CSA/ACVM Canadian Securities Administrators Autorités canadiennes en valeurs mobilières

CSA Notice and Request for Comment
Proposed Amendments to Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids*
Proposed Changes to National Policy 62-203 *Take-Over Bids and Issuer Bids*
and
Proposed Consequential Amendments

March 31, 2015

INTRODUCTION

The Canadian Securities Administrators (the **CSA** or **we**) are publishing, for a 90 day comment period, proposed amendments to Multilateral Instrument 62-104 *Take-Over Bids and Issuer* Bids (**MI 62-104**) and changes to National Policy 62-203 *Take-Over Bids and Issuer Bids* (**NP 62-203**) (collectively, the **Proposed Bid Amendments**).

Currently, MI 62-104 governs take-over bids and issuer bids in all jurisdictions of Canada, except Ontario. In Ontario, substantively harmonized requirements for take-over bids and issuer bids are set out in Part XX of the *Securities Act* (Ontario) (the **Ontario Act**) and Ontario Securities Commission Rule 62-504 *Take-Over Bids and Issuer Bids* (the **Ontario Rule**). NP 62-203 applies in all jurisdictions of Canada. In this Notice, MI 62-104, the Ontario Act, the Ontario Rule and NP 62-203 are collectively referred to as the **take-over bid regime** or **bid regime**.

The Ontario Securities Commission intends to seek legislative amendments to the Ontario Act to accommodate the adoption of MI 62-104 in Ontario, as amended by the Proposed Bid Amendments and the Proposed Market Price Amendment (as described below) (such amended instrument, **Proposed NI 62-104**). The proposed repeal of the Ontario Rule and the related consequential amendments necessary to facilitate the adoption of Proposed NI 62-104 in Ontario (the **Proposed Harmonization**) are set out in Annex M to the version of this Notice published in Ontario.

As a result of the Proposed Bid Amendments and the Proposed Harmonization, we are proposing to make related consequential amendments to each of the following, in the applicable jurisdictions in which such instruments and/or policies have been adopted (collectively, the **Consequential Amendments**):

- Multilateral Instrument 11-102 *Passport System* (**MI 11-102**);
- Multilateral Instrument 13-102 *System Fees for SEDAR and NRD* (**MI 13-102**);
- National Instrument 43-101 *Standards of Disclosure for Mineral Projects* (**NI 43-101**);

- Multilateral Instrument 51-105 *Issuers Quoted in the U.S. Over-the-Counter Markets* (**MI 51-105**);

- Companion Policy 55-104CP *Insider Reporting Requirements and Exemptions* (**55-104CP**);

- Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions* (**MI 61-101**);

- Companion Policy 61-101CP to MI 61-101 (**61-101CP**); and

- National Instrument 62-103 *The Early Warning System and Related Take-Over Bid and Insider Reporting Issues* (**NI 62-103**).

Additionally, we are proposing a technical amendment to the meaning of "market price" in MI 62-104 (the **Proposed Market Price Amendment**) as it relates to securities acquired pursuant to an issuer bid that is made in the normal course on a published market other than a designated exchange in reliance on the normal course issuer bid exemption set out in paragraph 4.8(3)(c) of MI 62-104.

The texts of the Proposed Bid Amendments, Proposed Market Price Amendment and Consequential Amendments are set out in Annexes B to L of this Notice and will also be available on the 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

SUBSTANCE AND PURPOSE OF THE PROPOSED BID AMENDMENTS

1. Overview of the Proposed Bid Amendments

In general, we intend the Proposed Bid Amendments to enhance the quality and integrity of the take-over bid regime and rebalance the current dynamics among offerors, offeree issuer boards of directors (**offeree boards**), and offeree issuer security holders by (i) facilitating the ability of offeree issuer security holders to make voluntary, informed and co-ordinated tender decisions, and (ii) providing the offeree board with additional time and discretion when responding to a take-over bid.

Specifically, the Proposed Bid Amendments require that all non-exempt take-over bids

(1) receive tenders of more than 50% of the outstanding securities of the class that are subject to the bid, excluding securities beneficially owned, or over which control or direction is exercised, by the offeror or by any person acting jointly or in concert with the offeror (the **Minimum Tender Requirement**);

(2) be extended by the offeror for an additional 10 days after the Minimum Tender Requirement has been achieved and all other terms and conditions of the bid have been complied with or waived (the **10 Day Extension Requirement**); and

(3) remain open for a minimum deposit period of 120 days unless

(a) the offeree board states in a news release a shorter deposit period for the bid of not less than 35 days that is acceptable to the offeree board, in which case all contemporaneous take-over bids must remain open for at least the stated shorter deposit period, or

(b) the issuer issues a news release that it has agreed to enter into, or determined to effect, a specified alternative transaction, in which case all contemporaneous take-over bids must remain open for a deposit period of at least 35 days

(the **120 Day Requirement**).

We are also proposing amendments to other aspects of the take-over bid regime relating to these key amendments.

2. Objectives of the Proposed Bid Amendments

(1) Minimum Tender Requirement

The Minimum Tender Requirement establishes a mandatory majority acceptance standard for all take-over bids, whether a bid is made for all or only a portion of the outstanding securities. The purpose of the majority standard is to address the current possibility that control of, or a controlling interest in, an offeree issuer can be acquired through a take-over bid without a majority of the independent security holders of the offeree issuer supporting the transaction if the offeror elects, at any time, to waive its minimum tender condition (if any) and end its bid by taking up a smaller number of securities.

The Minimum Tender Requirement allows for collective action by security holders in response to a take-over bid in a manner that is comparable to a vote on the bid. Collective action for security holders in response to a take-over bid is difficult under the current bid regime, where an unsolicited offeror's ability to reduce or waive its minimum tender condition may impel security holders to tender out of concern that they will miss their opportunity to tender and be left holding securities of a controlled company. Coupled with the 10 Day Extension Requirement, the Minimum Tender Requirement is intended to mitigate this "pressure to tender".

(2) 10 Day Extension Requirement

The 10 Day Extension Requirement is intended to provide offeree issuer security holders who have not tendered their securities to a take-over bid with an opportunity to participate in the bid after a majority of independent security holders have tendered to the bid and it is known that the bid will succeed.

Currently, offerors are not required to extend their bids after they have taken up offeree issuer securities and there is no formal mechanism for offeree issuer security holders to coordinate their actions in the bid context. As a result, offeree issuer security holders make tender decisions without knowing what other security holders will do and with the awareness that the offeror can always elect to waive its minimum tender condition (if any) and end its bid by taking up a smaller number of securities, thereby altering the future control of the offeree issuer. This situation creates "pressure to tender" or coercion concerns since security holders may tender to the take-over bid or sell in the market not because they support the bid but because they are afraid of being "left behind" if the offeror obtains sufficient tenders from other security holders.

The 10 Day Extension Requirement addresses the "pressure to tender" concern by protecting the security holder's ability to tender whether or not it supports the bid in the first instance. As well, by mitigating coercive dynamics in the tender process, the 10 Day Extension Requirement enhances the quality and integrity of the collective majority security holder decision on whether or not to approve the bid.

(3) 120 Day Requirement

The 120 Day Requirement is intended to provide offeree boards with a longer, fixed period of time to consider and respond to a take-over bid. The current take-over bid regime mandates a minimum 35 day deposit period. Where a board has adopted a security holder rights plan (a **Rights Plan**) to prevent a bid from being completed after 35 days, securities regulators have typically cease-traded the Rights Plan approximately 45-60 days after the commencement of the bid.

The 120 Day Requirement responds to the concern, as expressed by some commenters on the CSA Proposal and AMF Proposal (each as defined below), that offeree boards do not have enough time to respond to unsolicited take-over bids with appropriate action, such as seeking value-maximizing alternatives or developing and articulating their views on the merits of the bid.

We are, however, proposing two important exceptions as part of the 120 Day Requirement.

The first exception we are proposing is if an offeree board issues a news release in respect of a proposed or commenced take-over bid stating a deposit period for the bid of not less than 35 days that is acceptable to the offeree board. In this circumstance, the bid regime would provide that the minimum deposit period for the subject bid must be at least the number of days from the date of the bid as stated in the news release, instead of 120 days from the date of the bid. The purpose of this exception is to accommodate a shorter deposit period in cases where a longer bid period is not necessary for the offeree board to respond to the bid.

However, in order to prevent discriminatory and unequal treatment of competing bids under the bid regime, if an offeree board issues a news release stating an acceptable shorter deposit period for one bid, then all other outstanding or subsequent take-over bids, including any unsolicited bids, would also become subject to the stated shorter minimum deposit period rather than the minimum 120 day deposit period. In any event, no bid could be open for less than 35 days.

The second exception we are proposing is if an issuer issues a news release announcing that it has agreed to enter into, or determined to effect, an "alternative transaction" (being, generally, a plan of arrangement or similar change of control transaction to be approved by security holders of the issuer). In such case, the minimum deposit period for any then-outstanding take-over bid or subsequent take-over bid commenced before the completion of the alternative transaction must be at least 35 days, rather than 120 days, from the date of the bid. The purpose of this exception is to avoid unequal treatment of offerors when a board-supported change of control transaction is proposed to be effected through an "alternative transaction" rather than by way of a "friendly" take-over bid. As well, since the purpose of the 120 day minimum deposit period is to provide offeree boards with a longer period of time to respond to an unsolicited bid, there is no need for the 120 day minimum deposit period to apply where the offeree issuer has determined that an alternative transaction is appropriate.

Where an offeror reduces the initial deposit period in connection with a deposit period news release or an alternative transaction, the bid would have to remain open for at least 10 days after the date of any notice of variation concerning the reduction of the deposit period.

The 120 Day Requirement does not apply to issuer bids; the minimum deposit period for issuer bids remains 35 days.

BACKGROUND

Prior proposals

On March 14, 2013, the CSA published for comment proposed National Instrument 62-105 *Security Holder Rights Plans* and proposed Companion Policy 62-105CP *Security Holder Rights Plans* (together, the **CSA Proposal**). The Autorité des marchés financiers (the **AMF**), while participating in the publication for comment of the CSA Proposal, concurrently published a consultation paper entitled *An Alternative Approach to Securities Regulators' Intervention in Defensive Tactics* (the **AMF Proposal**).

The CSA Proposal and the AMF Proposal sought to address, in different ways, concerns raised with respect to the CSA's current approach to reviewing defensive tactics adopted by offeree boards in response to, or in anticipation of, unsolicited or "hostile" take-over bids.

CSA Proposal

The purpose of the CSA Proposal was to create a framework for the regulation of Rights Plans adopted by offeree boards in response to, or in anticipation of, unsolicited bids. The CSA Proposal would have allowed an offeree board to maintain a Rights Plan in the face of an

unsolicited bid if a majority of the equity or voting securities of the offeree issuer (excluding the securities of the unsolicited offeror and its joint actors) were voted in favour of the Rights Plan, either in the face of the unsolicited bid or at the offeree issuer's previous annual meeting.

AMF Proposal

While the CSA Proposal addressed the use of Rights Plans by offeree boards, the AMF Proposal raised more fundamental issues regarding the regulation of defensive tactics in Canada, including the role of offeree boards when faced with unsolicited take-over bids. The AMF Proposal, as described, sought to remedy the structural imbalance between offerors and offeree boards and update the policy framework of the take-over bid regime to reflect the current legal and economic environment and market practices regarding unsolicited take-over bids.

The AMF Proposal put forward two changes to address concerns with the existing regulatory approach to defensive tactics. First, it suggested replacing National Policy 62-202 *Take-Over Bids - Defensive Tactics* (**NP 62-202**) with a new policy that would recognize the fiduciary duty of the offeree board to the offeree issuer when responding to an unsolicited bid. The new policy would have limited the intervention of securities regulators to circumstances where security holders were deprived of the opportunity to consider a *bona fide* offer because the offeree board failed to adequately manage its conflicts of interest, and to circumstances that demonstrated an abuse of security holders' rights or that negatively impacted the efficiency of the capital markets.

Second, the AMF Proposal proposed to amend the take-over bid regime to require a minimum tender condition of more than 50% of all outstanding offeree issuer securities owned or held by persons other than the offeror and its joint actors, along with a mandatory 10 day extension of the bid following an announcement that the minimum tender condition had been met to give the remaining security holders the opportunity to tender to the bid.

Public comments on proposals

The comment periods for the CSA Proposal and the AMF Proposal ended on July 12, 2013. We received 72 comment letters from various market participants, including issuers, institutional investors, industry associations and law firms that reflected a broad diversity of opinions on the two proposals. Many commenters provided helpful substantive submissions, information and alternative considerations. We wish to thank all of the commenters for their contributions.

General summaries of comments received in respect of the CSA Proposal and AMF Proposal are set out, respectively, at Annex A.1 and Annex A.2 of this Notice.

Proposed Bid Amendments

On September 11, 2014, we published CSA Notice 62-306 *Update on Proposed National Instrument 62-105 Security Holder Rights Plans and AMF Consultation Paper An Alternative Approach to Securities Regulators' Intervention in Defensive Tactics* (the **Update Notice**).

As indicated in the Update Notice, in light of the comments received on the CSA Proposal and AMF Proposal, and following further reflection and analysis, the CSA decided to propose specific amendments to the bid regime as an alternative harmonized policy approach for the regulation of take-over bids. At this time, the CSA are not contemplating any changes to the current take-over bid exemptions or NP 62-202.

SUMMARY AND EXPLANATION OF THE PROPOSED BID AMENDMENTS

The Proposed Bid Amendments introduce important new requirements for take-over bids and alter the procedural framework for the conduct of take-over bids. The following is an explanation of the current bid regime and Proposed Bid Amendments as they relate to these topics:

1. Deposit Periods
2. Minimum Tender Requirement
3. 120 Day Requirement
4. Variations to a Bid
5. Changes in Information for a Bid
6. Take Up and Payment
7. Withdrawal Rights

In preparing the Proposed Bid Amendments, we have endeavored to preserve the existing structure of Part 2 of MI 62-104, which includes combined provisions for both issuer bids and take-over bids, to the greatest extent possible.

Unless otherwise specified, all references to sections in this part are to sections of MI 62-104 and the Proposed Bid Amendments.

1. Deposit Periods

(a) Current Bid Regime

Currently, the take-over bid regime mandates a deposit period of at least 35 days from the date of the bid and requires an extension of the deposit period in circumstances where there is a variation in the terms of the bid, subject to limited exceptions. Outside of these parameters, an offeror can elect to extend its bid as it deems necessary or desirable as long as it complies with the take up and payment provisions of the bid regime for any extension that occurs after all of the terms and conditions of the bid have been complied with or waived.

(b) Proposed Bid Amendments

As a consequence of the Proposed Bid Amendments, there will be three distinct deposit periods for a take-over bid: (i) an initial deposit period; (ii) a mandatory 10 day extension period if certain conditions are met; and (iii) any further deposit period(s) where the offeror voluntarily extends its bid after the expiry of the mandatory 10 day extension period.

(i) Initial deposit period

The initial deposit period is the period during which securities may be deposited under a take-over bid excluding the mandatory 10 day extension period or any extension period thereafter. This initial deposit period includes any extension by the offeror that may be necessary to permit satisfaction of the Minimum Tender Requirement or any other condition of the bid prior to the mandatory 10 day extension period. At a minimum, the initial deposit period must satisfy the 120 Day Requirement. The Proposed Bid Amendments provide that an offeror cannot take up securities deposited under its bid until the 120 Day Requirement is satisfied, all terms and conditions of the bid have been complied with or waived, and the Minimum Tender Requirement is satisfied. If a bid does not meet these three requirements at the expiry date of the bid fixed by the offeror, then the offeror would not be permitted to take up securities deposited under the bid and would have to determine whether it wishes to either (further) extend the initial deposit period or abandon its bid.

(ii) Mandatory 10 day extension period

The 10 Day Extension Requirement applies to a take-over bid if, at the expiry of the initial deposit period, the 120 Day Requirement is satisfied, all terms and conditions of the bid have been complied with or waived, and the Minimum Tender Requirement is satisfied. Once these requirements are met, an offeror must immediately take up all securities tendered to the bid (subject to a limited exception for partial take-over bids). The Proposed Bid Amendments require that the offeror issue and file a news release, with specified information, concurrent with the commencement of the mandatory 10 day extension period.

The 10 Day Extension Requirement is a standard feature of "permitted bid" Rights Plans[1] and a significant number of commenters supported the 10 Day Extension Requirement (as set out in the AMF Proposal).

(iii) Subsequent extension period and restrictions on extension

The Proposed Bid Amendments allow a take-over bid that is not a partial take-over bid to be further extended after the expiry of the mandatory 10 day extension period.

