted in the past or have relied on shareholder approval in the face of a take-over bid as a basis not to intervene to cease trade a Rights Plan.[8]

---

[5] See, in particular, *Re Royal Host Real Estate Investment Trust* (1999), 22 OSCB 7819.
[6] See, for example, discussion in *Re Cara Operation Limited and The Second Cup Limited* (2002), 25 OSCB 7997.
[7] See *Re MDC Corporation and Regal Greetings & Gifts Inc.* (1994), 17 OSCB 4971.
[8] See, for example, *Re Pulse Data Inc.*, 2007 ABASC 895, *Re Neo Materials Technologies* (2009), 32 OSCB 6941, and *Re 1468860 Alberta Ltd* [*Canadian Hydro Developers*], 2009 ABASC 448.

3. Approaches to defensive tactics in the United States and United Kingdom

The CSA approach to defensive tactics, and Rights Plans in particular, can be contrasted with the approach by courts and state legislatures in the United States and the approach of regulators in the United Kingdom.

The ability of target boards to respond to hostile bids by adopting a Rights Plan or other defensive measures is significantly different under applicable Delaware and United Kingdom law.

In general, the current Canadian approach to Rights Plans and other defensive measures involves more active regulatory intervention than under the Delaware regime but is less restrictive than the United Kingdom Takeover Code (the **Takeover Code**).

A summary of the Delaware and United Kingdom approaches to Rights Plans and other defensive tactics is set out at Schedule A.

4. Concerns raised about the current CSA approach to Rights Plans

(a) Principled concerns with the current approach

There are two principled concerns with respect to Canadian securities regulators' current approach to Rights Plans.

First, some market participants believe that the current Canadian approach generally favours bidders rather than targets and their shareholders, limits board and shareholder discretion and does not necessarily maximize value for shareholders. Some of these market participants also argue that the current approach has contributed to the "hollowing out" of corporate Canada by making Canadian issuers easier to acquire than issuers in other jurisdictions.

In particular, these market participants believe that Canadian securities regulators may intervene too early when cease trading a Rights Plan. A Rights Plan in Canada is typically cease traded within 45 to 55 days after the launch of a take-over bid. Some believe that such a period leaves a target company board with limited leverage to negotiate with a hostile bidder. In contrast, a Rights Plan adopted under Delaware law can provide a very extended period of protection (see Schedule A of this Notice).

To address these concerns, some commentators have suggested that securities regulators revoke NP 62-202 and stop regulating take-over bid defensive tactics in any respect. They would prefer that defensive tactics be regulated only by the courts as a matter of fiduciary duty law or pursuant to the "oppression" remedy under corporate legislation.

In our view, however, securities regulators have a legitimate role in regulating take-over bids to ensure that defensive tactics do not unduly restrict the ability of shareholders to respond to a bid and do not unduly discourage the making of hostile bids. This role is

consistent with the detailed rules contained in securities legislation regulating the making and conduct of take-over bids.

The second principled concern with the current approach to Rights Plans relates to the collective action problem faced by shareholders in responding to a take-over bid.

When responding to a take-over bid, shareholders may either tender their shares or choose not to, but they are not able to act collectively through a shareholders' vote. As a result, shareholders may feel pressured to tender to a take-over bid in order not to have payment for their shares delayed or be left behind with a minority shareholding position in a less liquid stock if the bidder acquires less than all the shares of the target company.

The collective action problem provides a hostile bidder with a strategic advantage because shareholders may feel pressured to tender even if they do not support the bid and do not wish to accept it.[9] This dynamic might, however, be altered if shareholders were entitled to make a collective decision about the maintenance of a particular Rights Plan in the face of a take-over bid.

These two principled concerns have informed our approach to the Proposed Rule and Proposed Policy.

(b) Specific issues with the current approach

We describe below other specific concerns with the current approach of securities regulators to Rights Plans.

(i) Discretion of the board and shareholders

The current approach to Rights Plans may result in securities regulators pre-empting the discretion of (i) target company boards of directors to act in what they perceive to be shareholders' best interests by implementing a Rights Plan or maintaining it in place, and (ii) target shareholders to approve or retain a Rights Plan if they consider that to be in their best interests.

The current approach generally does not address the fact that:

1. A board may wish as a strategic matter to maintain a Rights Plan for an extended period to negotiate a higher price or more acceptable terms from a hostile bidder (even if a competing bid is not being solicited or is not likely). A hostile bidder will know that securities regulators will typically cease trade a Rights Plan within 45 to 55 days. As a result, the bidder may have little incentive to negotiate with the board to improve the terms of the bid.

[9] This collective action problem does not arise where a transaction proceeds as a merger or arrangement that requires a shareholder vote.

2. Shareholders may not want to receive certain types of bids or may not want to receive any bid at all in certain circumstances. This may be particularly true for partial bids and bids by significant shareholders that are not subject to a minimum tender condition (which may result in the acquisition of control without the bidder paying a full control premium). In these circumstances, shareholders may feel pressured to tender and suffer from the collective action problem referred to above.

