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CANADIAN SECURITIES ADMINISTRATORS REQUEST FOR COMMENTS REGARDING PROPOSED NATIONAL INSTRUMENT 62-105 SECURITY HOLDER RIGHTS PLANS DATED MARCH 14, 2013

AND

AUTORITÉ DES MARCHÉS FINANCIERS CONSULTATION PAPER AN ALTERNATIVE APPROACH TO SECURITIES REGULATORS' INTERVENTION IN DEFENSIVE TACTICS DATED MARCH 14, 2013

This letter is submitted on behalf of the Institute of Corporate Directors ("ICD") in response to the invitation to comment on the Canadian Securities Administrators' ("CSA") proposed National Instrument 62-105 regarding security holder rights plans (the "CSA Proposal") and the Autorité des marchés financiers ("AMF") consultation paper regarding defensive tactics (the "AMF Proposal").

The ICD is a not-for-profit, member based association with more than 7,200 members and 11 chapters across Canada. Our vision is to be the pre-eminent organization in Canada for directors in the for-profit, not-for-profit and crown sectors. Our mission is to foster excellence in directors to strengthen the governance and performance of Canadian corporations and organizations. This mission is achieved through education, certification and advocacy of best practices in governance.

Context

The ICD is pleased to have the opportunity to comment on the CSA Proposal and AMF Proposal. Twenty-seven years have passed since National Policy 38 on defensive tactics was introduced and it has been 21 years since the OSC handed down its first shareholder rights plan decision in Canadian Jorex.

A lot has changed since then in Canada and globally, but the CSA's approach to rights plans and defensive tactics has not. As a result, Canada has become a highly bidder-friendly jurisdiction since the sale of the target company is highly likely upon the launching of an unsolicited take-over bid due to the leverage of a rights plan being denied to target company directors[1]. This does not always result in shareholders receiving "maximum" value, reinforces short-term thinking for Boards and management teams, and hinders the ability of Canadian companies to achieve global scale. The ability of shareholders owning just 5% of a company's stock to requisition a meeting and the lack of staggered boards in Canada, coupled with many Canadian issuers having majority voting policies, will continue to render Canadian companies more vulnerable to hostile take-over bids as compared to the U.S.

The CSA decisions regarding rights plans are also contrary to the decision of the Supreme Court of Canada in BCE. The CSA decisions require directors to maximize short term value, whereas the Supreme Court of Canada requires directors to act in the best interests of the corporation from a longer term perspective. In addition, as we saw in various recent cases, the CSA decisions have become inconsistent

[1] 1. This is a result of the long line of CSA decisions that have held that at some point (typically 45-70 days), the shareholder rights plan or pill "has to go". Based on Bloomberg and company filings, since 2000 through May 28, 2013, for announced deals greater than $100million, in unsolicited bid situations in Canada, a change of control of the Target occurred 86% of the time. The original bidder succeeded 54% of the time and an alternate bidder succeeded 32% of the time. The Target remained independent in only 14% of the cases, which included for example, Potash, where the government stepped in.

and at times irreconcilable.

The business judgment of the Board of Directors is central to Canada's system of corporate governance. The current regulatory regime for shareholder rights plans and defensive tactics unduly limits the exercise of that judgment and warrants examination. We commend the efforts of the CSA and AMF to tackle this important policy issue.

Independent directors on a board have a unique perspective on a change of control transaction:

- Unlike management, their employment and livelihood is generally not affected in a material way.
- Unlike shareholders, they must act and exercise their business judgment in the best interests of the corporation – not in their self-interest.

This fiduciary duty, unconflicted perspective and the requirement that they exercise their independent business judgment gives directors an integral role in change of control transactions. Accordingly, their voices should be heard and their views considered when governments and regulators are making policy choices regarding the regulation of change of control transactions, of which shareholder rights plans and defensive tactics form an integral part.

In our view the overriding purpose of any new proposal concerning shareholder rights plans and defensive tactics should be to enable directors to do their job to act in the best interests of the corporation.

AMF Proposal

The AMF Proposal takes a holistic approach to critically assessing the shareholder rights plan and defensive tactics regime in Canada.

We applaud the AMF for opening up the debate in Canada on the appropriate approach to shareholder rights plans and defensive tactics in this country.

<u>Positive Aspects</u>

- Under the AMF Proposal, courts would determine the propriety of defensive tactics – including rights plans – as part of their jurisdiction over the discharge of directors' fiduciary duties. Securities regulators would only intervene where a board's actions or decisions are clearly abusive of shareholder rights or negatively impact the efficiency of capital markets.

- Decisions regarding rights plans and defensive tactics would reside with directors who are obliged under Canadian corporate law and the BCE decision to act in the best interests of the corporation and are entitled to consider value maximization over the longer term having regard to the interests of various stakeholders.