Under the Proposed Bid Amendments, a partial take-over bid must not be extended after the expiry of the mandatory 10 day extension period. As a partial take-over bid is for a fixed number of securities and a pro-ration requirement applies, the offeror will have effectively achieved its desired minimum number of tenders before the commencement of the mandatory 10 day extension period and the number of securities ultimately taken up by the offeror will not increase as a result of tenders during the mandatory 10 day extension period. Also, under the Proposed Bid Amendments, in order to accommodate the required 10 day extension, an offeror making a partial take-over bid is permitted to defer take up and payment in respect of a portion of the tendered securities until the end of the mandatory 10 day extension period when the pro-ration

[1] In general, a "permitted bid" Rights Plan includes conditions that allow a take-over bid to be made to offeree issuer security holders without triggering the Rights Plan if: (i) the offeror keeps the take-over bid open for a minimum period of time (usually 60 days); (ii) the offeror is not entitled to acquire securities under the take-over bid unless a majority of securities owned by persons other than the offeror are tendered; and (iii) the offeror is obligated to extend the bid for an additional 10 days following the offeror's initial take up under the take-over bid.

factor can be properly calculated. Any further extension to a partial take-over bid after the expiry of the mandatory 10 day extension period would be unnecessary.

2. Minimum Tender Requirement

(a) Current Bid Regime

The current take-over bid regime does not impose a Minimum Tender Requirement for a take-over bid. An offeror may elect to make its bid conditional upon the receipt of a specified percentage of deposited securities; however any such condition can be waived at the discretion of the offeror. An offeree issuer may, independent of any take-over bid regime requirement, adopt a "permitted bid" Rights Plan that would require that a "permitted bid" have a minimum 50% tender condition.

(b) Proposed Bid Amendments

The Minimum Tender Requirement applies to all take-over bids and an offeror is prohibited from taking up any securities deposited under its bid unless, among other things, the Minimum Tender Requirement is satisfied.

The proposed Minimum Tender Requirement prohibits an offeror from taking up securities under a bid unless the bid receives tenders of more than 50% of the outstanding securities of the class that are subject to the bid, excluding securities beneficially owned, or over which control or direction is exercised, by the offeror or by any person acting jointly or in concert with the offeror.

The following examples show how this requirement would apply in different scenarios. References to the "offeror" in the table below include the offeror and any joint actors.

Type of Take-Over Bid	**Percentage of Issued and Outstanding Offeree Issuer Securities Owned by Offeror (as at Date of the Bid)**	**Tenders Required under the Minimum Tender Requirement**
Take-over bid for all issued and outstanding offeree issuer securities (e.g. 1,000,000 securities)	0%	50% + 1 of all issued and outstanding offeree issuer securities (or 500,001 securities)
Take-over bid for all issued and outstanding offeree issuer securities (e.g. 1,000,000 securities)	40% (or 400,000 securities)	50% + 1 of the remaining 60% of issued and outstanding offeree issuer securities not owned by the offeror (or 300,001 securities)

Partial take-over bid for 25% of all issued and outstanding offeree issuer securities (e.g. 250,000 of outstanding 1,000,000 securities)	0%	50% + 1 of all issued and outstanding offeree issuer securities (or 500,001 securities) Offeror will take up the desired 25% issued and outstanding offeree issuer securities *pro rata* from all tendered securities (or 250,000 securities)
Partial take-over bid for 25% of all issued and outstanding offeree issuer securities (e.g. 250,000 of outstanding 1,000,000 securities)	10% (or 100,000 securities)	50% + 1 of the remaining 90% of issued and outstanding offeree issuer securities not owned by the offeror (or 450,001 securities) Offeror will take up the desired 25% issued and outstanding offeree issuer securities not owned by the offeror *pro rata* from all tendered securities (or 250,000 securities)

The Minimum Tender Requirement does not preclude an offeror from establishing a higher minimum tender condition for its bid or waiving such higher minimum tender condition. However, an offeror is prohibited from taking up securities deposited under the bid until the Minimum Tender Requirement and 120 Day Requirement have been satisfied and all terms and conditions of the bid have been complied with or waived.

The Minimum Tender Requirement was put forward in the AMF Proposal and supported by many commenters. The effect of the Minimum Tender Requirement is comparable to the majority security holder approval requirement for Rights Plans that was proposed under the CSA Proposal. We also note that a Minimum Tender Requirement is a standard feature of a "permitted bid" under the terms of a "permitted bid" Rights Plan.

3. 120 Day Requirement

(a) Current Bid Regime

Under the current bid regime, an offeror must allow securities to be deposited under its bid for at least 35 days from the date of the bid (s. 2.28) and an offeror must not take up securities deposited under a bid until the expiration of that period (s. 2.29). An offeror complies with these requirements by having its bid expire not earlier than 35 days following the date of the bid.

The current bid regime's minimum 35 day deposit period provides all offeree issuer security holders with that period of time in which to receive disclosure regarding, assess the merits of, and ultimately decide whether to tender to, a take-over bid. As long as an offeree issuer security holder deposits its securities within this 35 day period and all conditions to the bid are complied with or waived, then the offeror is obligated to acquire all of the security holder's deposited securities (subject to pro-ration in the case of a partial take-over bid) (s. 2.32).

(b) Proposed Bid Amendments

Under the Proposed Bid Amendments, take-over bids will have a minimum 120 day deposit period (s. 2.28.1), subject to the exceptions described below.

We note that several commenters in connection with their consideration of the CSA Proposal, AMF Proposal, or both, supported a longer minimum deposit period of 90 or 120 days.

(i) Shortened minimum deposit period – deposit period news release

Under the Proposed Bid Amendments, the offeree board has an option to initiate a reduction of the minimum deposit period from a minimum of 120 days to a minimum of 35 days. This may be desirable for an offeree board because otherwise, for example, a board-supported change of control transaction structured as a take-over bid would be less expeditious than an alternative structure such as a plan of arrangement effected under corporate law if a firm 120 day minimum deposit period applied.

Under the Proposed Bid Amendments, the minimum deposit period of a take-over bid can be shortened if an offeree issuer issues a deposit period news release in respect of the bid that states an initial deposit period of not more than 120 and not less than 35 days that is acceptable to the offeree board (s. 2.28.2(1)). The stated shorter deposit period in the news release would be expressed as a number of days from the date of the bid (e.g. 35 days, 60 days, 90 days, etc.) rather than with reference to an actual date (e.g. July 1, 2015). A deposit period news release is a news release in respect of a proposed or commenced take-over bid. Any purported deposit period news release in respect of a possible future bid would not have the effect of shortening the minimum deposit period for any take-over bid. We have proposed changes to NP 62-203 to provide guidance on deposit period news releases (sections 2.11 and 2.12).

The Proposed Bid Amendments expressly provide that, despite the application of a shorter deposit period for a bid as a result of the issuance of a deposit period news release, an offeror must not allow securities to be deposited under its bid for an initial deposit period of less than 35 days from the date of the bid (s. 2.28.2(3)). We think this limitation is appropriate because a period of 35 days provides all offeree issuer security holders with an equal and sufficient period of time in which to obtain disclosure regarding, assess the merits of, and ultimately decide whether to tender to, a take-over bid.

Where a deposit period news release is issued in respect of a bid, the offeror can avail itself of the shortened minimum deposit period permitted under the regime by reflecting the earlier expiry date in its bid documents (if the bid is announced at the same time as or after the deposit period news release is issued) or by way of a notice of variation (if the bid was commenced prior to the

issuance of the deposit period news release) (s. 2.12(1)). We have proposed changes to NP 62-203 to provide guidance on shortened deposit periods, including in the additional circumstances described below (section 2.10).

(ii) Shortened minimum deposit period – application to other bids

While the Proposed Bid Amendments are intended to provide more time for offeree boards to respond to an unsolicited take-over bid and accommodate the expeditious completion of a "friendly" bid, they are not intended to result in discriminatory treatment among competing offerors. As such, the Proposed Bid Amendments provide that if an offeree board issues a deposit period news release stating an acceptable shorter deposit period for one bid, then all other outstanding or subsequent take-over bids, including any unsolicited bids, would also be entitled to avail themselves of the stated shorter minimum deposit period rather than the minimum 120 day deposit period (s. 2.28.2(2)). The rationale for this mechanism is similar to the rationale that underlies the "waive for one, waive for all" provision present in the majority of "permitted bid" Rights Plans.

A competing offeror with an outstanding bid at the time the deposit period news release is issued in respect of another bid must vary its bid if it intends to avail itself of the shorter deposit period (s. 2.12(1)). An offeror that commences a take-over bid subsequent to the issuance of a deposit period news release in respect of another bid could adopt the stated shorter minimum deposit period, provided that the bid was commenced prior to the expiry of the bid that was the subject of the deposit period news release or any other take-over bid that had been commenced at the time the deposit period news release was issued (s. 2.28.2(2)(b)). The purpose of this limitation on the application of a shortened deposit period for future take-over bids is to make clear that the shortened deposit period applies only to contemporaneous bids.

The following examples demonstrate how the minimum deposit period provisions would apply in different scenarios.

Issuance of Deposit Period News Release	**Bid Scenario / Shorter Deposit Period**	**Result**
Deposit period news release issued in respect of proposed Bid A	Deposit period news release states a minimum deposit period of 35 days in respect of Bid A	Bid A subject to minimum deposit period of 35 days from the date of the bid
Deposit period news release issued in respect of previously commenced Bid A	Deposit period news release states a minimum deposit period of 35 days in respect of Bid A Bid B also commenced prior to issuance of deposit	Bid A and Bid B both subject to minimum deposit period of 35 days from the date of each respective bid Offerors A and B may vary bids to expire at least 35

	period news release in respect of Bid A	days from date of their respective bid (provided that the bid must not expire before 10 days from the date of variation)
Deposit period news release issued in respect of previously commenced Bid A	Deposit period news release states a minimum deposit period of 35 days in respect of Bid A Bid C commenced subsequent to issuance of deposit period news release in respect of Bid A, but before expiry of Bid A	Bid A and Bid C both subject to minimum deposit period of 35 days from the date of each respective bid Offeror A may vary its bid to expire at least 35 days from date of its bid (provided that the bid must not expire before 10 days from the date of variation) Bid C subject to minimum deposit period of 35 days from the date of its bid

(iii) Shortened minimum deposit period – alternative transaction

In addition to deposit period provisions that afford equal treatment of competing offerors, we believe that an offeror should not be disadvantaged vis-à-vis another potential acquiror solely on the basis of the structure of the change of control transaction (e.g. take-over bid as opposed to a plan of arrangement). Accordingly, the Proposed Bid Amendments provide that, if an issuer issues a news release announcing that it has agreed to enter into, or determined to effect, an "alternative transaction", then the minimum deposit period for any then-outstanding take-over bid or subsequent take-over bid (commenced before the completion or the abandonment of the alternative transaction or expiry of any other outstanding take-over bid) must be at least 35 days, rather than 120 days, from the date of the bid (s. 2.28.3). We do not think that an offeree board that has already agreed to an alternative transaction needs the additional time between 35 to 120 days to consider and respond to a competing take-over bid. The effect of maintaining the 120 day deposit period would be to unduly prejudice existing offerors or those contemplating a bid after the alternative transaction is announced.

We propose a concept of "alternative transaction" principally based on the definition of "business combination" currently found in MI 61-101. The definition of "alternative transaction" has been drafted with a view to capturing other types of change of control transactions that could be agreed to or initiated by the issuer. As well, we propose that the definition encompass, based upon language found in business corporation legislation, a sale, lease or exchange of property by an issuer that requires approval by way of a special resolution. We have proposed changes to NP 62-203 to provide guidance on alternative transactions (sections 2.13 and 2.14).

The following examples demonstrate how the minimum deposit period provisions would apply in different scenarios involving an "alternative transaction".

Timing of Announcement of Alternative Transaction	**Result**
Announcement of alternative transaction in respect of offeree issuer subsequent to commencement of Bid A	Bid A subject to minimum deposit period of 35 days from the date of its bid Offeror A may vary bid to expire at least 35 days from date of its bid (provided that the bid must not expire before 10 days from the date of variation)
Announcement of alternative transaction in respect of offeree issuer prior to commencement of Bid B Bid B commenced before completion or abandonment of alternative transaction	Bid B subject to minimum deposit period of 35 days from the date of its bid

(iv) Scope and duration of shortened minimum deposit period

The 120 Day Requirement is, effectively, restored for any new bids commenced after all of the bids to which sections 2.28.2 and 2.28.3 apply have expired and any applicable alternative transaction has been completed or abandoned.

4. Variations to a Bid

(a) Current Bid Regime

Currently, if an offeror varies its take-over bid it must issue and file a news release and send a notice of variation to all security holders subject to the bid whose securities were not taken up before the date of variation (s. 2.12(1)). If there is a variation, the period during which securities may be deposited under the bid must not expire before 10 days after the date of the notice of variation (s. 2.12(3)). An exception to these requirements exists for a variation consisting solely of a waiver of a condition in the bid where the consideration offered for the securities consists solely of cash (s. 2.12(4)).

The current bid regime also prohibits variations to a bid after expiry of the period during which securities can be deposited under a bid, except for a waiver of a condition that is specifically stated in the bid as being waivable at the sole option of the offeror (s. 2.12(5)).

(b) Proposed Bid Amendments

We are proposing two changes to the variation provisions in the bid regime as a result of the Proposed Bid Amendments.

(i) Reduction or extension of deposit period is a variation to the bid

First, we are adding language confirming that any reduction to the period during which securities may be deposited to a bid pursuant to section s. 2.28.2 or section 2.28.3 constitutes a variation requiring the offeror to issue and file a news release and send a notice of variation (s. 2.12(1)). This would apply where an offeror shortens its initial deposit period following the issuance of a deposit period news release or as a result of the offeree issuer announcing an "alternative transaction". If an offeror varies its bid to shorten the deposit period, subsection 2.12(3) requires that the bid must not expire before 10 days after the date of the offeror's corresponding notice of variation, which means that the period during which securities may be deposited under the bid may have to be extended.

We note that currently subsection 2.12(1) expressly states that a variation to a bid includes an extension of the period during which securities may be deposited to the bid. As a result, that provision would apply to the mandatory 10 day extension period required under paragraph 2.31.1(a), or any other permissible extension, such that the offeror would be required to issue and file a news release and send a notice of variation in connection with any such extension.

(ii) Prohibition on Certain Variations after Bid Pre-Conditions Achieved

The second change we are proposing to the variation provisions of the bid regime is an express restriction on variations in the terms of a take-over bid after the offeror becomes obligated to take up securities (s. 2.12(6)). Under the Proposed Bid Amendments, an offeror must immediately take up securities deposited under its bid if, at the expiry of the initial deposit period, the 120 Day Requirement and Minimum Tender Requirement are satisfied and all terms and conditions of the bid have been complied with or waived (s. 2.32.1(1)).

The purpose of the general restriction on variations after these requirements are satisfied is to preclude possible prejudice to security holders whose deposited securities were taken up prior to the variation. We are, however, proposing exceptions to this restriction for (i) a variation to extend the time during which securities may be deposited under the bid to not later than 10 days after the notice of variation, or (ii) a variation to increase the consideration offered for securities subject to the bid.

5. Changes in Information for a Bid

(a) Current Bid Regime

The bid regime sets out requirements where there is a change in the information contained in a bid circular, a notice of change or a notice of variation that would reasonably be expected to affect the decision of the security holders of the offeree issuer to accept or reject the bid (s. 2.11).

In that circumstance, an offeror must promptly issue and file a news release and send a notice of change to every security holder to whom the bid was required to be sent and whose securities were not taken up before the date of the change. The purpose of this requirement is to ensure that security holders who have yet to deposit securities to the bid, or those whose deposited securities have not yet been taken up, can consider whether the new information impacts their tender decision. As well, a security holder is entitled to withdraw securities deposited to a bid during the 10 day period after the date of a notice of change provided that the securities were not already taken up by the offeror before the date of the notice of change (s. 2.30).

(b) Proposed Bid Amendments

We are proposing to introduce a new provision concerning changes in information whereby, if an offeror is required to send a notice of change prior to the expiry of the initial deposit period, the initial deposit period must not expire before 10 days after the date of the notice of change, which means that the initial deposit period may have to be extended (s. 2.11(5)). The purpose of this restriction is to ensure that all withdrawal rights associated with a notice of change have lapsed before an offeror can take up deposited securities at the expiry of the initial deposit period (assuming that, otherwise, the 120 Day Requirement has been satisfied, all terms and conditions of the bid have been complied with or waived, and the Minimum Tender Requirement has been satisfied). We have also proposed changes to NP 62-203 to provide further guidance on changes in information (section 2.15 in Annex D).

