HANSELL

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VIA EMAIL

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
Financial and Consumer Services Commission of New Brunswick
Superintendent of Securities, Newfoundland and Labrador
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Nunavut

The Secretary
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Me Anne-Marie Beaudoin
Corporate Secretary
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Dear Sirs/Madams:

Re: Proposed Amendments to Take-Over Bid Regime

We appreciate the opportunity to comment on the Canadian Securities Administrators' ("CSA") proposed amendments to Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids*, and changes to National Policy 62-203 *Take-Over Bids and Issuer Bids* (collectively, the "Proposed Bid Amendments").

Hansell LLP provides expert, independent legal and governance counsel to both shareholders and boards of directors of reporting issuers across Canada. We advise boards, shareholders and management teams in a number of special situations, and in respect of their governance practices generally. In particular, we advise boards and special committees in a variety of change of control situations, including unsolicited take-over bids.

We have provided our general comments to the Proposed Bid Amendments in the next section. The CSA has also invited comments on specific topics and we have set out our responses to address these in the order they appear in the CSA Notice and Request for Comment (the "CSA Notice") under the following headings: Reduction of the Minimum Deposit Period; Partial Take-Over Bid Regime; Duty to Prepare and Send Directors' Circular; and Anticipated Changes to Market Activity. All capitalized terms have the same meanings as defined in the CSA Notice unless otherwise defined in this letter.

1. General Comments

We fully support the CSA's efforts to harmonize and streamline the requirements governing take-over bids across all Canadian jurisdictions. These amendments represent the first significant change to the take-over bid regime since the amendments that resulted from the recommendations of the Zimmerman Committee[1] in 1996. We believe that the harmonized approach outlined in the Proposed Bid Amendments addresses the key issues identified in the CSA Proposal[2] and the alternative AMF Proposal[3] published in March 2013. In this respect, the CSA has clearly expressed its continued endorsement of the shareholder primacy approach first recommended by the Kimber Committee[4] and clearly articulated in National Policy 62-202 *Take-Over Bids – Defensive Tactics* ("NP 62-202") by leaving the final decision to respond to a take-over bid or to a competing bid to the shareholders of the target company.

Without commenting further on the appropriate role of target boards facing unsolicited take-over bids and whether directors should be entitled to receive more deference in their actions and decisions, we believe the Proposed Bid Amendments represent a reasonable compromise and a significant improvement over the current regime. In particular, the Proposed Bid Amendments address the individual shareholder coercion and "pressure to tender" concerns of the current regime and allow shareholders the collective opportunity to "vote" in favour of or against the take-over bid. The Proposed Amendments also respond to the dynamics of the current regime by providing target boards increased time and leverage to appropriately respond to an unsolicited take-over bid. Importantly, the Proposed Bid Amendments provide more bidder certainty, which will foster a more predictable take-over bid regime, promote efficiency and reduce costs by minimizing the need for regulatory intervention.

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1 Zimmerman et al., *Report of the Committee to Review take-over Bid time Limits*, looseleaf (Toronto: IDA, 1996).

2 Canadian Securities Administrators, Notice and Request for Comment Proposed National Instrument 62-105 *Security Holder Rights Plans* and proposed Companion Policy 62-105CP *Security Holder Rights Plans* (March 14, 2013), online: http://www.osc.gov.on.ca/en/SecuritiesLaw_ni_20130314_62-105_security-holder-rights-plan.htm (the "CSA Proposal").

3 Autorité des marchés financiers, *An Alternative Approach to Securities Regulators' Intervention in Defensive Tactics* (March 14, 2013), online: https://www.lautorite.qc.ca/files//pdf/consultations/juin-2013/2013mars14-avis-amf-62-105-cons-publ-en.pdf (the "AMF Proposal").

4 *Report of the Attorney General's Committee on Securities Legislation in Ontario* (Toronto: Queen's Printer, March 1965) at 3-10.