In contrast, in the United States, a Rights Plan can remain in place almost indefinitely subject to the right of shareholders to vote to remove the board (although that action may be delayed by staggered boards and other structural defences).

(ii) Current approach is not based on a policy review

The securities regulators' current approach to Rights Plans has evolved through adjudicative decisions in contested hearings rather than as a result of a policy review as to the appropriate approach to regulating Rights Plans. Rights Plans were adopted as a defensive tactic in Canada after the implementation of NP 62-202 and, accordingly, the policy does not expressly address them.

Adjudicative decisions generally follow the Ontario Securities Commission's 1992 decision in *Canadian Jorex*[10] that held that "there comes a time when the pill has got to go" (that is to say, when it has accomplished its only "legitimate" purpose of encouraging competing bids or transactions). That decision was made in circumstances in which cease trading a Rights Plan allowed shareholders to decide between two competing bids.

There have been a number of market and governance developments since the adoption of NP 62-202 and the decision in *Canadian Jorex* that suggest a need to revisit the assumptions on which the current securities regulatory approach to Rights Plans is based. These developments include the adoption of relatively standard form "permitted bid" Rights Plans, more cross-border bids that require increased time for the board to respond, changes in board governance practices and greater shareholder activism.

The significance of shareholder activism is evidenced by the evolution of Rights Plans from less shareholder friendly plans to the current standard of a "permitted bid" Rights Plan. Shareholders have been increasingly assertive in a number of governance matters, such as majority voting and advisory votes on executive compensation, and in launching dissident proxy campaigns to replace board members. We think it is appropriate that shareholders also determine, in conjunction with their boards, the appropriate approach to Rights Plans based on the particular circumstances of the issuer.

We believe that the considerations above reinforce the need for the policy review reflected in the Proposed Rule and Proposed Policy.

(iii) Risk of inconsistent regulatory decisions

---

[10] See *Re Canadian Jorex Ltd.*, (1992) 15 OSCB 257.

Given the event-driven nature of decision-making through contested hearings interpreting the application of NP 62-202, there is a risk of inconsistent and unpredictable decisions regarding Rights Plans by securities regulators in different jurisdictions or even in the same jurisdiction but at different times.

These varying determinations can occur as a result of different perspectives on underlying principles, such as the relevance of shareholder approval to the particular circumstances, the relevance of the board's fiduciary duty obligations when responding to hostile take-over bids, and the significance of the risk of structural coercion of target company shareholders by the bidder in particular circumstances, as they are applied to the facts of a particular case.

We anticipate that the Proposed Rule and Proposed Policy may reduce the likelihood of inconsistent decisions related to Rights Plans.

(iv) Consistency with the fiduciary duty of directors

Some commentators have suggested that intervention by securities regulators to cease trade Rights Plans inappropriately fetters the discretion of target boards to apply their fiduciary duty to act in the best interests of the corporation in a manner consistent with the *BCE*[11] decision by the Supreme Court of Canada.

The Proposed Rule would provide target boards with greater flexibility in determining whether to adopt or maintain a Rights Plan by taking into account considerations relating to their fiduciary duty to the corporation and its stakeholders, including shareholders.

However, we are of the view that the ultimate decision about the adoption or maintenance of a Rights Plan should remain with the shareholders and not with the board of directors, regulators or courts. This is reflected in the Proposed Policy which indicates that the securities regulators' policy approach is that generally a target board would be permitted to retain a rights plan if a majority of its shareholders have approved the Rights Plan at a prior annual meeting or in the face of the bid.

SUBSTANCE AND PURPOSE OF THE PROPOSED RULE

1. Overview of the Proposed Rule

As is explained in the Proposed Policy, the purpose of the Proposed Rule is to: (1) establish a comprehensive regulatory framework for Rights Plans in Canada that provides target boards and shareholders with greater discretion over the use of Rights Plans; (2) reduce the circumstances where regulatory intervention may be necessary; and (3) maintain an active market for corporate control.

---

[11] *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69.

In developing the Proposed Rule, we have accepted as a general proposition that securities regulators should:

(i) interfere with the role of the target board only to the extent necessary to protect the legitimate interests of shareholders;

(ii) intervene to regulate Rights Plans only to the extent necessary to achieve accepted policy objectives, including any public interest objectives not contemplated in the Proposed Rule;

(iii) attempt to develop a broad framework that leaves decisions to the target board and target shareholders;

(iv) avoid creating arbitrary rules that cannot be responsive to all of the circumstances that a target board may face; that is, recognizing that a one-size-fits-all approach to Rights Plans is not the most desirable or effective; and

(v) regulate the specific terms of Rights Plans only to a limited extent.