We believe this extension requirement is appropriate because it ensures that the Minimum Tender Requirement is achieved in circumstances where offeree issuer security holders have had adequate time to consider the information in a notice of change. We also think that security holders who have an opportunity to deposit securities to a bid during the mandatory 10 day extension period, after a bid has already succeeded in meeting the Minimum Tender Requirement and all other conditions to the bid, should make their tender decisions with assurance that the bid cannot fail as a result of withdrawal rights being exercised and the Minimum Tender Requirement no longer being met.

6. Take Up and Payment

(a) Current Bid Regime

The purpose of the take up and payment provisions of the bid regime is to provide an equitable framework for the timely take up and payment of securities deposited to a bid.

The current bid regime provides that if all terms and conditions of a take-over bid have been complied with or waived, the offeror must take up and pay for securities deposited under the bid not later than 10 days after the expiry of the bid (or possibly earlier in certain cases) (s. 2.32(1)). The offeror cannot take up deposited securities until the expiration of 35 days from the date of the bid. An offeror is specifically required to pay for any securities taken up as soon as possible, and in any event, not later than 3 business days after take up (s. 2.32(2)). An offeror is further obligated to take up and pay for securities deposited subsequent to the date on which it first took up securities deposited under the bid no later than 10 days after the deposit of those securities

(s. 2.32(3)). In addition, an offeror is prohibited from extending its take-over bid if all the terms and conditions have been complied with or waived, unless the offeror first takes up all securities deposited under the bid and not withdrawn (s. 2.32(4)).

The current take-over bid regime includes exceptions to the take up and payment provisions for partial take-over bids. Section 2.26 provides that, if a greater number of securities are deposited to a partial take-over bid than the offeror is bound or willing to acquire under the bid, the offeror must take up and pay for the securities proportionately according to the number of securities deposited by each security holder. This *pro rata* requirement is intended to ensure that all depositing security holders to a partial take-over bid are treated equally, rather than permitting an offeror to take up its desired number of offeree issuer securities on a first-come-first-served basis or arbitrarily from the pool of deposited securities. To permit *pro rata* treatment of security holders, an offeror is only required to take up, by the specified times, the maximum number of securities that the offeror can take up without contravening the *pro rata* requirement at the expiry of the bid (s. 2.32(5)).

(b) Proposed Bid Amendments

(i) Prohibition on take up of deposited securities until conditions satisfied

Under the Proposed Bid Amendments (s. 2.29.1), an offeror is prohibited from taking up securities deposited under its bid unless

(a) 120 days, or the number of days determined in accordance with section 2.28.2 or section 2.28.3, have elapsed from the date of the bid,

(b) all terms and conditions of the bid have been complied with or waived, and

(c) more than 50% of the outstanding securities of the class that are subject to the bid, excluding securities beneficially owned, or over which control or direction is exercised, by the offeror or by any person acting jointly or in concert with the offeror, have been deposited under the bid and not withdrawn.

(ii) Obligation to take up and pay for deposited securities

We propose that if at the expiry of the initial deposit period, (i) the 120 Day Requirement is satisfied, (ii) all terms and conditions of the bid have been complied with or waived, and (iii) the Minimum Tender Requirement is satisfied, the offeror must immediately take up securities deposited under the bid (s. 2.32.1(1)). As discussed below, an exception to this general obligation is available for partial take-over bids.

(iii) General take up and payment provisions

As is the case under the current bid regime, the Proposed Bid Amendments require that an offeror must pay for securities taken up as soon as possible, and in any event, not later than 3 business days after the securities deposited under the bid are taken up (s. 2.32.1(2)).

Securities deposited to a take-over bid (other than a partial take-over bid) during the mandatory 10 day extension period or a subsequent extension period must be taken up and paid for by the offeror no later than 10 days after the deposit of securities (s. 2.32.1(3)). For a take-over bid that is not a partial take-over bid, an offeror is also prohibited from extending its bid at any time after the expiry of the mandatory 10 day extension period unless it has first taken up all securities deposited to the bid (s. 2.32.1(4)).

(iv) Partial Take-Over Bids

As is the case under the current bid regime, an offeror that has made a partial take-over bid is required to take up securities tendered on a *pro rata* basis where a greater number of securities are deposited under the bid than the offeror is bound or willing to acquire. The Proposed Bid Amendments exempt an offeror making a partial take-over bid from the general obligation to immediately take up all deposited securities if, at the expiry of the initial deposit period, the specified bid conditions in section 2.32.1(1) are satisfied; instead, the offeror is only required to take up at that time the maximum number of securities that it can without contravening the *pro rata* requirement (s. 2.32.1(6)). The Proposed Bid Amendments further provide that an offeror making a partial take-over bid must take up any securities deposited during the initial deposit period and not already taken up by it in reliance on subsection s. 2.32.1(6), and securities deposited during the mandatory 10 day extension period, on a *pro rata* basis and not later than one day after the expiry of the mandatory 10 day extension period (s. 2.32.1(7)). Partial take-over bids cannot be extended beyond the expiry of the mandatory 10 day extension period.

7. Withdrawal Rights

(a) Current Bid Regime

The take-over bid regime provides that a security holder can withdraw securities deposited by it under a take-over bid (a) at any time before those securities have been taken up by the offeror, (b) at any time before the expiration of 10 days from the date of a notice of change or a notice of variation (subject to exceptions), or (c) if the securities have not been paid for by the offeror within 3 business days after the securities were taken up (s. 2.30(1)).

(b) Proposed Bid Amendments

(i) Suspension of withdrawal rights for partial take-over bids

The Proposed Bid Amendments include new restrictions on the availability of withdrawal rights in respect of partial take-over bids.

Securities deposited under a partial take-over bid must be taken up on a *pro rata* basis by the offeror. Under the Proposed Bid Amendments, an offeror would not be able to determine the exact number of securities that it could take up *pro rata* from each depositing security holder at the expiry of the initial deposit period because it may receive additional deposits of securities during the mandatory 10 day extension period. An offeror making a partial take-over bid is

obliged to determine the portion of securities deposited under the bid at the expiry of the initial deposit period that it is required to take up without contravening the *pro rata* requirement (ss. 2.32.1(1) and (6)). However, an offeror making a partial take-over bid will have to defer take up of at least some number of deposited securities until the end of the mandatory 10 day extension period when the pro-ration factor can be finally determined. As a consequence, a number of securities deposited to a successful partial take-over bid that has met the Minimum Tender Requirement and all other conditions to the bid under subsection 2.32.1(1) would remain subject to rights of withdrawal for lack of take up and/or in respect of a notice of change issued after the expiry of the initial deposit period but before the deposited securities are taken up upon expiry of the mandatory 10 day extension period. We do not think this outcome would be consistent with the framework of the Proposed Bid Amendments which impose a mandatory extension period for a partial take-over bid when an offeror would otherwise be in a position to take up securities and complete its offer.

We propose to suspend or remove a depositing security holder's withdrawal rights in respect of securities deposited under a partial take-over bid before the expiry of the initial deposit period but not taken up by the offeror at the expiry of the initial deposit period in reliance on the exception for pro-ration in subsection 2.32.1(6). The suspension of withdrawal rights for lack of take up of these securities and removal of withdrawal rights for these securities in respect of a notice of change or notice of variation after the expiry of the initial deposit period are set out in new provisions in subsections 2.30(1.1) and 2.30(2)(a.1). We believe these provisions are appropriate because the offeror's delay in taking up deposited securities is necessitated by its obligation to comply with the *pro rata* requirement and a depositing security holder is otherwise assured that, in any event, the partial take-over bid will be completed in a timely manner once the mandatory 10 day deposit period has expired. As noted in the "Changes in Information for a Bid" section above, we also think that security holders who have an opportunity to deposit securities to a bid during the mandatory 10 day extension period, after a bid has already succeeded in meeting the Minimum Tender Requirement and all other conditions to the bid, should make their tender decisions with assurance that the bid cannot fail as a result of withdrawal rights being exercised and the Minimum Tender Requirement no longer being met.

(ii) Removal of withdrawal rights in respect of certain variations

The bid regime provides that a security holder can withdraw securities deposited under a take-over bid at any time before the expiration of 10 days from the date of a notice of change or a notice of variation. This particular right of withdrawal is not available if (a) the securities have already been taken up by the offeror, or (b) the variation consists either solely of an increase in consideration offered for the securities and an extension of time for deposit of securities (to not later than 10 days after the date of the notice of variation), or a waiver of one or more of the conditions of the bid where the consideration offered for offeree issuer securities consists solely of cash (s. 2.30(2)).

We propose that the right of withdrawal in respect of a notice of variation not apply to a variation in the terms of a take-over bid *subsequent to the expiry of the initial deposit period* where the variation consists of *either* (i) an increase in the consideration offered for the securities subject to the bid, *or* (ii) an extension of the time for deposit to not later than 10 days from the date of the

notice of variation (s. 2.30(2)(b)(iii)). We believe that an increase of consideration or a limited extension of time for deposits after all conditions of the bid under subsection 2.32.1(1) have been satisfied (such as an extension to provide for the mandatory 10 day extension period) does not warrant the availability of a withdrawal right for security holders, particularly where the bid regime otherwise mandates timely take up and payment for deposited securities.

CONSEQUENTIAL AMENDMENTS

Unless otherwise noted below, the Consequential Amendments update section and instrument references to reflect the Proposed Harmonization.

We have proposed certain consequential changes to NP 62-103 to provide policy guidance in respect of the proposed amendments to MI 62-104.

The consequential amendments to NI 43-101 reflect the fact that, for the purposes of the technical report filing requirement in subparagraph 4.2(5)(a)(ii) of that Instrument in respect of disclosure contained in a directors' circular, the appropriate reference in that subparagraph is to the expiry of the initial deposit period, not the expiry of the bid.

The Ontario Securities Commission and the Autorité des marchés financiers are proposing to change section 4.1 of 61-101CP to clarify, for the avoidance of doubt, that it is their view that notwithstanding that Form 62-104F1 *Take-Over Bid Circular* of MI 62-104 is not specifically referenced in subsection 2.2(1)(d) of MI 61-101, the disclosure set out in such form is required for insider bids.

ANTICIPATED IMPACT OF PROPOSED BID AMENDMENTS

The following are some expected impacts of adopting the Proposed Bid Amendments.

1. Mitigation of coercive aspects of the current tender process

- We expect that the Minimum Tender Requirement and the 10 Day Extension Requirement will address the "pressure to tender" and coercion concerns associated with the existing tender process. We believe this would ensure the legitimacy of individual security holder tender decisions.

- The possibility that an offeror would waive its minimum tender condition may lead security holders that do not support the bid to tender to the bid or risk being left holding less liquid securities of the offeree issuer. The mandatory Minimum Tender Requirement would prevent this circumstance.

2. Collective majority security holder decision-making

- The Minimum Tender Requirement would ensure that an effort to gain control of a company, or a controlling interest in a company, would succeed only with the uncoerced

approval of a majority of independent security holders. Further, security holders would have additional time to assess bid information as a result of the 120 Day Requirement.

- One consequence of the Minimum Tender Requirement is that minority security holders who tender to a bid will not have their securities taken up where holders of a majority of the securities do not support the bid.

3. Increased leverage for offeree boards

- The 120 Day Requirement would provide offeree boards with more time to communicate their vision for the issuer and provide information about its value. The offeree board would also have more time to attract competing offers or seek value-maximizing strategic alternatives.

- The fact that the 120 day minimum deposit period can be shortened if an offeree board issues a news release stating an acceptable shorter deposit period may provide an incentive for offerors to negotiate with the offeree issuer.

4. Higher quality bids

- Offerors may put forward higher quality bids to win the support of a majority of independent security holders.

5. Fewer partial take-over bids

- The Proposed Bid Amendments could reduce the number of partial take-over bids because all partial take-over bids would have to satisfy the Minimum Tender Requirement to proceed.

ALTERNATIVES CONSIDERED

The CSA Proposal and the AMF Proposal, and comments thereon, were alternatives considered. The Proposed Bid Amendments are now the CSA's preferred regulatory approach for the regulation of take-over bids.

UNPUBLISHED MATERIALS

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

SUBSTANCE AND PURPOSE OF THE PROPOSED MARKET PRICE AMENDMENT

The normal course issuer bid exemption set out in paragraph 4.8(3)(c) of MI 62-104 (the **Other Published Markets Exemption**) requires that the value of the consideration paid by the issuer not be in excess of the "market price" at the date of acquisition, as determined in accordance

with section 1.11 of MI 62-104. As currently drafted, section 1.11 of MI 62-104 determines "market price" with reference to an average of the closing price, highest and lowest prices, closing bid and ask prices, as applicable, over a preceding 20 business day period. Accordingly, in order to rely on the Other Published Markets Exemption, an issuer would have to acquire securities on a published market other than a designated exchange (each, an **Other Published Market**) at a price representing the applicable average of prices of the securities for the prior 20 business days, and not the current trading price. Given that securities are acquired through the trading system of the applicable Other Published Market at the prevailing market price, it is not clear how this would be possible in practice.

Subsection 1.11(3) of MI 62-104, which applies to normal course purchases made during the currency of a take-over bid, provides an alternative meaning for market price, being the price of the last standard trading unit of securities of that class purchased by a person who was not acting jointly or in concert with the offeror. The application of a "market price" requirement in respect of the Other Published Markets Exemption was first introduced in February 2008. It was the intention that such requirement mirror the requirement for exempt normal course purchases during a take-over bid. Accordingly, the Proposed Market Price Amendment amends subsection 1.11(3) of MI 62-104 so that the alternative meaning of "market price" in that subsection also applies for the purposes of the Other Published Markets Exemption.

LOCAL MATTERS

Annex M to this Notice is being published in any local jurisdiction that is making related changes to local securities laws, including local notices or other policy instruments in that jurisdiction. It also includes any additional information that is relevant to that jurisdiction only.

REQUEST FOR COMMENTS

We welcome your comments on the Proposed Bid Amendments. In addition to any general comments you may have, we also invite comments on the following specific questions:

1. The Proposed Bid Amendments contemplate the reduction of the minimum deposit period for take-over bids in the event that the offeree board issues a deposit period news release. Do you anticipate any difficulties with the application of the Proposed Bid Amendments as they relate to a deposit period news release and the ability of an offeror to reduce the initial deposit period for its bid as a result of the issuance of a deposit period news release?

2. The Proposed Bid Amendments provide that the minimum deposit period for an outstanding or future take-over bid for an issuer must be at least 35 days if the issuer announces that it has agreed to enter into, or determined to effect, an "alternative transaction". The Proposed Bid Amendments include a definition of "alternative transaction" that is intended to encompass transactions generally involving the acquisition of an issuer or its business. Do you agree with the scope of the definition of "alternative transaction"? If not, please explain why you disagree with the scope and what changes to the definition you would propose.

3. Do you anticipate any difficulties with the application of the Proposed Bid Amendments as they relate to alternative transactions? Does the proposed policy guidance in sections 2.13 and 2.14 of NP 62-203 assist with interpretation of the alternative transaction provisions?

4. The Proposed Bid Amendments include a number of provisions that are specific to partial take-over bids. In particular, the Proposed Bid Amendments contemplate that an offeror making a partial take-over bid is only obligated to take up, at the expiry of the initial deposit period and assuming all pre-conditions to the bid are met, the maximum number of securities it can without contravening the *pro rata* take up requirement (s. 2.32.1(6)). Then, at the expiry of the mandatory 10 day extension period, the offeror must complete the *pro rata* take up obligation in respect of securities previously deposited (but not taken up) and securities deposited during the mandatory 10 day extension period (s. 2.32.1(7)). Would policy guidance concerning the interpretation or application of the Proposed Bid Amendments as they relate to partial take-over bids be useful? If so, please explain.

5. The Proposed Bid Amendments include revisions to the take up and payment and withdrawal right provisions in the take-over bid regime. Do you agree with these proposed changes or foresee any unintended consequences as a result of these changes? In particular, do you agree that there should not be withdrawal rights for securities deposited to a partial take-over bid prior to the expiry of the initial deposit period for so long as they are not taken up until the end of the mandatory 10 day extension period?

6. Are the current time limits set out in subsections 2.17(1) and (3) sufficient to enable directors to properly evaluate an unsolicited take-over bid and formulate a meaningful recommendation to security holders with respect to such bid?

7. Do you anticipate any changes to market activity or the trading of offeree issuer securities during the pendency of a take-over bid as a result of the Proposed Bid Amendments? If so, please explain.

How to provide your comments

Please provide your comments in writing by June 29, 2015. Please provide your comments in Microsoft Word format.