We believe that 120 days will provide a significantly increased and more certain period of time for the target board to evaluate an unsolicited take-over bid, inform and advise shareholders and seek, where appropriate, value enhancing alternatives. A benefit of additional time will be the ability of the target board to consider a broader range of alternatives beyond simply facilitating an auction or seeking a "white knight". From the bidder's perspective, 120 days will be perceived as a very long time and may result in additional financing costs and improbability regarding the bid's success. However, we believe that the certainty in the timing of unsolicited take-over bids will minimize these concerns. We assume that the 120 Day Requirement will reduce the need to adopt Rights Plans in the face of a bid, although the CSA should consider clarifying this view by issuing a statement to that effect.

We would also welcome additional guidance from the CSA, either through a review of NP 62-202 or a separate policy initiative, on the appropriateness of Rights Plans in situations where the target board wishes to protect against creeping acquisitions, and on the increased adoption of modified Rights Plans with a "voting pill" feature to protect against shareholders who wish to coordinate on voting matters. We would recommend that this review take place once the Proposed Bid Amendments are in force.

2. Reduction of the Minimum Deposit Period

(a) Deposit Period News Release

The Proposed Bid Amendments provide the target board the option to reduce the minimum deposit period from a minimum 120 days to a minimum of 35 days by issuing a deposit period news release in respect of a proposed or commenced take-over bid. We fully support this option and believe that it will give target boards additional leverage to negotiate a friendly bid and obtain a more attractive offer price in exchange for providing more deal certainty to the bidder. In many cases, we anticipate the target board facing a proposed unsolicited take-over bid will want to take advantage of the full 120-day deposit period to effectively respond and consider its alternatives. As stated by the CSA, the issuance of a deposit period news release to waive the 120-day minimum will be attractive in circumstances where the target board is in favour of a board-supported take-over bid or where the target board is attempting to negotiate a higher price with the bidder.

(b) Definition of "Alternative Transaction"

(i) General Comments

The Proposed Bid Amendments provide that the minimum deposit period will be at least 35 days for any outstanding or future take-over bid if the issuer announces that it has agreed to enter into, or determined to effect, an "alternative transaction". The CSA has asked for specific comment on the scope of the definition of "alternative transaction" and whether we anticipate any difficulties with the application of the Proposed Bid Amendments as they relate to alternative transactions. We note that a clear definition and a common understanding of the announcement of an alternative transaction by the issuer is critical to eliminate any uncertainties in respect of the shortened deposit period for any then-outstanding or subsequent take-over bid. Any uncertainty regarding the definition of "alternative transaction" may generate negative consequences in respect of timing of the bid and whether the bidder is in compliance with the bid regime. This would impose unnecessary costs and uncertainty and potentially require the securities regulators to intervene.

The CSA has stated that the definition of "alternative transaction" is intended to encompass transactions generally involving the acquisition of an issuer or its business effected through means other than a take-over bid. As a general policy matter, the definition should not deter the target board from pursuing all alternatives that increase shareholder value. These may include change of control transactions or transactions proposed as part of the target's corporate strategy. In our view, the proposed definition of "alternative transaction" may result in a quagmire of uncertainty for boards for a few reasons. Primarily, we note that not all transactions fall within the definition of "alternative transaction" and it is unclear how this definition would apply to transactions that do not require shareholder approval such as, for example, a restructuring transaction or a divestiture where the proceeds are distributed to shareholders by way of dividend or a spinoff of a major corporate division. It is also unclear how the definition distinguishes between a legitimate alternative transaction and a transaction that may be viewed as depriving shareholders of the ability to adequately respond to a take-over bid or a competing bid. In our view, the purpose of the definition should cover all transactions that target shareholders can effectively evaluate and compare the payment offered with the outstanding unsolicited bid. Where this transaction requires a shareholder vote that will occur at a later date, such as a business combination for example, the timing of that proposed transaction should not be prejudiced by the hostile bidder benefiting from a reduced minimum deposit period and target shareholders should have the opportunity to consider both offers on the same timetable.