The basic elements of the Proposed Rule are:

(i) a Rights Plan is effective[12] when adopted by the board of directors but it must be approved by security holders within 90 days from the date of adoption or, if adopted after a take-over bid has been made, within 90 days from the date the take-over bid was commenced;

(ii) a Rights Plan must be approved annually by majority vote of shareholders to continue to remain effective;

(iii) shareholders can terminate a Rights Plan at any time by majority vote;

(iv) any shares held by the bidder are excluded from a security holder vote to adopt, maintain or amend a Rights Plan;

(v) material amendments to a Rights Plan must be approved by security holders within 90 days of the date of adoption;

(vi) a Rights Plan is effective only against take-over bids or an acquisition by a person of securities of the issuer (e.g. it cannot be triggered by a shareholder vote); and

[12] We use the concept of "effectiveness" of a Rights Plan in this Notice for ease of reference. Under the Proposed Rule, the effectiveness or not of a Rights Plan is expressed in terms of a prohibition on the distribution of a security pursuant to the exercise of a right issued under a Rights Plan unless certain conditions are met.

(vii) a Rights Plan cannot be used to discriminate between take-over bids, so if it is waived or modified with respect to one take-over bid it must be waived or modified with respect to any other take-over bid.

2. Objectives of the Proposed Rule

Take-over bid regulation protects target shareholders by creating an orderly and structured process for changes in control that are effected through the acquisition of a substantial number of shares from shareholders. The purpose of take-over bid regulation is to ensure fair treatment of target shareholders and that all market participants know what rules apply.

We intend that the Proposed Materials will modernize, harmonize and codify the CSA approach to Rights Plans. In developing the Proposed Materials we have sought to establish a framework that will complement the policy objectives of take-over bid regulation by (i) assisting target shareholders to make a coordinated, voluntary and informed tendering decision, and (ii) giving shareholders the final say on whether they want to adopt a Rights Plan that grants more discretion to the target board or facilitates collective decision-making by shareholders.

We think the Proposed Rule is consistent with the policy goals of the CSA policy on defensive tactics, the primary purpose of which is the protection of the *bona fide* interests of shareholders of a target issuer. NP 62-202 refers to prior shareholder approval as an important factor that would allay the concerns of securities regulatory authorities with respect to defensive tactics. The Proposed Rule leaves to shareholders the ultimate decision of whether to permit a Rights Plan to remain in place or not.

If we adopt the Proposed Materials, we anticipate that securities regulators will only intervene in the operation of a Rights Plan that is approved by security holders in limited circumstances where the substance or spirit of the Proposed Rule is not being complied with or there is a public interest rationale for the intervention not contemplated by the Proposed Rule.

In this context, we think that the Proposed Rule will facilitate shareholder choice and also allow for greater board empowerment. The Proposed Rule sets out a framework permitting boards and shareholders, through the specific terms of a Rights Plan, to determine how much authority the board should have in responding to a take-over bid and the terms upon which a bid would be acceptable. Shareholders will have the ability to approve an existing Rights Plan at each annual meeting or, where a Rights Plan is adopted in the face of a bid, within 90 days of commencement of the bid.

An effect of the Proposed Rule and Proposed Policy will generally be to allow a board to maintain a Rights Plan in place for an indefinite period of time and in the face of a hostile take-over bid if the Rights Plan is approved by target company shareholders and the Rights Plan complies with the terms of the Proposed Rule. Nonetheless, the Proposed Rule preserves the ability of a hostile bidder to make an offer directly to target

shareholders and, if there is a Rights Plan in place, to seek shareholder support for the termination of the Rights Plan. In this way, the Proposed Rule will still facilitate direct challenges to Rights Plans without obliging a bidder or aggrieved shareholder to launch a proxy contest for the purpose of installing a board that will support removal of the Rights Plan. We believe that a shareholder vote on the specific question of termination of a Rights Plan is preferable to the circumstance where a shareholders must decide whether to replace a majority of the board as a means to remove a Rights Plan. The removal of directors and the termination of a Rights Plan are two separate matters and shareholders should be able to consider them on their own merits.

Comparison of Proposed Rule with Approaches to Rights Plans in the United States and United Kingdom

The Proposed Rule reflects certain elements of both the U.S.-Delaware and United Kingdom regimes.

The Proposed Rule will introduce a formal regulatory framework for Rights Plans that will allow both target boards and target shareholders greater control over the use of Rights Plans if, as under the Takeover Code, it is approved by a majority of the shareholders. While the Takeover Code only permits defensive measures that have been approved by shareholders in the face of the bid, the Proposed Rule permits a Rights Plan to be maintained in the face of a hostile take-over bid if it was approved by shareholders either at the prior annual meeting or in the face of the bid.

The ability of the board, with shareholder approval, to adopt a Rights Plan will give the board greater latitude, as under Delaware law, to use the Rights Plan to negotiate with the bidder or reject the hostile take-over bid. However, unlike Delaware law, a bidder or dissident shareholder can seek to terminate a pre-approved Rights Plan without launching a proxy battle to elect the majority of the target board and rely on the new board to terminate the Rights Plan.