Please address your submissions to all members 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

Financial and Consumer Services Commission (New Brunswick)
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 jurisdictions.

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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 CSA jurisdictions requires publication of a summary of the written comments received during the comment period. Therefore, you should not include personal information directly in comments to be published.

Contents of Annexes

Annex A.1	Summary of Comments on CSA Proposal
Annex A.2	Summary of Comments on AMF Proposal
Annex B	Proposed Amendments to MI 62-104
Annex C	Blackline Extracts of MI 62-104 Showing Proposed Amendments
Annex D	Proposed Changes to NP 62-203
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Annex F	Proposed Amendments to MI 13-102

Annex G	Proposed Amendments to NI 43-101
Annex H	Proposed Amendments to MI 51-105
Annex I	Proposed Changes to 55-104CP
Annex J	Proposed Amendments to MI 61-101
Annex K	Proposed Changes to 61-101CP
Annex L	Proposed Amendments to NI 62-103
Annex M	Local Matters

Questions

Please refer your questions to any of the following:

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ANNEX A.1

SUMMARY OF COMMENTS ON CSA PROPOSAL

The following is a general summary of comments received on the CSA Proposal, including comments received that relate to aspects of the Proposed Bid Amendments. The summary does not review comments on specific or technical aspects of the CSA Proposal since the CSA has determined to proceed with the Proposed Bid Amendments as an alternative to that proposal.

The CSA Proposal put forward a framework for the regulation of security holder rights plans adopted by boards of directors of offeree issuers in response to unsolicited bids. Under the proposal, an offeree board could maintain a security holder rights plan if a majority of the equity or voting securities of the offeree issuer (excluding the securities of the offeror and its joint actors) were voted in favour of such plan, either in the face of the unsolicited bid or at the offeree issuer's previous annual meeting.

1. General Comments

We invited comments on whether the CSA Proposal was preferable to the status quo.

We received comments that both supported and disagreed with the proposal.

- Many commenters said that the CSA Proposal was preferable to the status quo. They noted that the current regime has led to inconsistent decisions and the timing of the termination of a security holder rights plan by securities regulators is uncertain.

- Other commenters indicated that the CSA Proposal was not preferable to the status quo as it would discourage bids or prevent bids from going to security holders for consideration, or lead to management entrenchment at the expense of security holders. Many of these commenters felt that shareholders, as owners of a corporation, were best placed to determine what is in their best interest and should be left with the decision to tender their securities to a take-over bid.

2. Appropriate Security Holder Approval Period

The CSA Proposal did not specifically include a proposal for a minimum bid period as contemplated by the Proposed Bid Amendments. However, the CSA Proposal allowed for an approval period of 90 days for security holder rights plans and invited comments on whether the 90-day period was appropriate.

We received the following comments on that proposal:

- Some commenters suggested that a 90-day period was not long enough. They recommended that the period provided to a board of directors to obtain shareholders' approval under the CSA Proposal be increased to 120 days. In their view, the 90-day period could be insufficient to complete the due diligence required in an auction process.

- Other commenters believed that 90 days was too long. These commenters indicated that the proposed 90-day period could result in additional delays and financing costs for offerors, which, in turn, could result in fewer unsolicited take-over bids.

- Several commenters believed that a period of 90 days would ordinarily provide sufficient time for a board of directors of an offeree issuer to seek alternatives to a hostile bid, to obtain the highest reasonably available price for its securities and to assess the offer. They were of the view that a 90-day period would not have a significant effect on the willingness of hostile offerors to make bids.

3. Board Discretion

We asked in the CSA Proposal whether the discretion given to a board of directors under the proposal was appropriate. Some of the views expressed included the following:

- Many commenters agreed that, as under the CSA Proposal, shareholders should have the ultimate decision over whether to maintain a security holder rights plan. They expressed concern that boards may use security holder rights plans, even temporarily, as an entrenchment mechanism.

- Many commenters felt that, in general, the discretion given to boards of directors under the CSA Proposal was appropriate and would afford offeree boards more time to exercise their fiduciary duties. However, a few commenters were concerned that, under the CSA Proposal, a board of directors could maintain a "just say no" security holder rights plan between annual general meetings unless the shareholders requisitioned a special meeting to terminate the rights plan.

- Several commenters stated that the CSA Proposal unduly restricted the board of directors' discretion and did not adequately empower boards of directors. In their view, allowing shareholders to ratify the board of directors' decision to adopt a security holder rights plan by way of shareholder vote did not constitute a sufficiently "hands-off" approach.

4. Structure of Take-over Bids in Canada

We invited comments on whether the CSA Proposal would have any negative impact on the structure of take-over bids in Canada.

Most commenters agreed that the CSA Proposal would not unduly discourage or impose serious impediments to the making of unsolicited bids. They added that, in their view, the CSA Proposal would result in more negotiated bids.

Many commenters indicated that the CSA Proposal would likely lead to more proxy contests, which they anticipated would be time- and resource-consuming for the offeror and the offeree issuer.

Many commenters stated general concerns about the quality of votes obtained under the proxy system in Canada. Consequently, they believed that voting results might not accurately reflect shareholders' views.

5. Role of Securities Regulators

We also invited comments on whether the CSA Proposal would reduce the need for securities regulators to review security holder rights plans through public interest hearings.

Some commenters agreed that the number of hearings might decrease but, in their view, the involvement of securities regulators would continue, albeit in other circumstances.

Some commenters believed that the CSA Proposal would address current concerns relating to arbitrary and inconsistent results from regulatory intervention, while others noted that it was unclear as to what circumstances might engage the public interest jurisdiction of securities regulators under the CSA Proposal.

ANNEX A.2

SUMMARY OF COMMENTS ON AMF PROPOSAL

The following is a general summary of comments received on the AMF Proposal, including comments received that relate to aspects of the Proposed Bid Amendments. The summary does not review comments on specific or technical aspects of the AMF Proposal since the CSA has determined to proceed with the Proposed Bid Amendments as an alternative to the proposal.

1. Minimum Tender Requirement and Mandatory Extension Requirement

The AMF Proposal included a proposed amendment to the take-over bid regime to require that all take-over bids receive tenders from more than 50% of all outstanding securities of the offeree issuer owned or held by persons other than the offeror (the minimum tender requirement). The AMF Proposal also proposed a mandatory 10-day extension of the bid following an announcement that the minimum tender requirement had been met.

Along with this proposal, the AMF invited comments on whether the proposed changes would (i) allow offeree security holders to make a voluntary, undistorted collective decision to sell, and (ii) promote the efficiency of capital markets.

The AMF received a number of comments on the proposed amendments in the AMF Proposal. The following is a general summary of the views expressed by commenters:

- Commenters were generally supportive of adopting these provisions.

- Many commenters were of the view that these provisions would provide security holders with the opportunity to make more informed decisions and would allow offeree security holders to make voluntary, undistorted collective decisions to sell. In their view, this would address the collective action concerns associated with our take-over bid regime and ensure fair treatment of security holders.

- Some commenters indicated that the proposed changes would alleviate the pressure on certain security holders to tender into the bid or to sell their shares in the secondary market for fear of being left in the minority. They also suggested that the proposed changes were akin to security holder approval and increased the legitimacy of the bid process. More specifically, they noted that the minimum tender requirement would act like a referendum among security holders and the 10-day extension of the bid would allow undecided shareholders to tender.

- Some commenters submitted that it is important to level the playing field for all security holders, as only larger companies tend to adopt the "permitted bid" security holder rights plan. The proposed changes reflect elements of the "permitted bid" concept under most security holder rights plans.

- Similar to the bid regime amendments in the AMF Proposal, some commenters suggested that securities regulators mandate that all security holder rights plans contain the terms of

the "permitted bid" security holder rights plan, including that a waiver of a security holder rights plan with respect to one bid results in a waiver for all bids.

- Many issuers felt that there are currently regulatory imbalances that unduly favour offerors and that the bid regime amendments included in the AMF Proposal would enhance the efficiency of capital markets by reducing coercion and the pressure to which security holders are subjected.

- Some commenters expressed concern that offeree boards of directors have no real ability to protect offeree issuers from structurally coercive bids and, in particular, from bids that substantially undervalue the offeree issuer. These commenters noted that boards do not have the ability to maintain a security holder rights plan indefinitely in the face of a bid.

- A few commenters argued that the suggestion that the current take-over bid regime is too "offeror friendly" is not supported by empirical evidence. In their view, the current regime appropriately provides security holders with an unrestricted ability to accept a premium bid.

2. Board Discretion

In addition to proposing the minimum tender requirement and the 10-day mandatory extension requirement, the AMF Proposal also contemplated policy changes that would recognize the fiduciary duty of the board of directors of the offeree issuer when responding to an unsolicited bid.

The AMF invited comments on whether giving appropriate deference to directors in the exercise of their fiduciary duty would negatively impact the ability of offeree issuer security holders to tender their securities to an unsolicited take-over bid.

Several commenters were of the view that directors should have a greater ability to fulfill their fiduciary duty in response to a take-over bid.

They voiced the following views:

- The CSA should recognize that boards are constrained by their fiduciary duties and by existing shareholder rights, including rights to submit proposals and to appoint new directors, adding that a proposal that gives priority to shareholders undermines board authority under corporate law.

- The CSA should allow boards of directors the discretion to act in what they determine to be the best interest of the corporation, including the ability to "say no" to a hostile take-over bid.

- Directors can legitimately conclude that an unsolicited offer is not in the corporation's best interests and that alternatives better aligned with the corporation's best interests exist.

Some commenters favoured the shareholder-focused status quo. They found the AMF Proposal unacceptable for the following reasons:

- It would give directors broad discretion to adopt defensive tactics that could prevent security holders from tendering into bids.

- The AMF Proposal could tilt the balance of power too far in favour of the offeree issuer's directors, making hostile take-over bids very difficult to carry out without replacing the offeree board.

Some commenters indicated that security holders generally had the appropriate tools to discipline boards under corporate law. They commented that the right of shareholders to elect and to remove directors, along with their right to sue for breach of fiduciary duty or seek relief under the oppression remedy, provides a powerful check on directorial authority.

However, other commenters did not agree that security holders have the appropriate tools to discipline directors. They took the view that the tools available to security holders had largely been ineffective, as demonstrated by the difficulty pursuing a claim in courts and the fact that the exercise of the shareholders' voting rights to withhold votes does not generally lead to the removal of the director. In their view, it is difficult for minority shareholder voices to be heard given that the shareholder base of many Canadian companies is quite concentrated.

3. Role of securities regulators

Law firms and issuers generally indicated that courts would be an appropriate forum to address disputes regarding defensive tactics, as it is the case in the U.S.

Institutional investors generally expressed concerns with a decreased role for securities regulators, particularly under the AMF Proposal. They commented that securities regulators have a specific mandate, not shared by the courts, to protect the interests of investors; they did not wish to see that mandate or involvement weakened.

ANNEX B

PROPOSED AMENDMENTS TO
MULTILATERAL INSTRUMENT 62-104 *TAKE-OVER BIDS AND ISSUER BIDS*

1. Multilateral Instrument 62-104 Take-Over Bids and Issuer Bids is amended by this Instrument.

2. The title of the Instrument is replaced with "National Instrument 62-104 *Take-Over Bids and Issuer Bids****".***

3. Section 1.1 is amended

(a) by adding the following definition:

"alternative transaction" means, for an issuer:

(a) an amalgamation, arrangement, consolidation, amendment to the terms of a class of equity securities or any other transaction of the issuer, as a consequence of which the interest of a holder of an equity security of the issuer may be terminated without the holder's consent, regardless of whether the equity security is replaced with another security, but does not include

(i) a consolidation of securities that does not have the effect of terminating the interests of holders of equity securities of the issuer in those securities without their consent, through the elimination of post-consolidated fractional interests or otherwise, except to an extent that is nominal in the circumstances,

(ii) a termination of a holder's interest in a security, under the terms attached to the security, for the purpose of enforcing an ownership or voting constraint that is necessary to enable the issuer to comply with legislation, lawfully engage in a particular activity or have a specified level of Canadian ownership, or

(iii) a transaction between the issuer and a subsidiary of the issuer,

(b) a transaction as a result of which a person, whether alone or with joint actors, would, directly or indirectly, acquire the issuer, or

(c) 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; **,**

(b) by adding "or***" at the end of paragraph (c) of the definition of "***associate***", and***

(c) by adding the following definitions in alphabetical order:

"deposit period news release" means a news release issued by an offeree issuer in respect of a proposed or commenced take-over bid for the securities of the offeree issuer and stating an initial deposit period for the bid of not more than 120 days and not less than 35 days that is acceptable to the board of directors of the offeree issuer, expressed as a number of days from the date of the bid;

"initial deposit period" means the period, including any extension, during which securities may be deposited under a take-over bid but does not include a mandatory 10 day extension period or any extension period subsequent to a mandatory 10 day extension period;

"mandatory 10 day extension period" means the 10 day period referred to in paragraph 2.31.1(a);

"partial take-over bid" means a take-over bid for less than all of the class of securities subject to the bid; **.**

4. Subsection 1.11(3) is amended by adding "and subsection 4.8(3)***" after "***section 4.1***".***

5. Section 2.11 is amended by adding the following subsections:

(1.1) Despite paragraph (1)(b), an offeror is not required to send a notice of change to a security holder to whom paragraph 2.30(2)(a.1) applies.

(5) If an offeror is required to send a notice of change pursuant to subsection (1) prior to the expiry of the initial deposit period, the initial deposit period must not expire before 10 days after the date of the notice of change. **.**

6. Section 2.12 is amended

(a) in subsection (1) by adding "reduction of the period during which securities may be deposited under the bid pursuant to section 2.28.2 or section 2.28.3, or***" before "***extension***",***

(b) by adding the following subsections:

(1.1) Despite paragraph (1)(b), an offeror is not required to send a notice of variation to a security holder to whom paragraph 2.30(2)(a.1) applies.

(3.1) If an offeror is required to send a notice of variation pursuant to subsection (1) prior to the expiry of the initial deposit period, the initial deposit period must not expire before 10 days after the date of the notice of variation. **,**

(c) ***in subsection (4) by replacing "***and (3)***" with "***, (3) and (3.1)***", and adding "***, other than an extension in respect of the mandatory 10 day extension period,***" before "***resulting***",***

(d) ***in subsection (5) by deleting "***a take-over bid or***", and***

(e) ***by adding the following subsection:***

(6) A variation in the terms of a take-over bid, other than a variation to extend the time during which securities may be deposited under the bid or a variation to increase the consideration offered for the securities subject to the bid, must not be made after the offeror becomes obligated to take up securities deposited under the bid in accordance with section 2.32.1. **.**

7. ***Subsection 2.17(3) is amended by replacing "***period during which securities may be deposited under the bid***" with "***initial deposit period***".***

8. ***Section 2.26 is amended***

(a) ***in subsection (1) by deleting "***a take-over bid or***", and***

(b) ***by repealing subsection (4).***

9. ***The Instrument is amended by adding the following section:***

Proportionate take up and payment – partial take-over bids

2.26.1(1) If a greater number of securities is deposited under a partial take-over bid than the offeror is bound to acquire under the bid, the offeror must take up and pay for the securities proportionately, disregarding fractions, according to the number of securities deposited by each security holder.

(2) For the purposes of subsection (1), any securities acquired in a pre-bid transaction to which subsection 2.4(1) applies are deemed to have been deposited under the take-over bid by the person who was the seller in the pre-bid transaction. **.**

10. ***Section 2.28 is amended***

(a) ***by deleting "***a take-over bid or***", and***

(b) ***by adding "***a minimum deposit period of***" before "***at least***".***

11. ***The Instrument is amended by adding the following sections:***

Minimum deposit period – take-over bids

2.28.1 An offeror must allow securities to be deposited under a take-over bid for an initial deposit period of at least 120 days from the date of the bid.

Shortened deposit period – deposit period news release

2.28.2 (1) Despite section 2.28.1, if at or after the time an offeror announces a take-over bid, the offeree issuer issues a deposit period news release in respect of the offeror's take-over bid, the offeror must allow securities to be deposited under its take-over bid for an initial deposit period of at least the number of days from the date of the bid as stated in the deposit period news release.

(2) Despite section 2.28.1, an offeror, other than an offeror under subsection (1), must allow securities to be deposited under its take-over bid for an initial deposit period of at least the number of days from the date of the bid as stated in the deposit period news release if either of the following applies:

(a) the offeror, prior to the issuance of the deposit period news release referred to in subsection (1), has commenced a take-over bid in respect of the securities of the offeree issuer that has yet to expire;

(b) the offeror, subsequent to the issuance of the deposit period news release referred to in subsection (1), commences a take-over bid in respect of the securities of the offeree issuer and the bid is made prior to one of the following:

(i) the date of expiry of the take-over bid referred to in subsection (1),

(ii) the date of expiry of a take-over bid referred to in paragraph (a).