(ii) Drafting Suggestions

Section 2.28.3 of the Proposed Bid Amendments, as currently drafted, would not require the issuer to disclose in its press release that a transaction entered into while a take-over bid is outstanding – for example, a private placement or the sale of a business unit – is not an alternative transaction. Although the companion policy provides some guidance on this issue, there is still some uncertainty regarding the types of transactions announced by an issuer that may reasonably be interpreted to be an "alternative transaction". In the event the CSA decides to adopt the "alternative transaction" definition as proposed (subject to our comments above), we recommend that the CSA consider the revisions suggested in the following paragraphs to clarify the meaning of the definition.

We note that paragraphs (a) and (b) of the definition of "alternative transaction" is substantially similar to the definition of a "business combination" currently found in Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions* ("MI 61-101") and the "going private transaction" definition found in the corporate statutes. The intended meaning is further reinforced by the proposed guidance provided in s. 2.13 of the companion policy to the Proposed Bid Amendments, which adopts similar language found in s. 2.9 of the companion policy to MI 61-101, and provides that the term "acquire the issuer" is not intended to merely capture the acquisition of a control position, but refers to the acquisition of the entire issuer or its business. This is what normally occurs in a business combination, and we do not believe that the words used in paragraphs (a) and (b) of the definition of "alternative transaction" would be misunderstood in that context. We would suggest, however, making minor wording revisions to paragraph (b) as follows: "a transaction as a result of which a person, whether alone or with joint actors, would, directly or indirectly, acquire the issuer or the business of the issuer," [our underline].

Paragraph (c) of the definition of "alternative transaction" refers to "a sale, lease or exchange of all or *substantially all the property* of the issuer other than in the ordinary course of business of the issuer" [our emphasis]. The term "substantially all" is not defined or commonly used in securities law, although it has been considered extensively in the context of corporate transactions. The CSA Notice states that this definition is intended to capture sales, leases or exchanges of property that requires shareholder approval by special resolution in accordance with the corporate statutes. The courts have analyzed whether a transfer of property involves "substantially all" in a variety of contexts involving taxation legislation and determining shareholder dissent rights under the corporate statutes. The approach taken by courts in determining when a transaction involves "substantially all" of a corporation's property, however, is far from clear. Rather, courts approach the question using both a quantitative and a qualitative assessment of the effects of the proposed transaction.[5] This analysis is highly contextual in each case.

The quantitative approach compares the proportion or relative value of the transferred property to the total property of the transferor. No single qualitative measure predominates in the cases. In establishing relative values of the assets disposed of compared to the total assets, courts have looked at book value, market value[6] as well as the contribution to revenue and profit.[7] The appropriate measure will be determined in light of the nature of the assets. Expert valuation evidence is typically required. The qualitative analysis will consider the relationship between the property in question and the nature of the corporation's business as a whole to determine whether, on an overall basis, the transfer of assets will have the effect of fundamentally changing the core nature of its business activity, strikes at the heart of the corporation's existence or primary corporate purpose,[8] fundamentally changes or destroys the corporation's business or

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5 See, for example, *Canadian Broadcasting Corp. Pension Plan v. BF Realty Holdings Ltd.*, [2002] O.J. No. 2125 (C.A.) ("*BF Realty Holdings*") and *Amaranth LLC v. Counsel Corp.* (2007), 84 O.R. (3d) 361 (S.C.J.) ("*Amaranth*").