3. Effects of the Proposed Rule

In our view, adoption of the Proposed Rule may result in the following effects:

Effect on Shareholders

- Shareholders will decide by majority vote whether to approve a Rights Plan either at an annual or other meeting of the issuer in the absence of a bid or at a special meeting in the face of an actual bid.

- Shareholders may receive higher premiums for their shares as the Proposed Rule will give boards of directors more leverage in negotiating friendly transactions, in negotiating with hostile bidders and in generating an auction if a hostile take-over bid is made.

- When faced with a bid, shareholders may collectively decide by shareholder vote on a Rights Plan whether they wish to receive a bid without any compulsion to tender to it. This may mitigate the risk of coercion in the event of a partial bid or an "insider" bid by a significant shareholder.

- When faced with a bid, shareholders may be more likely to retain their shares if they want the issuer to remain independent or if they believe the Rights Plan may have the ultimate effect of increasing the bid price.

- Arbitrageurs may be somewhat discouraged from acquiring shares of a target company as the Proposed Rule will create more uncertainty as to the outcome of a bid. The adoption of a pre-approved Rights Plan will signal that the target board has increased leverage to respond to a bid and the length of time between the commencement of a bid and its completion is likely to be lengthier than under the current securities regulatory approach.

- The right of shareholders to accept a particular bid will be restricted where shareholders, by majority vote, approve maintaining a Rights Plan that could effectively prevent the bid from proceeding.

Effect on Boards of Directors

- Boards of directors will have more discretion, in the first instance, with respect to implementing and maintaining a Rights Plan.

- Boards of directors will have a greater range of alternatives, and potentially more time, to respond to a hostile take-over bid.

- Boards of directors will have greater leverage in negotiating with a hostile bidder.

- A bidder will require shareholders holding a majority of shares to reject a Rights Plan before any shares can be taken up under the bid. This will give boards of directors and shareholders more control over the terms under which they will accept a bid.

- By making the use of a Rights Plan a more effective take-over bid defence, the Proposed Rule may, to some extent, discourage the use of other defensive tactics by boards of directors.

Effect on Bidders

- The Proposed Rule may discourage hostile take-over bids by making them somewhat more time consuming, more expensive and less certain.

- A bidder will be able to challenge a Rights Plan through a proxy solicitation to terminate the Rights Plan by a majority shareholder vote.

- A bidder will have cause to challenge a Rights Plan by way of an application to the securities regulators only in limited circumstances.

- If an issuer adopts a Rights Plan, the Proposed Rule will effectively extend the period a bid will be outstanding.

Effect on Securities Regulators

- Securities regulators will enforce the regulatory regime with respect to Rights Plans and will generally intervene only where the target issuer engages in conduct that undermines the principles underlying the Proposed Rule or there is a public interest rationale for the intervention not contemplated by the Proposed Rule.

- There may be a reduction in the number of applications to cease trade Rights Plans and fewer Rights Plan hearings given that securities regulators would intervene in more limited circumstances.

- Any inconsistencies in the adjudicative decisions of securities regulators in different jurisdictions or over time with respect to Rights Plans may be resolved and the potential for future conflicting decisions may be reduced.

SUMMARY AND EXPLANATION OF KEY PROVISIONS OF THE PROPOSED RULE

In this section, we describe the key provisions of the Proposed Rule, the rationale for those provisions and the effect of the provisions on those with an interest in a take-over bid.

1. Establishment of Rights Plan

(a) A Rights Plan is effective when it is adopted by an issuer's board of directors (subsection 2(4)).

A Rights Plan is effective from the date it is adopted by an issuer's board of directors rather than from the date that security holder approval is obtained. This maintains the status quo until the issuer obtains security holder approval and is consistent with current market practice. The Rights Plan will remain effective until the date by which it must be approved even if the board of directors chooses not to call a meeting, adjourns the meeting or fails to put the Rights Plan for consideration at a meeting.

The Proposed Rule would not prohibit the board of an issuer from adopting a second tactical Rights Plan with different or more restrictive terms than a pre-approved Rights Plan, so long as shareholders approve the second Rights Plan within 90 days.

(b) A Rights Plan must be approved by security holders of the issuer within 90 days from the date of adoption or, if adopted after a take-over bid has been

announced or commenced, within 90 days from the date the take-over bid was commenced (subsection 2(1)).

For a Rights Plan to remain effective, security holders must approve it within 90 days of its adoption by the board. If a Rights Plan is implemented after the date a take-over bid is announced or commenced, the issuer must obtain security holder approval within 90 days from the earlier of date of commencement of the bid and the date of adoption of the Rights Plan. We selected the date of commencement of the take-over bid rather than the date of announcement of the take-over bid as a trigger for the 90 day period because a target board should not be required to make a decision with respect to a Rights Plan until it has been able to review the full terms of the offer.