(3) For the purposes of subsections (1) and (2), an offeror must not allow securities to be deposited under its take-over bid for an initial deposit period of less than 35 days from the date of the bid.

Shortened deposit period – alternative transaction

2.28.3 Despite section 2.28.1, if an issuer issues a news release announcing that it has agreed to enter into, or determined to effect, an alternative transaction, an offeror must allow securities to be deposited under its take-over bid for an initial deposit period of at least 35 days from the date of the bid if either of the following applies:

(a) the offeror, prior to the issuance of the news release, has commenced a take-over bid in respect of the securities of the offeree issuer that has yet to expire;

(b) the offeror, subsequent to the issuance of the news release, commences a take-over bid in respect of the securities of the offeree issuer and the bid is made prior to one of the following:

(i) the date of completion or abandonment of the alternative transaction,

(ii) the date of expiry of a take-over referred to in paragraph (a). **.**

12. Section 2.29 is amended by deleting "a take-over bid or***".***

13. The Instrument is amended by adding the following section:

Prohibition on take up – take-over bids

2.29.1 An offeror must not take up securities deposited under a take-over bid unless all of the following conditions are satisfied:

(a) 120 days, or the number of days determined in accordance with section 2.28.2 or section 2.28.3, have elapsed from the date of the bid,

(b) all terms and conditions of the bid have been complied with or waived,

(c) more than 50% of the outstanding securities of the class that are subject to the bid, excluding securities beneficially owned, or over which control or direction is exercised, by the offeror or by any person acting jointly or in concert with the offeror, have been deposited under the bid and not withdrawn. **.**

14. Section 2.30 is amended

(a) by adding the following subsection:

(1.1) Despite paragraph (1)(a), if an offeror that has made a partial take-over bid becomes obligated to take up securities under subsection 2.32.1(1), a security holder may not withdraw securities that have been deposited under the bid before the expiry of the initial deposit period but not taken up by the offeror in reliance on subsection 2.32.1(6) during the period

(a) commencing at the time the offeror became obligated to take up securities under subsection 2.32.1(1), and

(b) ending at the time the offeror becomes obligated to take up securities not taken up by the offeror in reliance on subsection 2.32.1(6) under subsection 2.32.1(7) or (8), as applicable. **,**

(b) in subsection (2) by replacing "The right of withdrawal under paragraph (1)(b) does not apply***" with "***Despite paragraph (1)(b), a security holder may not withdraw securities that have been deposited under the take-over bid or issuer bid***",***

(c) by adding the following paragraph:

(a.1) in the case of a partial take-over bid, the securities were deposited under the bid before the expiry of the initial deposit period and were not taken up

by the offeror in reliance on subsection 2.32.1(6) and the date of the notice of change or notice of variation is after the date that the offeror became obligated to take up securities under subsection 2.32.1(1), or **,**

(d) ***in paragraph (2)(b) by replacing "***one or both***" with "***any***",***

(e) ***in subparagraph (2)(b)(i) by replacing "***the bid***" with "***a take-over bid or issuer bid***",***

(f) ***in subparagraph (2)(b)(ii) by replacing "***the bid***" with "***a take-over bid or issuer bid***", and by adding "***;***" at the end of the subparagraph, and***

(g) ***in paragraph (2)(b) by adding the following subparagraph:***

(iii) a variation in the terms of a take-over bid subsequent to the expiry of the initial deposit period consisting of either an increase in consideration offered for the securities subject to the bid or an extension of the time for deposit to not later than 10 days from the date of the notice of variation. **.**

15. ***Section 2.31 is amended***

(a) ***by adding "***not***" before "***be counted***",***

(b) ***by replacing "***a condition as to the minimum number of securities to be deposited under a take-over bid has been fulfilled, but***" with "***the minimum tender requirement in paragraph 2.29.1(c) is satisfied and***", and***

(c) ***by replacing "***the bid***" with "***the take-over bid***".***

16. ***The Instrument is amended by adding the following sections:***

Mandatory 10 day extension period – take-over bids

2.31.1 If, at the expiry of the initial deposit period, an offeror is obligated to take up securities deposited under a bid pursuant to subsection 2.32.1(1), the offeror must

(a) extend the period during which securities may be deposited under the bid for a period of 10 days, and

(b) promptly issue and file a news release disclosing the following

(i) that the minimum tender requirement specified in paragraph 2.29.1(c) has been satisfied,

(ii) the number of securities deposited and not withdrawn as at the expiry of the initial deposit period,

(iii) that the period during which securities may be deposited under the bid is extended for the mandatory 10 day extension period, and

(iv) in the case of a take-over bid that

(A) is not a partial take-over bid, that the offeror will immediately take up the deposited securities and pay for securities taken up as soon as possible and in any event not later than 3 business days after the securities are taken up, or

(B) is a partial take-over bid, that the offeror will take up and pay for the deposited securities proportionately in accordance with applicable securities legislation and in any event not later than one day after the expiry of the mandatory 10 day extension period.

Time limit on extension – partial take-over bids

2.31.2 A partial take-over bid must not be extended after the expiry of the mandatory 10 day extension period. **.**

17. Section 2.32 is amended by deleting "a take-over bid or***" wherever the expression occurs.***

18. The Instrument is amended by adding the following section:

Obligation to take up and pay for deposited securities – take-over bids

2.32.1(1) An offeror must immediately take up securities deposited under a take-over bid if, at the expiry of the initial deposit period,

(a) the deposit period referred to in section 2.28.1, section 2.28.2 or section 2.28.3, as applicable, has elapsed,

(b) all the terms and conditions of the take-over bid have been complied with or waived, and

(c) the requirement in paragraph 2.29.1(c) is satisfied.

(2) An offeror must pay for any securities taken up under a take-over bid as soon as possible, and in any event not later than 3 business days after the securities deposited under the bid are taken up.

(3) In the case of a take-over bid that is not a partial take-over bid, securities deposited under the bid during the mandatory 10 day extension period, or an extension period subsequent to the mandatory extension period, must be taken up and paid for by the offeror not later than 10 days after the deposit of securities.

(4) In the case of a take-over bid that is not a partial take-over bid, an offeror must not extend its bid at any time subsequent to the expiry of the mandatory 10 day extension

period unless the offeror first takes up all securities deposited under the bid and not withdrawn.

(5) Despite subsection (4), if the offeror extends the bid in circumstances where the rights of withdrawal conferred by paragraph 2.30(1)(b) are applicable, the bid must be extended without the offeror first taking up the securities which are subject to the rights of withdrawal.

(6) Despite subsection (1), an offeror that has made a partial take-over bid is only required to take up, by the time specified in that subsection, the maximum number of securities that the offeror can take up without contravening section 2.23 or section 2.26.1 at the expiry of the bid.

(7) In the case of a partial take-over bid, securities deposited before the expiry of the initial deposit period but not taken up by the offeror in reliance on subsection (6), and securities deposited during the mandatory 10 day extension period, must be taken up by the offeror, in the manner required under section 2.26.1, not later than one day after the expiry of the mandatory 10 day extension period.

(8) Despite subsection (7), if at the expiry of the mandatory 10 day extension period rights of withdrawal conferred by paragraph 2.30(1)(b) are applicable, securities deposited before the expiry of the initial deposit period but not taken up by the offeror in reliance on subsection (6), and securities deposited during the mandatory 10 day extension period, must be taken up by the offeror, in the manner required under section 2.26.1, not later than one day after the expiry of the withdrawal period conferred by paragraph 2.30(1)(b). **.**

19. Section 6.1 is amended by renumbering it as subsection 6.1(1) and by adding the following subsection:

(2) Despite subsection (1), in Ontario, only the regulator may grant such an exemption. **.**

20. Section 6.2 is amended by renumbering it as subsection 6.2(1) and by adding the following subsection:

(2) Despite subsection (1), in Ontario, only the regulator may make such a decision. **.**

21. Form 62-104F1 is amended by replacing "Multilateral***" with "***National***" in paragraph (a) of the General Provisions in Part 1.***

22. Form 62-104F1 is amended by adding the following item:

Item 9.1. Minimum Tender Requirement and Mandatory Extension Period

State the following in italics and boldface type at the top of the cover page of the take-over bid circular:

No securities tendered to this bid will be taken up until (a) more than 50% of the outstanding securities of the class sought (excluding those securities beneficially owned, or over which control or direction is exercised by the offeror or any person acting jointly or in concert with the offeror) have been tendered to the bid, (b) the minimum deposit period required under applicable securities laws has elapsed, and (c) any and all other conditions of the bid have been complied with or waived, as applicable. If these criteria are met, the offeror will take up securities deposited under the bid in accordance with applicable securities laws and extend its bid for an additional 10 days to allow for further deposits of securities. **.**

23. Form 62-104F2 is amended by replacing "Multilateral***" with "***National***" in paragraph (a) of the General Provisions in Part 1.***

24. Form 62-104F3 is amended by replacing "Multilateral***" with "***National***" in paragraph (a) of the General Provisions in Part 1.***

25. Form 62-104F4 is amended by replacing "Multilateral***" with "***National***" in paragraph (a) of the General Provisions in Part 1.***

26. Form 62-104F4 is amended by replacing "revison***" with "***revision***" in item 14.***

27. Form 62-104F5 is amended by replacing "Multilateral***" with "***National***" in paragraph (a) of the General Provisions in Part 1.***

28. Form 62-104F5 is amended by adding the following paragraph under subsection (2) of item 3:

(a.1) if one of the terms referred to in paragraph (a) is the mandatory 10 day extension period required pursuant to paragraph 2.31.1(a) of the Instrument, the number of securities deposited under the take-over bid and not withdrawn as at the date of the variation, **.**

29. This Instrument comes into force on [●].

ANNEX C

BLACKLINE EXTRACTS OF MI 62-104 SHOWING PROPOSED AMENDMENTS

~~Multilateral~~National Instrument 62-104
Take-Over Bids and Issuer Bids
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~~Multilateral~~National Instrument 62-104
Take-Over Bids and Issuer Bids

PART 1DEFINITIONS AND INTERPRETATION

Definitions

1.1 In this Instrument,

"Act" means, in the jurisdiction, the statute referred to in Appendix B to National Instrument 14-101 *Definitions*;

"alternative transaction" means, for an issuer:

(a) an amalgamation, arrangement, consolidation, amendment to the terms of a class of equity securities or any other transaction of the issuer, as a consequence of which the interest of a holder of an equity security of the issuer may be terminated without the holder's consent, regardless of whether the equity security is replaced with another security, but does not include

(i) a consolidation of securities that does not have the effect of terminating the interests of holders of equity securities of the issuer in those securities without their consent, through the elimination of post-consolidated fractional interests or otherwise, except to an extent that is nominal in the circumstances,

(ii) a termination of a holder's interest in a security, under the terms attached to the security, for the purpose of enforcing an ownership or voting constraint that is necessary to enable the issuer to comply with legislation, lawfully engage in a particular activity or have a specified level of Canadian ownership, or

(iii) a transaction between the issuer and a subsidiary of the issuer,

(b) a transaction as a result of which a person, whether alone or with joint actors, would, directly or indirectly, acquire the issuer, or

(c) 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;

"associate", when used to indicate a relationship with a person, means

(a) an issuer of which the person beneficially owns or controls, directly or indirectly, voting securities entitling the person to more than 10% of the voting rights attached to outstanding securities of the issuer,

(b) any partner of the person,

(c) any trust or estate in which the person has a substantial beneficial interest or in respect of which a person serves as trustee or in a similar capacity, or

(d) a relative of that person, including

(i) the spouse or, in Alberta, adult interdependent partner of that person, or

(ii) a relative of the person's spouse or, in Alberta, adult interdependent partner

if the relative has the same home as that person;

"bid circular" means a bid circular prepared in accordance with section 2.10;

"business day" means a day other than a Saturday, a Sunday or a day that is a statutory holiday in the jurisdiction;

"class of securities" includes a series of a class of securities;

"consultant" has the same meaning as in National Instrument 45-106 *Prospectus and Registration Exemptions*;

"**deposit period news release**" means a news release issued by an offeree issuer in respect of a proposed or commenced take-over bid for the securities of the offeree issuer and stating an initial deposit period for the bid of not more than 120 days and not less than 35 days that is acceptable to the board of directors of the offeree issuer, expressed as a number of days from the date of the bid;

"equity security" means a security of an issuer that carries a residual right to participate in the earnings of the issuer and, on liquidation or winding up of the issuer, in its assets;

"initial deposit period" means the period, including any extension, during which securities may be deposited under a take-over bid but does not include a mandatory 10 day extension period or any extension period subsequent to a mandatory 10 day extension period;

"issuer bid" means an offer to acquire or redeem securities of an issuer made by the issuer to one or more persons, any of whom is in the local jurisdiction or whose last address as shown on the books of the offeree issuer is in the local jurisdiction, and also includes an acquisition or redemption of securities of the issuer by the issuer from those persons, but does not include an offer to acquire or redeem, or an acquisition or redemption if

(a) no valuable consideration is offered or paid by the issuer for the securities,

(b) the offer to acquire or redeem, or the acquisition or redemption is a step in an amalgamation, merger, reorganization or arrangement that requires approval in a vote of security holders, or

(c) the securities are debt securities that are not convertible into securities other than debt securities;

"mandatory 10 day extension period" means the 10 day period referred to in paragraph 2.31.1(a);

"offer to acquire" means

(a) an offer to purchase, or a solicitation of an offer to sell, securities,

(b) an acceptance of an offer to sell securities, whether or not the offer has been solicited, or

(c) any combination of the above;

"offeree issuer" means an issuer whose securities are the subject of a take-over bid, an issuer bid or an offer to acquire;

"offeror" means, except in Division 1 of Part 2 of this Instrument, a person that makes a take-over bid, an issuer bid or an offer to acquire;

"offeror's securities" means securities of an offeree issuer beneficially owned, or over which control or direction is exercised, on the date of an offer to acquire, by an offeror or any person acting jointly or in concert with the offeror;

"partial take-over bid" means a take-over bid for less than all of the class of securities subject to the bid;

"person" includes

(a) an individual,

(b) a corporation,

(c) a partnership, trust, fund and an association, syndicate, organization or other organized group of persons, whether incorporated or not, and

(d) an individual or other person in that person's capacity as a trustee, executor, administrator or personal or other legal representative;

"published market" means, with respect to any class of securities, a market in Canada or outside of Canada on which the securities are traded, if the prices at which they have been traded on that market are regularly

(a) disseminated electronically, or

(b) published in a newspaper or business or financial publication of general and regular paid circulation;

"standard trading unit" means

(a) 1,000 units of a security with a market price of less than $0.10 per unit,

(b) 500 units of a security with a market price of $0.10 or more per unit and less than $1.00 per unit, and

(c) 100 units of a security with a market price of $1.00 or more per unit;

"subsidiary" means an issuer that is controlled directly or indirectly by another issuer and includes a subsidiary of that subsidiary;

"take-over bid" means an offer to acquire outstanding voting securities or equity securities of a class made to one or more persons, any of whom is in the local jurisdiction or whose last address as shown on the books of the offeree issuer is in the local jurisdiction, where the securities subject to the offer to acquire, together with the offeror's securities, constitute in the aggregate 20% or more of the outstanding securities of that class of securities at the date of the offer to acquire but does not include an offer to acquire if the offer to acquire is a step in an amalgamation, merger, reorganization or arrangement that requires approval in a vote of security holders.

Definitions for purposes of the Act

1.2 (1) Except in Saskatchewan, in the Act,

(a) **"offer to acquire"** has the same meaning as in this Instrument, and

(b) **"offeror"** has the same meaning as in section 1.1 of this Instrument.

(2) In the definition of **"issuer bid"** in the Act, the prescribed class of issuer bids is that set out in the definition of **"issuer bid"** in this Instrument.

(3) In the definition of **"take-over bid"** in the Act, the prescribed class of take-over bids is that set out in the definition of **"take-over bid"** in this Instrument.

Affiliate

1.3 In this Instrument, an issuer is an affiliate of another issuer if

(a) one of them is the subsidiary of the other, or

(b) each of them is controlled by the same person.

Control

1.4 In this Instrument, a person controls a second person if

(a) the first person, directly or indirectly, beneficially owns or exercises control or direction over securities of the second person carrying votes which, if exercised, would entitle the first person to elect a majority of the directors of the second person, unless the first person holds the voting securities only to secure an obligation,

(b) the second person is a partnership, other than a limited partnership, and the first person holds more than 50% of the interests of the partnership, or

(c) the second person is a limited partnership and the general partner of the limited partnership is the first person.