6 See for example, *Re Vanalta Resources Ltd.* ,[1976] BCJ No 47 (BCSC) ("*Re Venalta Resources*"), *85956 Holdings Ltd. v. Fayerman Brothers Ltd.*, [1986] 2 WWR 754 (Sask CA) ("*85956 Holdings*"), *Martin v. FP Bourgault Industries Air Seeder Division Ltd.* (1987), 38 BLR 90 (Sask CA) ("*Martin*"), *Lindzon v. International Sterling Holdings Ltd.* (1989), 45 BLR 57 (BCSC), *BF Realty Holdings, supra.*

7 *Re Olympia and York Enterprises Ltd. and Hiram Walker Resources* (1989), 59 OR (2d) 254 (HC), aff'd 59 OR (2d) 281 (Div Ct) ("*Re Olympia and York*"), *GATX Corp v. Hawker Siddely Canada Inc.* (1996), 27 BLR (2d) 251 (Ont Gen Div) ("*GATX Corp*"), *Cogeco Cable Inc. v. CFCF Inc.* (1996), 136 DLR (4th) 243 (Que CA) ("*Cogeco Cable*").

8 See for example, *Re Vanalta Resources, supra, Re Olympia and York, supra, Re Electrohome Ltd.* [1988] OJ NO 1477 (Gen Div), *Cogeco Cable, supra.*

undertaking,[9] or divests the corporation of key sources of revenue putting the future viability of the corporation in question.[10]

While courts have given some guidance regarding the relationship between these two tests (for example, the suggestion that any transaction involving 75% or more of the value of a corporation's property is presumptively a "substantially all" sale),[11] the case law remains sufficiently unsettled. We would therefore suggest the CSA provide further guidance in the Companion Policy, to clarify that paragraph (c) is intended to refer to a transfer of property that is integral to the issuer's core business activity and purpose, and thus represents a fundamental change to the issuer's existence. This additional guidance would further support the current guidance provided in s. 2.13 of the Companion Policy in relation to paragraph (b) of the definition.

3. Partial Take-Over Bid Regime

The Proposed Bid Amendments introduce a number of changes to the requirements governing partial take-over bids, the most notable being that Partial Bids are also subject to the Minimum Tender Requirement. We support the delayed pro-ration calculation and suspension of the take-up requirements after the mandatory 10-day extension requirement and the removal of withdrawal rights for shareholders that have tendered at the expiry of the initial deposit period. These amendments fulfill the objective of the take-over bid regime to provide identical treatment and equal opportunity and ensure that shareholders who have made a tender decision during the mandatory 10-day extension period will always have their shares taken up on the same pro-rata basis as those shareholders who tendered before the expiry of the initial deposit period.

We note that the Minimum Tender Requirement and 10 Day Extension Requirement do not fully address the structural coercion concern in the context of Partial Bids. Unlike a take-over bid for all of the issued and outstanding securities where the decision to tender is comparable to a vote in favour of the bid, the same is not true for Partial Bids. Partial Bids create unique problems in terms of the degree of control sought by the bidder and the fate of minority shareholders in the target company following the Partial Bid. More specifically, shareholders faced with a Partial Bid may have different incentives to tender into a Partial Bid. On one hand, target shareholders may tender because they approve of the consideration given under the bid and approve of the bidder who will become the controlling shareholder at the end of the Partial Bid. On the other hand, target shareholders may be forced to tender to take advantage of the premium out of fear that their remaining shares may be less liquid and decline in value following the Partial Bid. In this context, shareholders act individually in respect to Partial Bids and, as such, the Proposed Bid Amendments do not fully resolve the coercion and "pressure to tender" concerns. These issues could be addressed, however, if the bid circular included a form of acceptance (i.e. a bid ballot) that shareholders of the target would record whether they vote for or against the Partial

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9 See for example, *85956 Holdings, supra, Martin., supra,* and *Amaranth, supra.*

10 See for example, *GATX Corp, supra* and *Cogeco Cable, supra.*

11 See for example, *Cogeco Cable, supra.*

Bid (i.e., allow the Partial Bid to proceed or to stop it from proceeding). This decision would be separate from the shareholders' decision whether or not to tender their shares to the Partial Bid. This framework has been used in other countries, including the U.K. and New Zealand, as explained below.