We considered whether to provide issuers with a longer period of time, for example up to 6 months, to obtain security holder approval if a Rights Plan is adopted when the issuer's board is not aware of any anticipated bids or if no bid has been made. We believe that 90 days is sufficient time for issuers to call a meeting and obtain security holder approval under any circumstance and that it is preferable to apply a 90 day period for approval of a Rights Plan whether or not a hostile take-over bid has been made.

While the Proposed Rule requires an issuer to obtain security holder approval of a Rights Plan within the specified 90 day period in order for the Rights Plan to continue, the Proposed Rule does not require an issuer to call and hold a meeting within this 90 day period. If an issuer determines not to hold a meeting in time to satisfy the requirement for security holder approval within 90 days then, by operation of the Proposed Rule, the Rights Plan would cease to be effective upon expiration of the 90 day period.

The Proposed Rule does not require a previously approved Rights Plan to be re-approved by security holders in the event a take-over bid is made. We believe that target shareholders should be able to approve a Rights Plan with the expectation that the Rights Plan will remain in place subject to annual approvals thereafter or the limited circumstances where regulatory intervention may be appropriate. An issuer's shareholders may want to pre-commit to a Rights Plan because they want their board to focus on creating long-term shareholder value. A pre-approved Rights Plan may, however, be removed by way of a shareholder vote after a bid has been commenced or at any other time.

(c) An issuer that adopts a Rights Plan prior to becoming a reporting issuer is excluded from the requirement to obtain initial security holder approval (section 5).

Security holders are presumed to have consented to the adoption of a Rights Plan if the disclosure document pursuant to which the issuer became a reporting issuer contains appropriate disclosure about the Rights Plan as specified in the Proposed Rule.

2. Renewal of Rights Plan

In order for a Rights Plan to continue to be effective, the Rights Plan must be approved no later than at each annual meeting following the initial shareholder approval (subsections 2(2) and (3)).

A Rights Plan ceases to be effective unless it is approved by a majority vote of security holders no later than each annual meeting of the issuer following the financial year in which the issuer first obtained approval of the Rights Plan. This provision provides security holders with the opportunity to reconsider each year whether to maintain the Rights Plan. This requirement also gives bidders the option to announce or launch a bid knowing when the Rights Plan will be considered for approval by security holders.

3. Non-Approval or Termination of a Rights Plan

(a) A Rights Plan ceases to be effective if it is not approved by shareholders (subsections 2(1), (2) and (3)).

No securities can be issued upon the exercise of rights issued under a Rights Plan if the issuer does not obtain shareholder approval as required by the Proposed Rule. A Rights Plan becomes ineffective if the board of the issuer fails to put the Rights Plan to a shareholder vote (in which case it lapses) or if it fails to receive the requisite majority approval at a meeting of the shareholders.

(b) Security holders can terminate a Rights Plan by majority vote at any time (subsection 2(5)).

Under corporate law, it may be open to a bidder or shareholder with sufficient shares to requisition a shareholder meeting to consider the termination of a Rights Plan. A Rights Plan can be terminated by a majority vote of security holders regardless of any prior approval of a Rights Plan. This provision gives ultimate control to security holders whether to terminate a Rights Plan and provides an ongoing opportunity for: (i) a bidder to challenge a Rights Plan by requisitioning a meeting to approve termination of the Rights Plan, and (ii) security holders to challenge a Rights Plan at any time if they view the Rights Plan as reducing shareholder value.

The ability to terminate a Rights Plan by majority vote also means that bidders and shareholders do not have to replace the target board to remove a Rights Plan. Although staggered boards in Canada do not have the same effectiveness as in the United States, we do not believe that bidders or target shareholders should be required to remove the board so that an offer can be accepted.

(c) An issuer whose Rights Plan was not approved or was terminated cannot adopt a new Rights Plan for at least twelve months thereafter, except in certain circumstances (section 7).

The general rule is that an issuer is not permitted for a period of one year to implement a new Rights Plan if an issuer failed to obtain security holder approval of a Rights Plan within the required time period or if security holders voted to terminate a Rights Plan, except with prior security holder approval. However, the issuer can adopt a new Rights Plan if a formal take-over bid is made after the date when the prior Rights Plan lapsed or was terminated, subject to the requirement in section 2 of the Proposed Rule to obtain security holder approval within 90 days from the date of adoption.

Currently, the TSX does not, as a matter of practice, generally permit a new Rights Plan to be adopted for a three year period after a Rights Plan has failed to be approved. However, an issuer can adopt a new Rights Plan in the face of a bid or anticipated bid because the TSX defers review of such plans to the relevant securities regulatory authority. This allows for tactical Rights Plans even if a Rights Plan would not otherwise be permitted by the TSX.