Computation of time

1.5 In this Instrument, a period of days is to be computed as beginning on the day following the event that began the period and ending at 11:59 p.m. on the last day of the period if that day is a business day or at 11:59 p.m. on the next business day if the last day of the period does not fall on a business day.

Expiry of bid

1.6 A take-over bid or an issuer bid expires at the later of

(a) the end of the period, including any extension, during which securities may be deposited under the bid, and

(b) the time at which the offeror becomes obligated by the terms of the bid to take up or reject securities deposited under the bid.

Convertible securities

1.7 In this Instrument,

(a) a security is deemed to be convertible into a security of another class if, whether or not on conditions, it is or may be convertible into or exchangeable for, or if it carries the right or obligation to acquire, a security of the other class, whether of the same or another issuer, and

(b) a security that is convertible into a security of another class is deemed to be convertible into a security or securities of each class into which the second-mentioned security may be converted, either directly or through securities of one or more other classes of securities that are themselves convertible.

Deemed beneficial ownership

1.8(1) In this Instrument, in determining the beneficial ownership of securities of an offeror or of any person acting jointly or in concert with the offeror, at any given date, the offeror or the person is deemed to have acquired and to be the beneficial owner of a security, including an unissued security, if the offeror or the person

(a) is the beneficial owner of a security convertible into the security within 60 days following that date, or

(b) has a right or obligation permitting or requiring the offeror or the person, whether or not on conditions, to acquire beneficial ownership of the security within 60 days by a single transaction or a series of linked transactions.

(2) The number of outstanding securities of a class in respect of an offer to acquire includes securities that are beneficially owned as determined in accordance with subsection (1).

(3) If 2 or more offerors acting jointly or in concert make one or more offers to acquire securities of a class, the securities subject to the offer or offers to acquire are deemed to be securities subject to the offer to acquire of each offeror for the purpose of determining whether an offeror is making a take-over bid.

(4) In this section, an offeror is not a beneficial owner of securities solely because there is an agreement, commitment or understanding that a security holder will tender the securities under a take-over bid or an issuer bid, made by the offeror, that is not exempt from Part 2.

(5) In Québec, for the purposes of this Instrument, a person that beneficially owns securities means a person that owns the securities or that holds securities registered under the name of an intermediary acting as nominee, including a trustee or agent.

Acting jointly or in concert

1.9 (1) In this Instrument, it is a question of fact as to whether a person is acting jointly or in concert with an offeror and, without limiting the generality of the foregoing,

(a) the following are deemed to be acting jointly or in concert with an offeror:

(i) a person that, as a result of any agreement, commitment or understanding with the offeror or with any other person acting jointly or in concert with the offeror, acquires or offers to acquire securities of the same class as those subject to the offer to acquire;

(ii) an affiliate of the offeror;

(b) the following are presumed to be acting jointly or in concert with an offeror:

(i) a person that, as a result of any agreement, commitment or understanding with the offeror or with any other person acting jointly or in concert with the offeror, intends to exercise jointly or in concert with the offeror or with any person acting jointly or in concert with the offeror any voting rights attaching to any securities of the offeree issuer;

(ii) an associate of the offeror.

(2) Subsection (1) does not apply to a registered dealer acting solely in an agency capacity for the offeror in connection with a bid and not executing principal transactions in the class of securities subject to the offer to acquire or performing services beyond the customary functions of a registered dealer.

(3) For the purposes of this section, a person is not acting jointly or in concert with an offeror solely because there is an agreement, commitment or understanding that the person will tender securities under a take-over bid or an issuer bid, made by the offeror, that is not exempt from Part 2.

Application to direct and indirect offers

1.10 In this Instrument, a reference to an offer to acquire or to the acquisition or ownership of securities or to control or direction over securities includes a direct or indirect offer to acquire or the direct or indirect acquisition or ownership of securities, or the direct or indirect control or direction over securities, as the case may be.

Determination of market price

1.11(1) In this Instrument,

(a) the market price of a class of securities for which there is a published market, at any date, is an amount equal to the simple average of the closing price of securities of that class for each of the business days on which there was a closing price in the 20 business days preceding that date,

(b) if a published market does not provide a closing price, but provides only the highest and lowest prices of securities traded on a particular day, the market price of the securities, at any date, is an amount equal to the average of the simple averages of the highest and lowest prices for each of the business days on which there were highest and lowest prices in the 20 business days preceding that date, and

(c) if there has been trading of securities in a published market for fewer than 10 of the 20 business days preceding the date as of which the market price of the securities is being determined, the market price is the average of the following prices established for each day of the 20 business days preceding that date:

(i) the average of the closing bid and ask prices for each day on which there was no trading; and

(ii) either the closing price of securities of the class for each day that there has been trading, if the published market provides a closing price, or the average of the highest and lowest prices of securities of that class for each day that there has been trading, if the published market provides only the highest and lowest prices of securities traded on a particular day

(2) If there is more than one published market for a security, the market price in paragraphs (1)(a), (b) and (c) must be determined as follows:

(a) if only one of the published markets is in Canada, the market price must be determined solely by reference to that market;

(b) if there is more than one published market in Canada, the market price must be determined solely by reference to the published market in Canada on which the greatest volume of trading in the particular class of securities occurred during the 20 business days preceding the date as of which the market price is being determined;

(c) if there is no published market in Canada, the market price must be determined solely by reference to the published market on which the greatest volume of trading in the particular class of securities occurred during the 20 business days preceding the date as of which the market price is being determined.

(3) Despite subsections (1) and (2) for the purposes of section ~~4.1,~~4.1 and subsection 4.8(3), if an offeror acquires securities on a published market, the market price for those securities is the price of the last standard trading unit of securities of that class purchased, before the acquisition by the offeror, by a person who was not acting jointly or in concert with the offeror.

PART 2: BIDS

Division 1: Restrictions on Acquisitions or Sales

Definition of "offeror"

2.1 In this Division, **"offeror"** means

(a) a person making a take-over bid or an issuer bid that is not exempt from Part 2,

(b) a person acting jointly or in concert with a person referred to in paragraph (a),

(c) a control person of a person referred to in paragraph (a), or

(d) a person acting jointly or in concert with a control person referred to in paragraph (c).

Restrictions on acquisitions during take-over bid

2.2 (1) An offeror must not offer to acquire, or make or enter into an agreement, commitment or understanding to acquire beneficial ownership of any securities of the class that are subject to a take-over bid or securities convertible into securities of that class otherwise than under the bid on and from the day of the announcement of the offeror's intention to make the bid until the expiry of the bid.

(2) Subsection (1) does not apply to an agreement between a security holder and the offeror to the effect that the security holder will, in accordance with the terms and conditions of a take-over bid that is not exempt from Part 2, deposit the security holder's securities under the bid.

(3) Despite subsection (1), an offeror may purchase securities of the class that are subject to a take-over bid and securities convertible into securities of that class beginning on the 3rd business day following the date of the bid until the expiry of the bid if all of the following conditions are satisfied:

(a) the intention of the offeror,

(i) on the date of the bid, is to make purchases and that intention is stated in the bid circular, or

(ii) to make purchases changes after the date of the bid and that intention is stated in a news release issued and filed at least one business day prior to making such purchases;

(b) the number of securities beneficially acquired under this subsection does not exceed 5% of the outstanding securities of that class as at the date of the bid;

(c) the purchases are made in the normal course on a published market;

(d) the offeror issues and files a news release immediately after the close of business of the published market on each day on which securities have been purchased under this subsection disclosing the following information:

(i) the name of the purchaser;

(ii) if the purchaser is a person referred to in paragraph 2.1(b), (c) or (d), the relationship of the purchaser and the offeror;

(iii) the number of securities purchased on the day for which the news release is required;

(iv) the highest price paid for the securities on the day for which the news release is required;

(v) the aggregate number of securities purchased on the published market during the currency of the bid;

(vi) the average price paid for the securities that were purchased on the published market during the currency of the bid; and

(vii) the total number of securities owned by the purchaser after giving effect to the purchases that are the subject of the news release;

(e) no broker acting for the offeror performs services beyond the customary broker's functions in regard to the purchases;

(f) no broker acting for the offeror receives more than the usual fees or commissions in regard to the purchases than are charged for comparable services performed by the broker in the normal course;

(g) the offeror or any person acting for the offeror does not solicit or arrange for the solicitation of offers to sell securities of the class subject to the bid, except for the solicitation by the offeror or members of the soliciting dealer group under the bid;

(h) the seller or any person acting for the seller does not, to the knowledge of the offeror, solicit or arrange for the solicitation of offers to buy securities of the class subject to the bid.

(4) For the purposes of paragraph 2.2(3)(b), the acquisition of beneficial ownership of securities that are convertible into securities of the class that is subject to the bid shall be deemed to be an acquisition of the securities as converted.

Restrictions on acquisitions during issuer bid

2.3 (1) An offeror must not offer to acquire, or make or enter into an agreement, commitment or understanding to acquire, beneficial ownership of any securities of the class that are subject to an issuer bid, or securities that are convertible into securities of that class, otherwise than under the bid on and from the day of the announcement of the offeror's intention to make the bid until the expiry of the bid.

(2) Subsection (1) does not prevent the offeror from purchasing, redeeming or otherwise acquiring any securities of the class subject to the bid in reliance on an exemption under paragraph 4.6(a), (b) or (c).

Restrictions on acquisitions before take-over bid

2.4 (1) If, within the period of 90 days immediately preceding a take-over bid, an offeror acquired beneficial ownership of securities of the class subject to the bid in a transaction not generally available on identical terms to holders of that class of securities,

(a) the offeror must offer

(i) consideration for securities deposited under the bid at least equal to and in the same form as the highest consideration that was paid on a per security basis under any such prior transaction, or

(ii) at least the cash equivalent of that consideration, and

(b) the offeror must offer to acquire under the bid that percentage of the securities of the class subject to the bid that is at least equal to the highest percentage that the number of securities acquired from a seller in any such prior transaction was of the total number of securities of that class beneficially owned by that seller at the time of that prior transaction.

(2) Subsection (1) does not apply to a transaction that occurred within 90 days preceding the bid if either of the following conditions are satisfied:

(a) the transaction is a trade in a security of the issuer that had not been previously issued;

(b) the transaction is a trade by or on behalf of the issuer in a previously issued security of that issuer that had been redeemed or purchased by, or donated to, that issuer.

Restrictions on acquisitions after bid

2.5 During the period beginning with the expiry of a take-over bid or an issuer bid and ending at the end of the 20th business day after that, whether or not any securities are taken up under the bid, an offeror must not acquire or offer to acquire beneficial ownership of securities of the class that was subject to the bid except by way of a transaction that is generally available to holders of that class of securities on identical terms.

Exception

2.6 Subsection 2.4(1) and section 2.5 do not apply to purchases made by an offeror in the normal course on a published market if all of the following conditions are satisfied:

(a) no broker acting for the offeror performs services beyond the customary broker's functions in regard to the purchases;

(b) no broker acting for the offeror receives more than the usual fees or commissions in regard to the purchases than are charged for comparable services performed by the broker in the normal course;

(c) the offeror or any person acting for the offeror does not solicit or arrange for the solicitation of offers to sell securities of the class subject to the bid, except for the solicitation by the offeror or members of the soliciting dealer group under the bid;

(d) the seller or any person acting for the seller does not, to the knowledge of the offeror, solicit or arrange for the solicitation of offers to buy securities of the class subject to the bid.

Restrictions on sales during bid

2.7 (1) An offeror, except under a take-over bid or an issuer bid, must not sell, or make or enter into an agreement, commitment or understanding to sell, any securities of the class subject to the bid, or securities that are convertible into securities of that class, beginning on the day of the announcement of the offeror's intention to make the bid until the expiry of the bid.

(2) Despite subsection (1), an offeror may, before the expiry of a bid, make or enter into an agreement, commitment or understanding to sell securities that may be taken up by the offeror under the bid, after the expiry of the bid, if the intention to sell is disclosed in the bid circular.

(3) Subsection (1) does not apply to an offeror under an issuer bid in respect of the issue of securities under a dividend plan, dividend reinvestment plan, employee purchase plan or another similar plan.

Division 2: Making a Bid

Duty to make bid to all security holders

2.8 An offeror must make a take-over bid or an issuer bid to all holders of the class of securities subject to the bid who are in the local jurisdiction by sending the bid to

(a) each holder of that class of securities whose last address as shown on the books of the offeree issuer is in the local jurisdiction, and

(b) each holder of securities that, before the expiry of the deposit period referred to in the bid, are convertible into securities of that class, whose last address as shown on the books of the offeree issuer is in the local jurisdiction.

Commencement of bid

2.9 (1) An offeror must commence a take-over bid by

(a) publishing an advertisement containing a brief summary of the take-over bid in at least one major daily newspaper of general and regular paid circulation in the local jurisdiction in English, and in Québec in French or in French and English, or

(b) sending the bid to security holders described in section 2.8.

(2) An offeror must commence an issuer bid by sending the bid to security holders described in section 2.8.

Offeror's circular

2.10 (1) An offeror making a take-over bid or an issuer bid must prepare and send, either as part of the bid or together with the bid, a take-over bid circular or an issuer bid circular, as the case may be, in the following form:

(a) Form 62-104F1 Take-Over Bid Circular, for a take-over bid; or

(b) Form 62-104F2 Issuer Bid Circular, for an issuer bid.

(2) An offeror commencing a take-over bid under paragraph 2.9(1)(a) must,

(a) on or before the date of first publication of the advertisement,

(i) deliver the bid and the bid circular to the offeree issuer's principal office,

(ii) file the bid, the bid circular and the advertisement,

(iii) request from the offeree issuer a list of security holders described in section 2.8, and

(b) not later than 2 business days after receipt of the list of security holders referred to in subparagraph (a)(iii), send the bid and the bid circular to those security holders.

(3) An offeror commencing a take-over bid under paragraph 2.9(1)(b) must file the bid and the bid circular and deliver them to the offeree issuer's principal office on the day the bid is sent, or as soon as practicable after that.

(4) An offeror making an issuer bid must file the bid and the bid circular on the day the bid is sent, or as soon as practicable after that.

Change in information

2.11(1) If, before the expiry of a take-over bid or an issuer bid or after the expiry of a bid but before the expiry of all rights to withdraw the securities deposited under the bid, a change has occurred in the information contained in the bid circular or any notice of change or notice of variation that would reasonably be expected to affect the decision of the security holders of the

offeree issuer to accept or reject the bid, the offeror must promptly

(a) issue and file a news release, and

(b) send a notice of the change to every person to whom the bid was required to be sent and whose securities were not taken up before the date of the change.

(1.1) Despite paragraph (1)(b), an offeror is not required to send a notice of change to a security holder to whom paragraph 2.30(2)(a.1) applies.

(2) Subsection (1) does not apply to a change that is not within the control of the offeror or of an affiliate of the offeror unless it is a change in a material fact relating to the securities being offered in exchange for securities of the offeree issuer.

(3) In this section, a variation in the terms of a bid does not constitute a change in information.

(4) A notice of change must be in the form of Form 62-104F5 Notice of Change or Notice of Variation.

(5) If an offeror is required to send a notice of change pursuant to subsection (1) prior to the expiry of the initial deposit period, the initial deposit period must not expire before 10 days after the date of the notice of change.

Variation of terms

2.12 (1) If there is a variation in the terms of a take-over bid or an issuer bid, including any reduction of the period during which securities may be deposited under the bid pursuant to section 2.28.2 or section 2.28.3, or extension of the period during which securities may be deposited under the bid, and whether or not that variation results from the exercise of any right contained in the bid, the offeror must promptly

(a) issue and file a news release, and

(b) send a notice of variation to every person to whom the bid was required to be sent under section 2.8 and whose securities were not taken up before the date of the variation.

(1.1) Despite paragraph (1)(b), an offeror is not required to send a notice of variation to a security holder to whom paragraph 2.30(2)(a.1) applies.

(2) A notice of variation must be in the form of Form 62-104F5 Notice of Change or Notice of Variation.

(3) If there is a variation in the terms of a take-over bid or an issuer bid, the period during which securities may be deposited under the bid must not expire before 10 days after the date of the notice of variation.

(3.1) If an offeror is required to send a notice of variation pursuant to subsection (1) prior to the expiry of the initial deposit period, the initial deposit period must not expire before 10 days after the date of the notice of variation.