In the U.K., change of control transactions are governed by the City Code on Takeovers and Mergers[12] (the "UK Code"), which is administered by the Panel on Take-overs and Mergers (the "Takeover Panel"). Partial Bids are generally viewed unfavourably in the U.K. and the prior consent of the Takeover Panel is required for all Partial Bids. Consent is usually given if the bidder is seeking to acquire less than 30% of the target's issued and outstanding voting securities. In situations where the bidder is seeking to obtain 30% or more of the target's issued and outstanding voting securities, the offer must be conditional on obtaining the specified number of shares and approval of the offer by a majority of shareholders who are independent of the bidder and persons acting in concert with the bidder.[13] This approval process is separate from tendering the securities. Shareholders approve or reject the bid by marking a check box on a bid ballot or form of acceptance.

Likewise, in New Zealand, change of control transactions are regulated under the Takeovers Code[14] adopted under the *Takeovers Act 1993* (the "NZ Code"). The allowance of Partial Bids under the NZ Code is more liberal than under the UK Code. Partial Bids are permitted provided the offer is extended to all shareholders of the target. The offer is accompanied with a separate voting document that provides for shareholders to approve or object to the offer.[15] A Partial Bid is conditional on approval being obtained and the bidder will succeed if it receives enough acceptances to get to the percentage that was specified in the offer, and if a majority of shareholders voted in favour of the offer.

Some commenters have argued that the Minimum Tender Requirement for Partial Bids will result in fewer Partial Bids. It is difficult to draw precise conclusions on this view given the small number of Partial Bids made. Based on our internal review of unsolicited take-over bids of Canadian reporting issuers during the past 10 years, we note that there have been eleven Partial Bids made and only three were ultimately successful. To avoid coercion as intended in the Proposed Bid Amendments, it is best to leave the decision to accept a take-over bid to be made by a majority of shareholders. This objective for Partial Bids would be achieved if shareholder approval is expressed through a separate majority vote and not only based on the individual tender decision of each shareholder.

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12 Panel on Takeovers and Mergers, *The City Code on Takeovers and Mergers* (United Kingdom) (11th ed, 20 May 2013), online: http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/code.pdf.

13 *Ibid* at Rule 36.5.

14 *Takeovers Code* (New Zealand) (1 July 2001) Takeovers Code Approval Order 2000, online: http://www.legislation.govt.nz/regulation/public/2000/0210/latest/DLM10106.html?search=ts_all%40act%40bill%40regulation_Takeovers+Code+Approval+Order_resel&p=1.

15 *Ibid*, Rule 10.

4. Duty to Prepare and Send Directors' Circular

The Proposed Bid Amendments do not change the timing requirements for directors of the target company to prepare and send a directors' circular to shareholders. In this respect, the directors' circular must be sent no later than 15 days after the commencement of the take-over bid, and must state the board's recommendation and reasons to either accept or reject the bid or explain why the board is unable to make a recommendation. The board may also state that it is considering the bid and advise shareholders to refrain from tendering their shares until they receive further information from the board, in which case the deadline for the board's recommendation is 7 days before the scheduled expiry of the initial deposit period.

The CSA has asked whether the current time limits remain a sufficient period to enable directors to properly evaluate an unsolicited take-over bid and formulate a meaningful recommendation to its shareholders. In considering this question, we note that any changes to the timing requirements set out in the take-over bid regime must have regard to the primary objective of the take-over bid regime to protect the *bona fide* interests of the shareholders of the target company.[16] An efficient take-over bid regime requires that shareholders be provided with sufficient information and advice to enable them to make a fully informed decision as to whether to accept or reject a take-over bid. To fulfil this objective, information such as the target board's evaluation of the terms of the take-over bid must be provided to shareholders in due course after the target board has had a reasonable opportunity to review the bidder's circular. This is particularly important because many target shareholders choose to sell their shares in the open market during the days after a take-over bid is announced. During this initial period, target shareholders are making an investment decision whether to sell in the open market or wait until they receive a recommendation from the target board to tender or hold their shares. This recommendation is needed in a timely manner after the bid is announced and, in our experience, most targets strive to get this information out as quickly as possible regardless of the time prescribed in the statute.