We believe it is appropriate to allow for a new Rights Plan to be adopted and effective in the face of a bid even if a prior Rights Plan has lapsed or been terminated within 12 months prior to the bid. The target board would need to obtain shareholder approval of such Rights Plan within 90 days of adoption, but the Rights Plan would be effective in the interim.

Our concern with a general prohibition against adopting a Rights Plan after a plan has lapsed or been terminated is that it could leave the issuer and its shareholders vulnerable to a hostile take-over bid that is launched within 12 months after a Rights Plan ceases to be effective. We also note that it is possible that shareholders of an issuer may choose to vote in favour of a Rights Plan implemented in the face of an actual bid even if they had previously voted against such a plan.

4. Shareholder Approval

(a) A bidder and its joint actors are excluded from the shareholder vote required to adopt, maintain, amend or terminate a Rights Plan (subsection 1(1)).

The Proposed Rule requires security holder approval of a Rights Plan and excludes a bidder and its joint actors from participating in any required vote. The bidder is in an obvious conflict of interest when a Rights Plan is being considered by shareholders because the vote on the Rights Plan is effectively a referendum on the bid.

The most significant impact of this restriction may occur on bids by significant shareholders, in particular if a partial bid or a bid without a minimum tender condition is made. In these circumstances, the ability of independent target shareholders to vote on a Rights Plan will increase the leverage of the target board in negotiating with a bidder that is an insider.

An insider bidder’s ability to increase its ownership by making a partial bid or a bid without a minimum tender condition increases the pressure on minority shareholders to

tender if they have to make independent decisions on whether to tender to the bid. Minority shareholders may tender into a partial bid they consider financially inadequate if they are concerned about reduced liquidity after the bid, the reduced likelihood of receiving a control premium, the increased control in the hands of the bidder, the increased ability of the bidder to acquire the target without minority approval once it owns 90 percent of the target shares, and the continued risk of future creeping bids. The ability of the target board to adopt a Rights Plan and maintain it with independent shareholder support would reduce the pressures on shareholders to accept a bid they view as undervaluing the shares.

Another important question in determining who is excluded from voting on the approval of a Rights Plan is whether target management should be permitted to vote. These individuals have a potential conflict of interest where a hostile take-over bid is made. Our view is that management should not be excluded from the shareholder vote as their vote would be proportional to their economic interest held through share ownership. Accordingly, they would only be able to exert influence commensurate with their share interest in the same way as other shareholders.

(b) A Rights Plan must be approved by (a) a majority vote of security holders that excludes the votes of an exempted security holder and its joint actors, and (b) a separate vote that does not exclude the votes of such security holder (section 6).

This provision addresses circumstances in which holders of grandfathered shares (typically existing large security holders) are exempted from the application of the Rights Plan if their holdings are above the threshold at which the Rights Plan is triggered. Grandfathered shareholders are often also permitted to increase their ownership by making annual restricted creeping acquisitions without triggering the Rights Plan.

This provision is similar to current TSX requirements and requires issuers to obtain dual approval from a vote that includes a grandfathered shareholder and a separate vote that excludes such shareholder.

The purpose of the dual vote is to recognize that the grandfathered shareholder and "minority" shareholders may have different but legitimate interests. The grandfathered shareholder faces restrictions on acquiring further shares that did not exist before the Rights Plan was implemented. There is also a risk that if the grandfathered shareholder is excluded from the vote on the Rights Plan, minority shareholders may approve unfair restrictions or requirements on the grandfathered shareholder. Both these considerations support requiring a vote that does not exclude the grandfathered shareholder.

On the other hand, separate minority shareholder approval is justified to reduce the risk that a grandfathered shareholder with a significant ownership may "cram down" a Rights Plan on the issuer and its minority shareholders that gives the grandfathered shareholder discretion to increase its holdings, makes it more difficult for a third party to make a bid or otherwise prejudices minority shareholders.

5. Application of a Rights Plan

(a) If the Rights Plan is waived or modified by the target board in favour of a bidder making a take-over bid it must be waived or modified with respect to all take-over bids (section 4).

Because shareholders expect a Rights Plan to be applied consistently against all bids, we believe that a target board should not be able to discriminate between bidders by waiving a Rights Plan in favour of a friendly bid while maintaining the Rights Plan against other formal bids. This permits shareholders to ultimately determine which bid will be successful through their decisions to tender.

(b) A Rights Plan can only be effective against take-over bids or acquisitions of securities (section 3).

A Rights Plan is only effective against take-over bids as defined in securities legislation or other acquisitions of securities of the issuer and does not apply to transactions or circumstances involving a shareholder vote such as contested director elections. The ability of shareholders to vote their shares or make proposals should not be affected by the operation of a Rights Plan.

6. Material Amendments to a Rights Plan

(a) Material amendments to a Rights Plan are effective as of the date they are adopted by the board of directors of the issuer (subsection 2(4)).

