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July 12, 2013

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission – Securities Division
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
New Brunswick Securities Commission
Registrar of Securities, Prince Edward Island
Nova Scotia Securities Commission
Securities Commission of Newfoundland and Labrador
Registrar of Securities, Government of Yukon
Registrar of Securities, Department of Justice, Government of the Northwest Territories
Registrar of Securities, Legal Registries Division, Department of Justice, Government of Nunavut

c/o Anne-Marie Beaudoin
Corporate Secretary
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SENT VIA E-MAIL

Dear Sirs and Mesdames:

RE: CSA/AMF Consultation on Changes to Security Holder Rights Plans

Thank you for the opportunity to provide comments to the Canadian Securities Administrators ("CSA") and the Autorité des marches financiers ("AMF") in response to the CSA's Notice and Request for Comment on Proposed National Instrument 62-105 *Security Holder Rights Plans*, Proposed Companion Policy

62-105CP *Security Holder Rights Plans* and Proposed Consequential Amendments ("CSA Proposal") and the AMF's Consultation Paper *An Alternate Approach to Securities Regulator's Intervention in Defensive Tactics* ("AMF Proposal"). We hope that you find our comments thoughtful and relevant.

With more than $129.5 billion in assets, the Ontario Teachers' Pension Plan ("Teachers'") is the largest single-profession pension plan in Canada. An independent organization, it invests the pension fund's assets and administers the pensions of 300,000 active and retired teachers in Ontario.

General Comments

We have considered the approaches reflected in both the CSA Proposal and the AMF Proposal. While we have concerns with both, as discussed below, those concerns are more limited in respect of the incremental changes contemplated by the CSA Proposal than the wholesale abandonment of National Policy 62-202 – *Take-Over Bids – Defensive Tactics* contemplated by the AMF Proposal.

Reconsidering Rights Plans

We believe that rights plans should be used by issuers for the limited purposes of ensuring equal treatment of shareholders in the event of a bid, allowing the company sufficient time to consider alternatives to a bid and permitting shareholders to make an informed decision about the bid and available alternatives.[1] If rights plans are permitted to stand in the face of a bid (with or without shareholder approval of the plan) to prevent the completion of the bid, we are concerned that they will increasingly have the potential to be used by management as an entrenchment mechanism. This is a particular concern in the context of the CSA's proposed endorsement of non-tactical rights plans which, we believe, will result in the proliferation of such plans.

Each of the CSA Proposal and the AMF Proposal appears to accept as a starting principle that the use of rights plans is appropriate in the Canadian market. The discussion generated by the current proposals is an excellent opportunity to consider whether rights plans are the appropriate tool for the protection of shareholder interests, or whether these interests could better be addressed through other revisions to Canadian securities laws that would not have the potential to be impacted by the conflicts of interest that are inherent in circumstances where rights plans are operative. For instance, an extension in the mandated offering period from 35 days may equally serve to provide an issuer with the necessary time to consider strategic alternatives or advocate for the status quo; shareholders would still be afforded the opportunity to weigh the competing perspectives and determine whether to tender to the bid(s).

If changes are to be considered to the existing regime, it also would be appropriate to consider the desirability of adopting one or more of the different approaches to defensive tactics that the CSA Proposal acknowledges have been adopted in other jurisdictions, such as the the United Kingdom's approach to "frustrating actions" (or a modified version thereof) to similarly protect the legitimate interests of shareholders of public companies in Canada.

[1] Our position on the use of rights plans can be found in Section 3.1 of our Corporate Governance Principles and Proxy Voting Guidelines, which can be accessed at http://www.otpp.com/investments/responsible-investing/ri-at-teachers/governace-basics.

We encourage the CSA to consider whether the perceived benefits of rights plans to shareholders may be achieved through alternate mechanisms and, if so, whether rights plans themselves have a place in the Canadian market other than for purposes of management entrenchment. We believe a discussion on these topics prior to adoption of either of the current Proposals can only benefit shareholders and issuers alike.

Deficiencies in the Proxy Voting System

We have another fundamental concern that is applicable to both the CSA Proposal and the AMF Proposal and their timing. We note that both Proposals place a very significant emphasis, and appear to be predicated on, an effective proxy voting system and effective shareholder democracy. Both the CSA Proposal and AMF Proposal emphasize the shareholder vote. The essence of the CSA Proposal appears to be that shareholders will be able to decide whether to adopt, and whether to neutralize, a rights plan. An essential rationale for the suggestion in the AMF Proposal that it would be appropriate for securities regulators to step back from the regulation of "defensive tactics" is that shareholders may exercise effective discipline on such tactics through their control over the election (and removal) of directors who approve and oversee such tactics.

As the Ontario Securities Commission has recognized in its most recent *Statement of Priorities*, and has been widely discussed and acknowledged in the market, there are significant issues inherent in the Canadian proxy voting infrastructure.[2] Those issues are well-documented and validated in the October 2010 discussion paper "*The Quality of the Shareholder Vote in Canada*"[3]. As those issues substantively undermine the effectiveness of the proxy voting system in Canada and effective shareholder democracy, we have a significant concern about both the CSA Proposal and the AMF Proposal, which rely significantly on a shareholder vote to discipline the use of rights plans (and, in the case of the AMF Proposal, defensive tactics more generally). We do not believe that one can responsibly implement either of the Proposals in the face of these concerns, and no reason has been advanced that the rights plan regime should be fundamentally changed – particularly in a manner that will increase uncertainty and reduce investor confidence – before at least the most fundamental failings of the current proxy voting system in Canada have been addressed.