In determining the appropriate period of time for the target board to provide its response to shareholders, we have reviewed the regulatory regimes in other comparable common law jurisdictions, such as the U.K., Australia and South Africa. Our review suggests that the 15 day time period for a target to provide its response is consistent with the regulatory regimes of the jurisdictions reviewed. However, as further explained below, the jurisdictions we reviewed distinguish between the date on which the bidder has made a firm intention to pursue the offer and the date on which it sends its offer circular to shareholders. In each of these cases, the time period for the target board to send its response begins after the offer is sent to the target's shareholders. Despite these differences, we find no compelling reasons in support of varying the current requirement to send a directors' circular no later than 15 days after the bid. To put this differently, the fact that the target board has more time to deal with the bid does not affect the timing to get the initial response out to shareholders.

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[16] NP 62-202, s. 1.1(2).

The UK Code sets out six General Principles in which the Rules are to be applied and interpreted by the Takeover Panel. General Principle 2, which sets out the information requirements for shareholders, provides that shareholders "must have sufficient time and information to enable them to reach a properly informed decision on the bid". Once the bidder has stated to the target its intention to make an offer to the board of the target company, it is required to post its offer document within 28 days of the announcement. The UK Code provides that the board of the target company must send a circular to shareholders within 14 days of the publication of the offer document.[17] The circular must set out the opinion of the board on the offer (including any alternative offers) and the board's reasons for forming its opinion, including its strategic plans for the target company and its employees.[18]

Take-over bids in Australia are regulated under Chapter 6 of the *Corporations Act 2001*. Off-market bids involving written offers to all shareholders are the primary method of acquiring control of a listed company in Australia.[19] An off-market bid will begin when a bidder's statement is lodged to the Australian Securities & Investments Commission and sent to the target company. The bidder's statement must then be sent to target shareholders within 14 and 28 days after the date it is sent to the target, although the target may agree to a shorter period. Directors of the target company are required to respond to the off-market bid by sending a target's statement to all shareholders within 15 days after the target receives a notice that the bidder's statement and offers have been sent to shareholders.[20] The target's statement must include all the information that shareholders of the target would reasonably require to make an informed assessment whether to accept the offer under the bid.[21]

Take-over bids in South Africa are regulated under Chapter 5 of the *Companies Act, No. 71 of 2008*, with the prescribed timeline requirements set out in the regulations. The timeline begins when the bidder publishes a firm intention announcement. The bidder's offer circular must be posted within 20 business days after the date of publication of a firm intention announcement.[22] The independent directors of the target must prepare and send the target's response circular

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17 UK Code, *supra* note 6, Rule 25.1.

18 *Ibid*, Rule 25.2.

19 We only make reference to "off-market bids", as defined in the *Corporations Act 2001*, in this letter because "on-market bids", where the bidder makes an announcement that it will stand in the market for a specified period to purchase all shares at a stated price through the stock exchange, are relatively rare because they must be made for cash and unconditional.

20 A detailed table setting the steps that a bidder must take to make an effective off-market bid and the steps that a target must take when an off-market bid is made is set out in section 633 of the *Corporations Act 2001*.

21 *Corporations Act 2011*, s. 638(1).