Material amendments to a Rights Plan are treated in the same way as the initial adoption of a Rights Plan. Such amendments are effective immediately or on such other date as is provided for under the amendment but must be approved by a shareholder vote within 90 days.

(b) Material amendments to a Rights Plan must be approved in the same manner as a new Rights Plan must be approved (section 2).

We considered whether to prohibit material amendments to a Rights Plan, whether to only make such amendments effective after shareholder approval is obtained or to require accelerated shareholder approval within, for example, 60 days. However, because the Proposed Rule does not prohibit an issuer from adopting a second Rights Plan even when an existing Rights Plan has been pre-approved by shareholders, material amendments can be effected through implementation of a new Rights Plan.

Therefore, we concluded that material amendments should be treated in the same way as the adoption of a new Rights Plan.

7. Filing and disclosure (subsection 2(6))

Rights Plans must be publicly filed on SEDAR and an issuer must distribute a news release with prescribed disclosure when a Rights Plan is adopted or materially amended.

The objective of these requirements is to ensure that there is sufficient disclosure for market participants to understand key terms of the Rights Plan, the rationale for its adoption or continued maintenance, and how it is being used by the issuer in the particular circumstances. It is necessary for shareholders to have sufficient information whenever they are voting on a Rights Plan.

8. Exemptions (section 9)

We have proposed that securities regulators have the ability to grant exemptions from the Proposed Rule. We believe that is appropriate because it is difficult to predict how the Proposed Rule will operate in all circumstances.

CONSEQUENTIAL AMENDMENTS

We have proposed changes to NP 62-202 to exclude its application to Rights Plans. We have also proposed consequential changes to NP 62-203 and consequential amendments to the prescribed form of information circular under NI 51-102, the prescribed forms of directors' circulars under MI 62-104 and OSC Rule 62-504, and the prescribed form of prospectus under NI 41-101 to require disclosure in respect of Rights Plans.

ALTERNATIVES CONSIDERED

We considered alternatives to the Proposed Rule. Those alternatives included (i) the status quo, (ii) leaving decisions as to defensive tactics completely to the courts as a matter of fiduciary duty law; and (iii) permitting Rights Plans only if they are standard form "permitted bid" Rights Plans and are approved by shareholders. We concluded that the Proposed Rule was preferable for the reasons discussed above.

UNPUBLISHED MATERIALS

In developing the Proposed Rule, we have not relied on any significant unpublished study, report, or other written materials.

LOCAL NOTICES

Certain jurisdictions are publishing other information required by local securities legislation in Annex I to this notice.

REQUEST FOR COMMENTS

We welcome your comments on these Proposed Materials. In addition to any general comments you may have, we also invite comments on the following specific 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?

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.

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

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

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.

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.

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?

   (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?

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.

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?

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?

    (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?

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?

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?

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?

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?

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)?

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

How to provide your comments

Please provide your comments in writing by **June 12, 2013**. If you are not sending your comments by email, please send a CD containing the submissions (in Microsoft Word format).

Please address your submissions to all of the CSA as follows:

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

Please send your comments **only** to the addresses below. Your comments will be distributed to the other participating CSA.

The Secretary
Ontario Securities Commission
20 Queen Street West
19th Floor, Box 55
Toronto, Ontario M5H 2S8
Fax: 416-593-2318
Email: comments@osc.gov.on.ca

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
Fax: 514-864-6381
Email: consultation-en-cours@lautorite.qc.ca

Please note that all comments received will be made publicly available and posted on the websites of certain securities regulatory authorities. We cannot keep submissions confidential because securities legislation in certain provinces requires publication of a summary of the written comments received during the comment period.

Contents of Annexes

Annex A Proposed Rule

Annex B Proposed Policy

Annex C Proposed Changes to NP 62-202

Annex D Proposed Changes to NP 62-203

Annex E Proposed Amendments to MI 62-104

Annex F Proposed Amendments to OSC Rule 62-504

Annex G Proposed Amendments to NI 41-101

Annex H Proposed Amendments to NI 51-102

Annex I Local Matters

Questions

Please refer your questions to any of the following:

Naizam Kanji
Deputy Director, Mergers & Acquisitions, Corporate Finance
Ontario Securities Commission
416-593-8060
nkanji@osc.gov.on.ca

Jason Koskela
Senior Legal Counsel, Mergers & Acquisitions, Corporate Finance
Ontario Securities Commission
416-595-8922
jkoskela@osc.gov.on.ca

Gordon Smith
Senior Legal Counsel, Corporate Finance
British Columbia Securities Commission
604-899-6656 (direct)
800-373-6393 (toll free in Canada)
gsmith@bcsc.bc.ca

Leslie Rose
Senior Legal Counsel, Corporate Finance
British Columbia Securities Commission
604-899-6654 (direct)
800-373-6393 (toll free in Canada)
lrose@bcsc.bc.ca