The CSA Proposal

While we share a number of the perspectives that we believe underlie the CSA Proposal, we do have concerns about the Proposal in addition to the overriding concerns discussed above.

Concurrent Perspectives

We agree that it is appropriate that security holders, as owners of an issuer, decide whether a rights plan should:

- be implemented, which may affect the potential for a control transaction, and

[2] The Ontario Securities Commission has identified as a priority initative for the coming year improving shareholder democracy and protection by (i) facilitating the adoption of majority voting for elections of directors by issuers listed on the Toronto Stock Exchange, and (ii) identifying the key proxy voting infrastructure issues and publishing a consultation paper (the CSA is planning on publishing a concept paper in Summer 2013).
[3] Carol Hansell, Mark Conelly, Michael Disney, Gillian Stacey, Tim Baron, Adam Fanaki and Richard Fridman, *The Quality of the Shareholder Vote in Canada*, (Davies Ward Phillips and Vineberg LLP, October 22, 2010).

- remain in place, which may affect whether security holders can sell their securities in a control transaction that may be proposed.

The security holders are to be provided by the issuer with the information required to make an informed decision about the rights plan. They are the "owners" of the issuer and are less likely to be subject to the conflicts of interest that could influence the judgment of the board and management of the issuer in a manner that compromises the best interests of the issuer and its security holders. That said, we also recognize that there may be circumstances in which it is appropriate and in the best interests of the issuer and its security holders – to limit the possibility of a "creeping bid", for example – for a rights plan to be implemented and remain in place while security holder approval is being sought. While it is not clear to us why a 90-day period was selected by the CSA, we are not uncomfortable with an issuer being afforded a window of that length for that purpose, except in situations where a rights plan is overly "defensive", as discussed below.

We also agree that security holders should decide if a rights plan should remain in effect, whether in the context of a bid or otherwise. As circumstances can change over time, it is appropriate to provide security holders with an annual vote that affords them the opportunity to review and reassess whether a structural defense that may have been considered appropriate in the context in which it was implemented continues to be appropriate in the prevailing environment.

Divergent Perspectives

Notwithstanding these shared perspectives, we do have some fundamental concerns with the CSA Proposal, in addition to the overriding concerns described above about whether a shareholder rights plan is the appropriate tool to protect shareholder interests and the current failings of our proxy voting system achieve effective shareholder democracy.

We are concerned that the CSA Proposal will result in significant uncertainty of the terms of rights plans that may be proposed and implemented. There is a real possibility that there will be a proliferation of rights plans with terms that potentially are more "defensive" than current "new generation" plans. Given the deficiencies in the proxy voting system and shareholder democracy in Canada, there may not be an appropriate discipline on this potential.

We also are concerned about the uncertainty as to how the "hands off" approach contemplated by the CSA Proposal would impact the potential involvement of the CSA in matters related to rights plans in the 90-day window between the implementation of a rights plan and the time by which the CSA Proposal contemplates that security holder approval would have to be obtained. It is entirely unclear as to what circumstances might engage the "public interest" jurisdiction of the CSA, and one can already envisage right plans that have broad triggers that could limit potential acquiror activities during that period.

We note that in the CSA Proposal the bidder is not permitted to vote on the approval of a rights plan, which we agree is appropriate because of the conflict of interest that the CSA Proposal has identified. We also agree that, as noted in the CSA Proposal, target management may have a potential conflict of interest in voting on a rights plan in the context of a hostile bid. We cannot, however, agree that management should be permitted to vote on a rights plan and counted toward the requisite majority notwithstanding that conflict because "their vote would be proportionate to their economic interest held though share ownership. Accordingly, they would only be able to exert influence commensurate with their share interest in the same way as other shareholders." This rationale would apply equally to bidders (and to persons who are excluded from "majority of minority" approval under Multilateral Instrument 61-101 – *Protection of Minority*

Security Holders in Special Transactions). It ignores the very real potential for conflicts of interest that underlies National Policy 62-202 and the importance of a "majority of minority vote" that underlies Multilateral Instrument 61-101. As we previously noted, we do not consider it appropriate for rights plans to be used to facilitate the maintenance of the status quo for the benefit of directors or management; excluding the votes of directors and management from the shareholder approval process would recognize their real or legitimately perceived conflicts of interest in potentially preferring to continue in their roles as an alternative to a bid that could result in the termination of those roles, and align the approval methodology with that required under other "majority of minority" approvals. We acknowledge that it may not be necessary to exclude all members of management and believe that refinement of this concept merits further consideration and refinement by the CSA.

The AMF Proposal

We have reviewed the AMF Proposal and do not support its recommendations. In addition to placing significant emphasis on the proxy voting system and effective shareholder democracy, the AMF Proposal relies upon the Canadian judicial system as the arbitreur for disputes. We do not believe at present that the courts are an efficient way to resolve timely shareholder matters; in addition, their jurisdication is narrower than the public interest jurisdication available to Commissions. Therefore, it is our belief that until (i) there has been a more complete discussion and analysis of the necessity of rights plans in the Canadian context, (ii) the proxy and shareholder governance deficiencies are remedied, and (iii) there are courts that can address these issues across the country in an efficient manner and more broadly than currently available, it would be imprudent to abandon the principles underlying NP 62-202. To follow the AMF Proposal today would compromise investor protection, increase uncertainty and undermine confidence in our capital markets.

Thank you again for this opportunity to comment on the Security Holder Rights Plans. Should you have any questions, please contact Brian Calalang, Senior Legal Counsel, Investments at brian_calalang@otpp.com or 416.730.6871, or Paul Schneider, Manager, Corporate Governance at paul_schneider@otpp.com or 416.730.5307.

Yours sincerely,

Brian Calalang
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