(4) Subsections (1), (3) and (~~3~~3.1) do not apply to a variation in the terms of a bid consisting solely of the waiver of a condition in the bid and any extension of the bid, other than an extension in respect of the mandatory 10 day extension period, resulting from the waiver where the consideration offered for the securities consists solely of cash, but in that case the offeror must promptly issue and file a news release announcing the waiver.

(5) A variation in the terms of ~~a take-over bid or~~ an issuer bid, other than a variation that is the waiver by the offeror of a condition that is specifically stated in the bid as being waivable at the sole option of the offeror, must not be made after the expiry of the period, including any extension of the period, during which the securities may be deposited under the bid.

(6) A variation in the terms of a take-over bid, other than a variation to extend the time during which securities may be deposited under the bid or a variation to increase the consideration offered for the securities subject to the bid, must not be made after the offeror becomes obligated to take up securities deposited under the bid in accordance with section 2.32.1.

Filing and sending notice of change or notice of variation

2.13 A notice of change or notice of variation in respect of a take-over bid or an issuer bid must be filed and, in the case of a take-over bid, delivered to the offeree issuer's principal office, on the day the notice of change or notice of variation is sent to security holders of the offeree issuer, or as soon as practicable after that.

Change or variation in advertised take-over bid

2.14 (1) If a change or variation occurs to a take-over bid that was commenced by means of an advertisement, and if the offeror has complied with paragraph 2.10(2)(a) but has not yet sent the bid and the bid circular under paragraph 2.10(2)(b), the offeror must

(a) publish an advertisement that contains a brief summary of the change or variation in at least one major daily newspaper of general and regular paid circulation in the local jurisdiction in English, and in Québec in French or in French and English,

(b) concurrently with the date of first publication of the advertisement,

(i) file the advertisement, and

(ii) file and deliver a notice of change or notice of variation to the offeree issuer's principal office, and

(c) subsequently send the bid, the bid circular and the notice of change or notice of variation to the security holders of the offeree issuer before the expiration of the period set out in paragraph 2.10(2)(b).

(2) If an offeror satisfies the requirements of subsection (1), the notice of change or notice of variation is not required to be filed and delivered under section 2.13.

Consent of expert – bid circular

2.15 (1) In this section and section 2.21, an expert includes a notary in Québec, solicitor, auditor, accountant, engineer, geologist or appraiser or any other person whose profession or business gives authority to a report, valuation, statement or opinion made by that person.

(2) If a report, valuation, statement or opinion of an expert is included in or accompanies a bid circular or any notice of change or notice of variation to the circular, the written consent of the expert to the use of the report, valuation, statement or opinion must be filed concurrently with the bid circular, notice of change or notice of variation.

Delivery and date of bid documents

2.16 (1) A take-over bid, an issuer bid, a bid circular and every notice of change or notice of variation must be

(a) mailed by pre-paid mail to the intended recipient, or

(b) delivered to the intended recipient by personal delivery, courier or other manner acceptable to the regulator or securities regulatory authority.

(2) Except for a take-over bid commenced by means of an advertisement in accordance with paragraph 2.9(1)(a), a bid, bid circular, notice of change or notice of variation sent in accordance with this section is deemed to be dated as of the date it was sent to all or substantially all of the persons entitled to receive it.

(3) If a take-over bid is commenced by means of an advertisement in accordance with paragraph 2.9(1)(a), a bid, bid circular, notice of change or notice of variation is deemed to have been dated as of the date of first publication of the relevant advertisement.

Division 3: Offeree Issuer's Obligations

Duty to prepare and send directors' circular

2.17 (1) If a take-over bid has been made, the board of directors of the offeree issuer must prepare and send, not later than 15 days after the date of the bid, a directors' circular to every person to whom the bid was required to be sent under section 2.8.

(2) The board of directors of the offeree issuer must evaluate the terms of the take-over bid and, in the directors' circular,

(a) must recommend to security holders that they accept or reject the bid and state the reasons for the recommendation,

(b) must advise security holders that the board is unable to make, or is not making, a recommendation and state the reasons for being unable to make a recommendation or for not making a recommendation, or

(c) must advise security holders that the board is considering whether to make a recommendation to accept or reject the bid, must state the reasons for not making a recommendation in the directors' circular and may advise security holders that they should not deposit their securities under the bid until they receive further communication from the board of directors in accordance with paragraph (a) or (b).

(3) If paragraph (2)(c) applies, the board of directors must communicate to security holders a recommendation to accept or reject the bid or the decision that it is unable to make, or is not making, a recommendation, together with the reasons for the recommendation or decision, at least 7 days before the scheduled expiry of the initial deposit period ~~during which securities may be deposited under the bid~~.

(4) A directors' circular must be in the form of Form 62-104F3 Directors' Circular.

Notice of change

2.18 (1) If, before the expiry of a take-over bid or after the expiry of a take-over bid but before the expiry of all rights to withdraw the securities deposited under the bid, a change has occurred in the information contained in a directors' circular or in any notice of change to the directors' circular that would reasonably be expected to affect the decision of the security holders to accept or reject the bid, the board of directors of the offeree issuer must promptly issue and file a news release relating to the change and send a notice of the change to every person to whom the take-over bid was required to be sent disclosing the nature and substance of the change.

(2) A notice of change must be in the form of Form 62-104F5 Notice of Change or Notice of Variation.

Filing directors' circular or notice of change

2.19 The board of directors of the offeree issuer must concurrently file the directors' circular or a notice of change in relation to it and deliver it to the principal office of the offeror not later than the date on which it is sent to the security holders of the offeree issuer, or as soon as practicable after that date.

Individual director's or officer's circular

2.20 (1) An individual director or officer may recommend acceptance or rejection of a take-over bid if the director or officer sends with the recommendation a separate director's or officer's circular to every person to whom the take-over bid was required to be sent under section 2.8.

(2) If, before the expiry of a take-over bid or after the expiry of a take-over bid but before the expiry of all rights to withdraw the securities deposited under the bid, a change has occurred in the information contained in a director's or officer's circular or any notice of change in relation to it that would reasonably be expected to affect the decision of the security holders to accept or reject the bid, other than a change that is not within the control of the director or officer, as the case may be, that director or officer must promptly send a notice of change to every person to whom the take-over bid was required to be sent under section 2.8.

(3) A director's or officer's circular must be in the form of Form 62-104F4 Director's or Officer's Circular.

(4) A director's or officer's obligation to send a circular under subsection (1) or to send a notice of change under subsection (2) may be satisfied by sending the circular or the notice of change, as the case may be, to the board of directors of the offeree issuer.

(5) If a director or officer sends to the board of directors of the offeree issuer a circular under subsection (1) or a notice of change under subsection (2), the board, at the offeree issuer's expense, must promptly send a copy of the circular or notice to every person to whom the take-over bid was required to be sent under section 2.8.

(6) The board of directors of the offeree issuer or the individual director or officer, as the case may be, must concurrently file the director's or officer's circular or a notice of change in relation to it and send it to the principal office of the offeror not later than the date on which it is sent to the security holders of the offeree issuer, or as soon as practicable after that.

(7) A notice of change in relation to a director's or officer's circular must be in the form of Form 62-104F5 Notice of Change or Notice of Variation.

Consent of expert - directors' circular/individual director's or officer's circular

2.21 If a report, valuation, statement or opinion of an expert is included in or accompanies a directors' circular, an individual director's or officer's circular or any notice of change to either circular, the written consent of the expert to the use of the report, valuation, statement or opinion must be filed concurrently with the circular or notice.

Delivery and date of offeree issuer's documents

2.22(1) A directors' circular, an individual director's or officer's circular and every notice of change must be

(a) mailed by pre-paid mail to the intended recipient, or

(b) delivered to the intended recipient by personal delivery, courier or other manner acceptable to the regulator or securities regulatory authority.

(2) Any circular or notice sent in accordance with this section is deemed to be dated as of the date it was sent to all or substantially all of the persons entitled to receive it.

Division 4: Offeror's Obligations

Consideration

2.23(1) If a take-over bid or an issuer bid is made, all holders of the same class of securities must be offered identical consideration.

(2) Subsection (1) does not prohibit an offeror from offering an identical choice of consideration to all holders of the same class of securities.

(3) If a variation in the terms of a take-over bid or an issuer bid before the expiry of the bid increases the value of the consideration offered for the securities subject to the bid, the offeror must pay that increased consideration to each person whose securities are taken up under the bid, whether or not the securities were taken up by the offeror before the variation of the bid.

Prohibition against collateral agreements

2.24 If a person makes or intends to make a take-over bid or an issuer bid, the person or any person acting jointly or in concert with that person must not enter into any collateral agreement, commitment or understanding that has the effect, directly or indirectly, of providing a security holder of the offeree issuer with consideration of greater value than that offered to the other security holders of the same class of securities.

Collateral agreements − exception

2.25(1) Section 2.24 does not apply to an employment compensation arrangement, severance arrangement or other employment benefit arrangement that provides

(a) an enhancement of employee benefits resulting from participation by the security holder of the offeree issuer in a group plan, other than an incentive plan, for employees of a successor to the business of the offeree issuer, if the benefits provided by the group plan are generally provided to employees of the successor to the business of the offeree issuer who hold positions of a similar nature to the position held by the security holder, or

(b) a benefit not described in paragraph (a) that is received solely in connection with the security holder's services as an employee, director or consultant of the offeree issuer, of an affiliated entity of the offeree issuer, or of a successor to the business of the offeree issuer, if

(i) at the time the bid is publicly announced, the security holder and its associates beneficially own or exercise control or direction over less than 1% of the outstanding securities of each class of securities of the offeree issuer subject to the bid, or

(ii) an independent committee of directors of the offeree issuer, acting in good faith, has determined that

(A) the value of the benefit, net of any offsetting costs to the security holder, is less than 5% of the amount referred to in paragraph 3(a), or

(B) the security holder is providing at least equivalent value in exchange for the benefit.

(2) In order to rely on an exception under paragraph (1)(b) the following conditions must be satisfied:

(a) the benefit is not conferred for the purpose, in whole or in part, of increasing the amount of the consideration paid to the security holder for securities deposited under the bid or providing an incentive to deposit under the bid;

(b) the conferring of the benefit is not, by its terms, conditional on the security holder supporting the bid in any manner; and

(c) full particulars of the benefit are disclosed in the issuer bid circular or, in the case of a take-over bid, in the take-over bid circular or directors' circular.

(3) In order to rely on an exception under subparagraph 1(b)(ii) the following conditions must be satisfied:

(a) the security holder receiving the benefit has disclosed to the independent committee the amount of consideration that the security holder expects it will be beneficially entitled to receive under the terms of the bid in exchange for the securities beneficially owned by the security holder; and

(b) the determination of the independent committee under subparagraph 1(b)(ii) is disclosed in the issuer bid circular or, in the case of a take-over bid, in the take-over bid circular or directors' circular.

(4) In this section, in determining the beneficial ownership of securities of a holder at a given date, any security or right or obligation permitting or requiring the security holder or any person acting jointly or in concert with the security holder, whether or not on conditions, to acquire a security, including an unissued security, of a particular class within 60 days by a single transaction or a series of linked transactions is deemed to be a security of a particular class.

Proportionate take up and payment – issuer bids

2.26 (1) If ~~a take-over bid or~~ an issuer bid is made for less than all of the class of securities subject to the bid and a greater number of securities is deposited under the bid than the offeror is bound or willing to acquire under the bid, the offeror must take up and pay for the securities proportionately, disregarding fractions, according to the number of securities deposited by each security holder.

(2) Subsection (1) does not prohibit an offeror from acquiring securities under the terms of an issuer bid that, if not acquired, would constitute less than a standard trading unit for the security holder.

(3) Subsection (1) does not apply to securities deposited under the terms of an issuer bid by security holders who

(a) are entitled to elect a minimum price per security, within a range of prices, at which they are willing to sell their securities under the bid, and

(b) elect a minimum price which is higher than the price that the offeror pays for securities under the bid.

Proportionate take up and payment – partial take-over bids

2.26.1(1) If a greater number of securities is deposited under a partial take-over bid than the offeror is bound to acquire under the bid, the offeror must take up and pay for the securities proportionately, disregarding fractions, according to the number of securities deposited by each security holder.

(~~4~~2) For the purposes of subsection (1), any securities acquired in a pre-bid transaction to which subsection 2.4(1) applies are deemed to have been deposited under the take-over bid by the person who was the seller in the pre-bid transaction.

Financing arrangements

2.27 (1) If a take-over bid or an issuer bid provides that the consideration for the securities deposited under the bid is to be paid in cash or partly in cash, the offeror must make adequate arrangements before the bid to ensure that the required funds are available to make full payment for the securities that the offeror has offered to acquire.

(2) The financing arrangements required to be made under subsection (1) may be subject to conditions if, at the time the take-over bid or the issuer bid is commenced, the offeror reasonably believes the possibility to be remote that, if the conditions of the bid are satisfied or waived, the offeror will be unable to pay for the securities deposited under the bid due to a financing condition not being satisfied.

Division 5: Bid Mechanics

Minimum deposit period – issuer bids

2.28 An offeror must allow securities to be deposited under ~~a take-over bid or~~ an issuer bid for a minimum deposit period of at least 35 days from the date of the bid.

Minimum deposit period – take-over bids

2.28.1 An offeror must allow securities to be deposited under a take-over bid for an initial deposit period of at least 120 days from the date of the bid.

Shortened deposit period – deposit period news release

2.28.2 (1) Despite section 2.28.1, if at or after the time an offeror announces a take-over bid, the offeree issuer issues a deposit period news release in respect of the offeror's take-over bid, the offeror must allow securities to be deposited under its take-over bid for an initial deposit period of at least the number of days from the date of the bid as stated in the deposit period news release.

(2) Despite section 2.28.1, an offeror, other than an offeror under subsection (1), must allow securities to be deposited under its take-over bid for an initial deposit period of at least the number of days from the date of the bid as stated in the deposit period news release if either of the following applies:

(a) the offeror, prior to the issuance of the deposit period news release referred to in subsection (1), has commenced a take-over bid in respect of the securities of the offeree issuer that has yet to expire;

(b) the offeror, subsequent to the issuance of the deposit period news release referred to in subsection (1), commences a take-over bid in respect of the securities of the offeree issuer and the bid is made prior to one of the following:

(i) the date of expiry of the take-over bid referred to in subsection (1),

(ii) the date of expiry of a take-over bid referred to in paragraph (a).

(3) For the purposes of subsections (1) and (2), an offeror must not allow securities to be deposited under its take-over bid for an initial deposit period of less than 35 days from the date of the bid.

Shortened deposit period – alternative transaction

2.28.3 Despite section 2.28.1, if an issuer issues a news release announcing that it has agreed to enter into, or determined to effect, an alternative transaction, an offeror must allow securities to be deposited under its take-over bid for an initial deposit period of at least 35 days from the date of the bid if either of the following applies:

(a) the offeror, prior to the issuance of the news release, has commenced a take-over bid in respect of the securities of the offeree issuer that has yet to expire;

(b) the offeror, subsequent to the issuance of the news release, commences a take-over bid in respect of the securities of the offeree issuer and the bid is made prior to one of the following:

(i) the date of completion or abandonment of the alternative transaction,

(ii) the date of expiry of a take-over bid referred to in paragraph (a).

Prohibition on take up – issuer bids

2.29 An offeror must not take up securities deposited under ~~a take-over bid or~~ an issuer bid until the expiration of 35 days from the date of the bid.

Prohibition on take up – take-over bids

2.29.1 An offeror must not take up securities deposited under a take-over bid unless all of the following conditions are satisfied:

(a) 120 days, or the number of days determined in accordance with section 2.28.2 or section 2.28.3, have elapsed from the date of the bid,

(b) all terms and conditions of the bid have been complied with or waived,

(c) more than 50% of the outstanding securities of the class that are subject to the bid, excluding securities beneficially owned, or over which control or direction is exercised, by the offeror or by any person acting jointly or in concert with the offeror, have been deposited under the bid and not withdrawn.

Withdrawal of securities

2.30 (1) A security holder may withdraw securities deposited under a take-over bid or an issuer bid

(a) at any time before the securities have been taken up by the offeror,

(b) at any time before the expiration of 10 days from the date of a notice of change under section 2.11 or a notice of variation under section 2.12, or

(c) if the securities have not been paid for by the offeror within 3 business days after the securities have been taken up.

(1.1) Despite paragraph (1)(a), if an offeror that has made a partial take-over bid becomes obligated to take up securities under subsection 2.32.1(1), a security holder may not withdraw securities that have been deposited under the bid before the expiry of the initial deposit period but not taken up by the offeror in reliance on subsection 2.32.1(6) during the period

(a) commencing at the time the offeror became obligated to take up securities under subsection 2.32.1(1), and

(b) ending at the time the offeror becomes obligated to take up securities not taken up by the offeror in reliance on subsection 2.32.1(6) under subsection 2.32.1(7) or (8), as applicable.