Tracy Clark
Legal Counsel, Corporate Finance
Alberta Securities Commission
403-355-4424
tracy.clark@asc.ca

Sonne Udemgba
Deputy Director, Legal/Exemption
Securities Division, Financial and Consumer Affairs Authority of Saskatchewan
306-787-5879
sonne.udemgba@gov.sk.ca

Chris Besko
Legal Counsel, Deputy Director
Manitoba Securities Commission
204-945-2561
chris.besko@gov.mb.ca

Rosetta Gagliardi
Senior Policy Advisor
Autorité des marchés financiers
514-395-0337 ext. 4462
rosetta.gagliardi@lautorite.qc.ca

Sandrine Tremblay
Senior Securities Analyst
Autorité des marchés financiers
514-395-0337 ext. 4425
sandrine.tremblay@lautorite.qc.ca

SCHEDULE A

Approaches to defensive tactics in the United States and United Kingdom

A. United States

(i) Delaware

In the United States, courts review defensive tactics as a fiduciary duty matter under the corporate law of the state in which the target is incorporated. Delaware courts have had significant influence on the conduct of target boards responding to hostile take-over bids because most U.S. public companies are incorporated in Delaware and are therefore subject to its corporate law.

While Delaware courts generally defer to a board's business judgment when determining whether there has been a breach of fiduciary duties, they take a more stringent approach in reviewing defensive tactics in recognition of the fact that, when faced with a hostile take-over bid, the interests of the target company board and management may differ from those of target company shareholders.

As a result, the courts will not apply the business judgment rule in reviewing board action taken in response to a hostile take-over bid unless the target board demonstrates, as a threshold issue, that: (i) it had reasonable grounds for believing that the take-over bid was a danger to corporate policy and effectiveness, and (ii) the defensive measures adopted were reasonable in relation to the threat posed.[13] If both elements are satisfied, the board will have the benefit of the business judgment rule.

The Delaware courts generally view a Rights Plan as a reasonable and proportionate response to the threat posed by a hostile take-over bid to the target company's existing corporate strategy.[14] This approach recognizes that shareholders of a target company can ultimately replace the board and elect a board that can remove the Rights Plan. Thus, under Delaware law, target company boards may retain a rights plan in the face of a hostile take-over bid to protect an existing corporate strategy so long as the board does not take steps that impedes the ability of the shareholders to replace the board and remove the Rights Plan.

A significant concern with the Delaware approach to Rights Plans is that it is difficult and expensive for a bidder to replace a target board to remove a Rights Plan, especially when the target company has a staggered or classified board. A staggered board typically provides for election of only one-third of the board each year. Therefore, a bidder would need to win two consecutive annual proxy contests to be able to elect a majority of the

---

[13] This is known as the "Unocal" test after the Delaware court decision.

[14] In *Unitrin v. American General Corp.*, 651 A.2d 345 (Del. 1993), the Delaware court held that a defensive measure would be upheld as a proportional response to a threat if the measure: (a) was not coercive or preclusive of the bid, and (b) comes within a range of reasonableness.

board and to remove the Rights Plan.[15] Generally, shareholders have limited rights in the United States to requisition a shareholders meeting for that purpose.

The Delaware approach is therefore a "board veto" approach in that it allows a target board to adopt defensive measures that effectively prevent shareholders from accepting a hostile take-over bid without target board support. This was prominently illustrated in a recent decision where the Delaware Chancery Court did not redeem the rights issued under a Rights Plan despite a non-coercive offer and a 16 month take-over contest.[16]

(ii) State legislation

Almost every state legislature in the United States has adopted an anti-takeover statute. The purpose of these statutes appears to be to make hostile take-over bids more difficult for the bidder and not to address structurally coercive bids or maximize shareholder value. For example, the effect of Delaware's "business combination statute" is that a bidder can gain control of a target without board consent only by acquiring more than 85% of the company's shares.

B. United Kingdom

In the United Kingdom, all take-over bid defensive measures are dealt with by the United Kingdom Takeover Panel in accordance with the requirements of United Kingdom Takeover Code (**Takeover Code**).

The Takeover Code prohibits a target company board from taking any action during a bid, or in anticipation of a bid, that would frustrate the take-over bid or otherwise deny shareholders the opportunity to decide on its merits, unless such action is approved by target company shareholders in the face of the bid.

Although boards of target companies subject to the Takeover Code have not traditionally adopted Rights Plans as defensive measures, other measures taken to deter a hostile bidder would require shareholder approval in the face of the bid. The Takeover Code also restricts the ability of a target board to enter into deal protection mechanisms, such as termination fees, in board supported transactions.

---

[15] Staggered boards are not an effective defensive measure in Canada because the entire board can be replaced at any time under Canadian corporate law.

[16] See *Air Products & Chemicals, Inc. v. Airgas, Inc.*, C.A. No. 5249-CC (Del. Ch. Feb. 15, 2011).