22 *Companies Regulations, 2011*, s. 102(2).

setting out the independent directors' views on the offer and offer consideration within 20 business days after the bidder's offer circular has been posted.[23]

5. Anticipated Changes to Market Activity

(a) Defensive tactics

NP 62-202 first came into force in 1986 and the securities regulators' application of the public interest jurisdiction in respect of defensive tactics has evolved considerably since then. We would recommend that the CSA undertake a broader review of NP 62-202 to determine whether any amendments should be considered in light of the Proposed Bid Amendments. This review should consider the approach taken by the securities regulators in respect of defensive tactics generally with a view to achieving a consistent framework. While the Proposed Bid Amendments do not indicate that Rights Plans will be prohibited, we anticipate that tactical Rights Plans adopted in the face of a bid will be ceased traded. However, additional guidance on the relevance of Rights Plans that have been approved by a majority of independent shareholders to protect against "creeping bids" – i.e. bids made through the normal course purchase and private agreement exemptions – would be appropriate.

We also recommend that this review address defensive tactics more broadly, particularly in view of differing decisions from the securities regulatory authorities. As stated in section 1 above, we believe the 120 Day Requirement will motivate target boards to pursue a broader range of strategic alternatives. Although shareholder approval will be required for a number of alternative transactions proposed, some of them may be perceived by bidders as frustrating an open take-over bid process. Many of these defensive tactics are subject to varying determinations and differences in approaches from the securities regulatory authorities.[24] We believe that these alternative transactions may come under scrutiny and, as suggested by the Alberta Securities Commission in ARC Equity, a holistic policy review of the purpose of such transactions would be welcomed.[25]

(b) Collective action from shareholders on voting matters

Shareholders are increasingly assertive in a number of governance matters by launching or publicly supporting proposals for change, including a dissident proxy campaign to replace directors. In light of this rise in shareholder activism, reporting issuers are increasingly adopting modified Rights Plans that are triggered not only by the acquisition of shares but also by any "agreements, commitments or understandings" from shareholders to vote their shares together.

[23] *Ibid*, s. 102(9).

[24] For example, we note that the securities regulatory authorities have applied NP 62-202 inconsistently in respect of private placements in the following decisions: *Re ARC Equity Management (Fund 4) Ltd*, [2009] ABASC 390 ("*ARC Equity*"), *Re Fibrek inc.*, [2012] QCBDR 17 and *Re Petaquilla Minerals Ltd.* [2012] BCSECCOM 442.

[25] *ARC Equity*, *supra*, at paras. 116 to 118.

These "voting pills" differ from a typical Rights Plan because they can be activated when two or more shareholders intend on using their collective voting power to seek control of the target board target through a proxy contest, instead of making a formal take-over bid. The CSA have previously indicated that they do not view "voting pills" favorably and that a Rights Plan can only be effective against take-over bids or acquisitions of securities.[26] Despite this view, our review indicates that nine reporting issuers have adopted Rights Plans with a "voting pill" feature since March 2013 and the securities regulators may be asked to opine on them during a hearing.

We would recommend that the CSA further consider this issue as part of its review of defensive tactics generally or as a separate initiative. We note that the UK and Australia have each undertaken a policy review of circumstances where collective action among shareholders is considered appropriate, as opposed to being viewed as "acting jointly or in concert".[27] In each case, the regulators have discussed the relevant legal considerations and provided guidance in distinguishing between cooperative action between shareholders and circumstances where shareholders are jointly seeking board control. Further guidance on this topic would be appropriate in light of the CSA's commitment to review the proxy voting infrastructure and its continued engagement in proxy voting matters.

Thank you for this opportunity to comment on the Proposed Bid Amendments. If you would like to discuss this comment letter in further detail, please contact any of us.

Yours very truly,

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26 CSA Proposal, *supra* note 2.

27 See, for example, UK Takeover Panel, Practice Statement No. 26 *Shareholder Activism* (9 September 2009), Australian Securities & Investments Commission, Consultation Paper 228 – *Update to Regulatory Guide 128 Collective action by institutional investors* (February 2015) and European Securities and Markets Authority, *Information on shareholder cooperation and acting in concert under the Takeover Bids Directive – 1st update* (ESMA/2014/677) (20 June 2014).