- In exercising their judgment, directors will recognize that they are highly accountable to their shareholders. Shareholder engagement is and will increasingly be a common feature of the Canadian landscape so directors will have insight on the perspective of their shareholders. Shareholders who are unhappy with the decisions of their directors (and do not wish or are

unable to simply sell their shares) will have recourse in the courts or via removal of directors at a requisitioned meeting of shareholders. In this regard, shareholder activism in general and proxy contests in particular, have become increasingly prevalent in Canada – further evidence that Canada continues to have an active and free market for corporate control.

- This approach will no longer render the sale of Canadian companies highly likely just because someone has commenced a hostile take-over bid, which is the current state of affairs in Canada and would continue to be under the CSA Proposal.

- This approach would have primary decision-making on change of control transactions reside with individuals who are legally mandated to act in the best interests of the corporation vs. self-interest.

- Corporate Canada's future would not be determined by arbitrageurs and hedge funds whose sole focus is self-interest and short-termism. Indeed, as was seen in the Mason/Telus situation this interest can be contrary to the best interests of the corporation.

- Hostile take-over bids are typically opportunistic and launched at times that are least optimal from a target company's perspective, so it is critical that the target board be provided with the tools and leverage required to act in the best interests of the corporation.

- The AMF Proposal recognizes that a lot has changed in Canada since the implementation of National Policy 38 and the Canadian Jorex decision. Long gone are the days of management entrenchment and scorched earth defensive tactics. Directors in Canada today better understand their duties and how to discharge them. If they do not, they can and will be held accountable. This is evident in the increased shareholder activism we have seen over the past few years.

- The AMF Proposal gives Boards of Directors greater ability to exercise their judgment in the best interests of the corporation and all of its stakeholders, including its shareholders, and would move Canada closer to the US approach to rights plans and defensive tactics. In an increasingly competitive global economy, Canada should welcome foreign capital and be open for business; that does not mean, however, that Canada's companies should be viewed as easy targets for opportunistic purchasers.

- The AMF Proposal pays high regard to the importance of a target board engaging in a proper process to consider an unsolicited take-over bid. It is important that the process be free of conflict. In our experience, before a board will recommend rejection of a hostile take-over bid it comes to the view that the present value of value realizable over the longer term or via pursuit of other alternatives will exceed the value of the unsolicited offer. Where the target board's process is flawed or other concerns regarding abuse exist, the AMF Proposal preserves the right of securities regulatory intervention.

- The AMF Proposal is in line with the "Compete to Win" report of the Competition Policy Review Panel commissioned by the Government of Canada and published in June 2008.

The CSA Proposal

We note that the purpose of the CSA Proposal is to: (a) establish a comprehensive regulatory framework for rights plans in Canada that provides target boards and security holders with greater discretion over the use of rights plans; (b) reduce the circumstances where regulatory intervention may be necessary; and (c) maintain an active market for corporate control.

Notably, the CSA Proposal has the CSA exiting the business of regulating shareholder rights plans. We view this as a positive development for the reasons discussed above.

Leaving this positive aside, we have a number of concerns with the CSA Proposal, as follows:

- The CSA Proposal will generally provide a board of directors 90 days to use a rights plan. This is an improvement over the status quo of 45-70 days (on average), but still insufficient because arbitrageurs who buy the stock on announcement of the hostile take-over bid can generally be expected to vote for termination of the rights plan. As a result, Canada will continue to be a bidder friendly jurisdiction and directors will likely be advised (or have little choice except) to seek a white knight sale transaction to maximize short term shareholder value.

- This outcome is again contrary to the proper exercise of a board's fiduciary duty as espoused by the Supreme Court of Canada in BCE.

- The option of seeking annual shareholder approval of a shareholder rights plan is largely a red herring. Why should an issuer's ability to remain independent become an annual agenda item? Is this not the ultimate regulatory expression of short-termism? In practice, many issuers are likely to avoid such annual soul-searching exercises by adopting tactical pills when needed.

- The CSA Proposal does not address defensive tactics at all, other than with respect to shareholder rights plans.

- With all due respect we view the CSA Proposal as an inadequate response to the vital policy challenges Canada faces in this area and urge the CSA and our governments to do better.

Conclusion

The ICD believes the AMF Proposal is meaningful and worthy of pursuit. Further, the ICD believes Canada should have one approach, the AMF Proposal, which prevails nationally.

The ultimate national instrument in this area should be optimal for the Canadian economy as a whole. The AMF Proposal goes a long way to achieving this objective. To the extent it falls short, the ICD believes a Task Force comprised of appropriate members should be struck to advance the AMF Proposal nationally and to make it best of class globally.

The ICD is pleased to have had an opportunity to provide you with our comments. If you have any questions regarding our comments, please contact the undersigned.

Yours truly,

Stan Magidson, LL.M., ICD.D
President & CEO