

July 10, 2013

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Dear Sirs/Mesdames:

Re: Autorité des marchés financiers Consultation Paper - An Alternative Approach to Securities Regulators' Intervention in Defensive Tactics (the "Consultation Paper")

The Canadian Advocacy Council¹ for Canadian CFA Institute² Societies (the CAC) appreciates the opportunity to comment on the Consultation Paper.

As a general comment, the CAC is in favour of re-examining the current regime related to shareholder rights plans. While the CAC generally favours the proposals put forth by the Canadian Securities Administrators in Proposed National Instrument 62-105 *Security Holder Rights Plans* (the "**Proposed Rule**"), we believe that elements of both proposals can help improve shareholder democracy.

The CAC wishes to respond to the following specific questions for consideration:

- 1. If proper safeguard measures to manage conflicts of interest are put in place and there exists no circumstance that demonstrates an abuse of security holders' rights or a negative impact of the efficiency of capital markets, do you agree that Regulators*

¹The CAC represents the 13,000 Canadian members of CFA Institute and its 12 Member Societies across Canada. The CAC membership includes portfolio managers, analysts and other investment professionals in Canada who review regulatory, legislative, and standard setting developments affecting investors, investment professionals, and the capital markets in Canada. See the CAC's website at <http://www.cfasociety.org/cac>. Our Code of Ethics and Standards of Professional Conduct can be found at <http://www.cfainstitute.org/ethics/codes/ethics/Pages/index.aspx>.

² CFA Institute is the global association of investment professionals that sets the standard for professional excellence and credentials. The organization is a champion for ethical behavior in investment markets and a respected source of knowledge in the global financial community. The end goal: to create an environment where investors' interests come first, markets function at their best, and economies grow. CFA Institute has more than 113,000 members in 140 countries and territories, including 102,000 CFA charterholders, and 137 member societies. For more information, visit <http://www.cfainstitute.org/>.

should give appropriate deference to the decision of target boards to implement a defensive measure?

Yes, we believe that the Regulators should give appropriate deference to decisions made by target boards. The current regime introduces unnecessary uncertainty for both bidders and directors of target companies with respect to the timing of hostile bids, and it would be of assistance if public interest reviews were limited to only serious instances of abuse. It would be helpful if additional guidance could be provided with respect to appropriate safeguard measures and perceived abuses of security holders' rights, to provide additional certainty to the market.

- 2. Do you think giving appropriate deference to directors in the exercise of their fiduciary duty will negatively impact the ability of target security holders to tender their securities to an unsolicited take-over bid?*

We do not believe that the actions of directors could impact the ability of security holders to tender securities to a take-over bid. Shareholders always have a choice to tender (or not to tender) in the face of a legal bid. While the actions of directors may (i) serve to dissuade target security holders from tendering their securities to an unsolicited take-over bid; (ii) make it difficult for a bid to be made in the first instance; or (iii) make it difficult for a bidder to take up and pay for the securities, such results may not necessarily be negative. If directors have made a decision with respect to a corporate action which satisfies their fiduciary duty to act in the best interests of the corporation, then increased difficulty in making a hostile bid may very well be the correct result.

- 3. Should directors, in the exercise of their fiduciary duty, be able to implement a rights plan or any other defensive measure to fend off an unsolicited take-over bid?*

The CAC is not opposed to the use of rights plans or other defensive measures imposed by directors in the exercise of their fiduciary duty. However, the CAC would support the proposed requirements in the CSA's Proposed Rule to require security holders to approve a rights plan within 90 days and annually thereafter.

- 4. Is it appropriate for Regulators to provide guidance as to appropriate safeguard measures generally recognized as effective in mitigating the inherent conflicts of interest of directors facing an unsolicited take-over bid? If you agree, are you of the view that these measures should be in a policy or in a rule?*

Guidance on the appropriate safeguard measures would be helpful if such measures were described in a non-binding policy. As each unsolicited take-over bid would need to be reviewed on its own merits given prevailing market circumstances at the time of the bid, directors will require the necessary flexibility to consider all appropriate options and make unfettered decisions in the exercise of their fiduciary duty.

5. *Do you have any suggestions of effective measures to manage conflicts of interest of directors?*

We do not have a view on specific measures that can be used to manage conflicts of interest that may arise when directors deliberate on an unsolicited take-over bid. Good corporate governance is vital for the long term sustainability and integrity of companies, but the CAC does not favour either an exclusively principles-based nor exclusively rules-based approach. Effective corporate governance results from behavioral factors driven by directors and management. Directors already have a fiduciary duty to act in the best interest of the corporation and to recommend an appropriate course of action in the face of a bid.

6. *Do you believe that security holders generally have the appropriate tools to discipline directors?*

The tools available to security holders to date have largely been ineffective. The shareholder base of many Canadian companies is quite concentrated, and it is difficult for minority voices to be heard. If shareholders are of the view that directors have operated in an inappropriate manner there are avenues for redress available, such as pursuing a claim through the courts, but such a course of action is difficult and expensive to pursue. In addition, while shareholders can exercise their voting rights to withhold votes from individual directors at an annual meeting, in most circumstances that will not lead to the removal of the director.

7. *Do you agree that our proposed changes to the take-over bid regime to add the irrevocable minimum tender condition and the extension of the bid would contribute to allow target security holders to make a voluntary, undistorted collective decision to sell?*

The CAC agrees with both the proposed minimum tender condition and the requirement to extend a bid by ten days. The extension should provide minority shareholders with sufficient time to tender to a successful bid if they so choose.

8. *Do you believe that the AMF Proposal would enhance investor protection against unfair, improper or fraudulent practices and promote the efficiency of capital markets?*

We believe the AMF Proposal related to take-over bid conditions would have a positive impact on minority shareholders. We do not believe the proposal would have any impact on fraudulent practices, which, if they exist with respect to take-over bids, might be expected to continue in the face of any type of regulatory reform. Absent specificity on the circumstances in which Regulators would interfere in a board's decision, it is difficult to predict the impact on the efficiency of our capital markets.

9. *Are there other amendments to address gaps in our take-over bid regime that we should contemplate?*

We recognize that the AMF Proposal specifically indicates that the AMF is committed to maintaining a cohesive and harmonious approach across the country. We wish to reiterate the importance of harmonized rules in all Canadian jurisdictions. Harmonizing rules regarding take-over bids and defensive tactics would simplify the process for bidders and target companies in circumstances which are already highly charged and for which time is of the essence.

Concluding Remarks

We thank you for the opportunity to provide these comments. We would be happy to address any questions you may have and appreciate the time you are taking to consider our points of view. Please feel free to contact us at chair@cfaadvocacy.ca on this or any other issue in future.

(Signed) *Ada Litvinov*

Ada Litvinov, CFA
Chair, Canadian Advocacy Council