(2) ~~The right of withdrawal under~~Despite paragraph (1)(b) ~~does not apply~~, a security holder may not withdraw securities that have been deposited under the take-over bid or issuer bid if

(a) the securities have been taken up by the offeror before the date of the notice of change or notice of variation,

(a.1) in the case of a partial take-over bid, the securities were deposited under the bid before the expiry of the initial deposit period and were not taken up by the offeror in reliance on subsection 2.32.1(6) and the date of the notice of change or notice of variation is after the date that the offeror became obligated to take up securities under subsection 2.32.1(1), or

(b) ~~one or both~~any of the following circumstances occur:

(i) a variation in the terms of ~~the~~a take-over bid or issuer bid consisting solely of an increase in consideration offered for the securities and an extension of the time for deposit to not later than 10 days after the date of the notice of variation;

(ii) a variation in the terms of ~~the~~a take-over bid or issuer bid consisting solely of the waiver of one or more of the conditions of the bid where the consideration offered for the securities subject to the take-over bid or the issuer bid consists solely of cash;

(iii) a variation in the terms of a take-over bid subsequent to the expiry of the initial deposit period consisting of either an increase in consideration offered for the securities subject to the bid or an extension of the time for deposit to not later than 10 days from the date of the notice of variation.

(3) The withdrawal of any securities under subsection (1) is made by sending a written notice to the depository designated in the bid circular and becomes effective on its receipt by the depository.

(4) If notice is given in accordance with subsection (3), the offeror must promptly return the securities to the security holder.

Effect of market purchases

2.31 If an offeror purchases securities as permitted by subsection 2.2(3), those purchased securities must not be counted in determining whether ~~a condition as to the minimum number of~~

~~securities to be deposited under a take-over bid has been fulfilled, but~~the minimum tender requirement in paragraph 2.29.1(c) is satisfied and must not reduce the number of securities the offeror is bound to take up under the take-over bid.

Mandatory 10 day extension period – take-over bids

2.31.1 If, at the expiry of the initial deposit period, an offeror is obligated to take up securities deposited under a bid pursuant to subsection 2.32.1(1), the offeror must

(a) extend the period during which securities may be deposited under the bid for a period of 10 days, and

(b) promptly issue and file a news release disclosing the following

(i) that the minimum tender requirement specified in paragraph 2.29.1(c) has been satisfied,

(ii) the number of securities deposited and not withdrawn as at the expiry of the initial deposit period,

(iii) that the period during which securities may be deposited under the bid is extended for the mandatory 10 day extension period, and

(iv) in the case of a take-over bid that

(A) is not a partial take-over bid, that the offeror will immediately take up the deposited securities and pay for securities taken up as soon as possible and in any event not later than 3 business days after the securities are taken up, or

(B) is a partial take-over bid, that the offeror will take up and pay for the deposited securities proportionately in accordance with applicable securities legislation and in any event not later than one day after the expiry of the mandatory 10 day extension period.

Time limit on extension – partial take-over bids

2.31.2 A partial take-over bid must not be extended after the expiry of the mandatory 10 day extension period.

Obligation to take up and pay for deposited securities – issuer bids

2.32(1) If all the terms and conditions of ~~a take-over bid or~~ an issuer bid have been complied with or waived, the offeror must take up and pay for securities deposited under the bid not later than 10 days after the expiry of the bid or at the time required by subsection (2) or (3), whichever is earliest.

(2) An offeror must pay for any securities taken up under ~~a take-over bid or~~ an issuer bid as soon as possible, and in any event not later than 3 business days after the securities deposited under the bid are taken up.

(3) Securities deposited under ~~a take-over bid or~~ an issuer bid subsequent to the date on which the offeror first takes up securities deposited under the bid must be taken up and paid for by the offeror not later than 10 days after the deposit of the securities.

(4) An offeror may not extend its ~~take-over bid or~~ issuer bid if all the terms and conditions of the bid have been complied with or waived, unless the offeror first takes up all securities deposited under the bid and not withdrawn.

(5) Despite subsections (3) and (4), if ~~a take-over bid or~~ an issuer bid is made for less than all of the class of securities subject to the bid, an offeror is only required to take up, by the times specified in those subsections, the maximum number of securities that the offeror can take up without contravening section 2.23 or section 2.26 at the expiry of the bid.

(6) Despite subsection (4), if the offeror waives any terms or conditions of ~~a take-over bid or~~ an issuer bid and extends the bid in circumstances where the rights of withdrawal conferred by paragraph 2.30(1)(b) are applicable, the bid must be extended without the offeror first taking up the securities which are subject to the rights of withdrawal.

Obligation to take up and pay for deposited securities – take-over bids

2.32.1(1) An offeror must immediately take up securities deposited under a take-over bid if, at the expiry of the initial deposit period,

(a) the deposit period referred to in section 2.28.1, section 2.28.2 or section 2.28.3, as applicable, has elapsed,

(b) all the terms and conditions of the take-over bid have been complied with or waived, and

(c) the requirement in paragraph 2.29.1(c) is satisfied.

(2) An offeror must pay for any securities taken up under a take-over bid as soon as possible, and in any event not later than 3 business days after the securities deposited under the bid are taken up.

(3) In the case of a take-over bid that is not a partial take-over bid, securities deposited under the bid during the mandatory 10 day extension period, or an extension period subsequent to the mandatory extension period, must be taken up and paid for by the offeror not later than 10 days after the deposit of securities.

(4) In the case of a take-over bid that is not a partial take-over bid, an offeror must not extend its bid at any time subsequent to the expiry of the mandatory 10 day extension period unless the offeror first takes up all securities deposited under the bid and not withdrawn.

(5) Despite subsection (4), if the offeror extends the bid in circumstances where the rights of withdrawal conferred by paragraph 2.30(1)(b) are applicable, the bid must be extended without the offeror first taking up the securities which are subject to the rights of withdrawal.

(6) Despite subsection (1), an offeror that has made a partial take-over bid is only required to take up, by the time specified in that subsection, the maximum number of securities that the offeror can take up without contravening section 2.23 or section 2.26.1 at the expiry of the bid.

(7) In the case of a partial take-over bid, securities deposited before the expiry of the initial deposit period but not taken up by the offeror in reliance on subsection (6), and securities deposited during the mandatory 10 day extension period, must be taken up by the offeror, in the manner required under section 2.26.1, not later than one day after the expiry of the mandatory 10 day extension period.

(8) Despite subsection (7), if at the expiry of the mandatory 10 day extension period rights of withdrawal conferred by paragraph 2.30(1)(b) are applicable, securities deposited before the expiry of the initial deposit period but not taken up by the offeror in reliance on subsection (6), and securities deposited during the mandatory 10 day extension period, must be taken up by the offeror, in the manner required under section 2.26.1, not later than one day after the expiry of the withdrawal period conferred by paragraph 2.30(1)(b).

Return of deposited securities

2.33 If, following the expiry of a take-over bid or an issuer bid, an offeror knows that it will not take up securities deposited under the bid, the offeror must promptly issue and file a news release to that effect and return the securities to the security holders.

News release on expiry of bid

2.34 If all the terms and conditions of a take-over bid or an issuer bid have been complied with or waived, the offeror must issue and file a news release to that effect promptly after the expiry of the bid, and the news release must disclose

(a) the approximate number of securities deposited, and

(b) the approximate number that will be taken up.

PART 3: GENERAL

[…]

Part 6: — Exemptions

Exemption — general

6.1 (1) The regulator or the securities regulatory authority may, under the statute referred to in Appendix B of National Instrument 14-101 *Definitions* opposite the name of the local jurisdiction, grant an exemption to this Instrument.

(2) Despite subsection (1), in Ontario, only the regulator may grant such an exemption.

Exemption — collateral benefit

6.2 (1) The regulator or the securities regulatory authority may decide for the purposes of section 2.24 that an agreement, commitment or understanding with a selling security holder is made for reasons other than to increase the value of the consideration paid to a selling security holder for the securities of the selling security holder and that the agreement, commitment or understanding may be entered into despite that section.

(2) Despite subsection (1), in Ontario, only the regulator may make such a decision.

[…]

ANNEX D

PROPOSED CHANGES TO
NATIONAL POLICY 62-203 *TAKE-OVER BIDS AND ISSUER BIDS*

1. The changes proposed to National Policy 62-203 Take-Over Bids and Issuer Bids are set out in this Schedule.

2. Section 1.1 is changed

(a) by replacing "Multilateral***" with "***National***",***

(b) by deleting ", except Ontario, and has been implemented as a rule or regulation in all jurisdictions, except Ontario. Part XX of the *Securities Act* (Ontario) (the Ontario Act) and Ontario Securities Commission Rule 62-504 *Take-Over Bids and Issuer Bids* (the Ontario Rule) govern take-over bids and issuer bids in Ontario only.***", and***

(c) by replacing "This Policy, the Instrument, the Ontario Act and the Ontario Rule are collectively***" with "***This Policy and the Instrument are together***".***

3. Section 2.1 is changed by adding ":" after "objectives***".***

4. Section 2.2 is changed by deleting, in the first paragraph, "in section 1.1 of the Instrument and subsection 89(1) of the Ontario Act***" and "***and subsection 89(1) of the Ontario Act***".***

5. Section 2.7 is changed by deleting "or clause 4.1(1)(b)(ii)(B) of the Ontario Rule***".***

6. The following sections are added:

2.10 Take-over bid deposit period – The Bid Regime requires all non-exempt take-over bids to remain open for a minimum deposit period of 120 days (section 2.28.1 of the Instrument). The 120 day minimum deposit period applies except in the following circumstances:

(a) the offeree issuer states in a news release a shorter deposit period for the bid of not less than 35 days that is acceptable to the offeree issuer board (section 2.28.2 of the Instrument); or

(b) the issuer issues a news release that it has agreed to enter into, or has determined to effect, a specified alternative transaction (section 2.28.3 of the Instrument).

Where a shorter minimum deposit period applies, an offeror that has not yet commenced its take-over bid can avail itself of the shorter minimum deposit period by establishing an initial deposit period of at least the number of days specified in the deposit period news release. In the case of an alternative

transaction, section 2.28.3 of the Instrument permits an offeror to establish an initial deposit period of as few as 35 days.

If an offeror has already commenced a take-over bid when a deposit period news release is issued or an alternative transaction is announced, sections 2.28.2 and 2.28.3 of the Instrument do not require the offeror to shorten the deposit period for its bid, nor do they apply to automatically shorten the initial deposit period of its bid. To avail itself of the permitted shorter initial deposit period, the offeror must vary its take-over bid in accordance with section 2.12 of the Instrument to reflect the earlier expiry date for the bid. As a consequence, the offeror must allow securities to be deposited under its bid for at least 10 days after the notice of variation even if the offeror's take-over bid would otherwise have already satisfied the shorter minimum deposit period.

2.11 Deposit period news release – A "deposit period news release" is defined, in part, as a news release issued by an offeree issuer in respect of a "proposed or commenced" take-over bid. A take-over bid is "proposed" if a person publicly announces that it intends to make a take-over bid for the securities of an offeree issuer. An anticipated but unannounced take-over bid or possible future take-over bid would not constitute a "proposed" take-over bid within the meaning of this definition.

A deposit period news release will state an initial deposit period for a take-over bid acceptable to the board of directors of the offeree issuer of not more than 120 days and not less than 35 days. A deposit period news release must describe the acceptable minimum deposit period by referring to a number of days from the date of the bid and not to specific calendar dates in order to facilitate the generic application of the shorter minimum deposit period to multiple take-over bids.

2.12 Multiple deposit period news releases – The Bid Regime does not restrict an offeree issuer from issuing multiple deposit period news releases in respect of a take-over bid or contemporaneous bids. While likely rare, we anticipate that there may be circumstances where an offeree issuer determines to further shorten a previously stated acceptable initial deposit period for a take-over bid or determines to state an acceptable shorter initial deposit period for a take-over bid after it had previously stated an acceptable initial deposit period for another take-over bid. In the event that an offeree issuer issues multiple deposit period news releases, the provisions in section 2.28.2 of the Instrument should be interpreted such that the shortest initial deposit period stated in a deposit period news release applies to all take-over bids that are subject to section 2.28.2 of the Instrument.

2.13 Alternative transaction – Section 2.28.3 of the Instrument provides that, in certain circumstances, the initial deposit period for a bid must be at least 35 days from the date of the bid if an issuer issues a news release announcing that it has "agreed to enter into, or determined to effect," an alternative transaction. An agreement to enter into an alternative transaction should be interpreted as having occurred when the issuer first makes a legally binding commitment to proceed

with the alternative transaction, subject to conditions such as security holder approval.

Where an issuer does not technically negotiate an alternative transaction with another party, such as in the case of a share consolidation, a determination to effect the alternative transaction should be interpreted as having occurred when the issuer's board of directors decides to proceed with the alternative transaction, subject to conditions.

Paragraph (b) of the definition of "alternative transaction" refers to "a transaction as a result of which a person, whether alone or with joint actors, would, directly or indirectly, acquire the issuer." This refers to the acquisition of all of the issuer and not merely the acquisition of a control position.

2.14 Alternative transaction – reliance on issuer news release – Section 2.28.3 of the Instrument provides for the reduction of the initial deposit period for a take-over bid to 35 days if an issuer issues a news release announcing that it has agreed to enter into, or determined to effect, an alternative transaction. Section 2.28.3 of the Instrument applies in respect of any transaction announced by an issuer that may reasonably be interpreted to be an "alternative transaction". An issuer that does not consider a transaction to be an alternative transaction for the purposes of section 2.28.3 of the Instrument should state that fact in its news release in respect of the transaction only if it believes that the transaction could be erroneously interpreted as an "alternative transaction".

2.15 Change in information – Subsection 2.11(5) of the Instrument provides that the initial deposit period for a take-over bid must not expire before 10 days after the date of a notice of change. If an offeror is required to send a notice of change in circumstances where the initial deposit period would expire less than 10 days from the date of the notice of change then the offeror would be obliged to further extend the initial deposit period to ensure that at least 10 days have elapsed before the expiry of the initial deposit period. **.**

7. These changes become effective on [●].

ANNEX E

PROPOSED AMENDMENTS TO
MULTILATERAL INSTRUMENT 11-102 *PASSPORT SYSTEM*

1. Multilateral Instrument 11-102 Passport System is amended by this Instrument.

2. Appendix D is amended by replacing the following:

Take-over bids and issuer bid requirements (TOB/IB) – Restrictions on acquisitions during take-over bid	s.2.2(1) of MI 62-104	s.93.1(1)
TOB/IB – Restrictions on acquisitions during issuer bid	s.2.3(1) of MI 62-104	s.93.1(4)
TOB/IB – Restrictions on acquisitions before take-over bid	s.2.4(1) of MI 62-104	s.93.2(1)
TOB/IB – Restrictions on acquisitions after bid	s.2.5 of MI 62-104	s.93.3(1)
TOB/IB – Restrictions on sales during formal bid	s.2.7(1) of MI 62-104	s.97.3(1)
TOB/IB – Duty to make bid to all security holders	s.2.8 of MI 62-104	s.94
TOB/IB – Commencement of bid	s.2.9 of MI 62-104	s.94.1(1) and (2)
TOB/IB – Offeror's circular	s.2.10 of MI 62-104	s.94.2(1) - (4) of *Securities Act* and s.3.1 of OSC Rule 62-504

TOB/IB – Change in information	s.2.11(1) of MI 62-104	s.94.3(1)
TOB/IB – Notice of change	s.2.11(4) of MI 62-104	s.94.3(4) of *Securities Act* and s.3.4 of OSC Rule 62-504
TOB/IB – Variation of terms	s.2.12(1) of MI 62-104	s.94.4(1)
TOB/IB – Notice of variation	s.2.12(2) of MI 62-104	s.94.4(2) of *Securities Act* and s.3.4 of OSC Rule 62-504
TOB/IB – Expiry date of bid if notice of variation	s.2.12(3) of MI 62-104	s.94.4(3)
TOB/IB – No variation after expiry	s.2.12(5) of MI 62-104	s.94.4(5)
TOB/IB – Filing and sending notice of change or notice of variation	s.2.13 of MI 62-104	s.94.5
TOB/IB – Change or variation in advertised take-over bid	s.2.14(1) of MI 62-104	s.94.6(1)
TOB/IB – Consent of expert – bid circular	s.2.15(2) of MI 62-104	s.94.7(1)
TOB/IB – Delivery and date of bid documents	s.2.16(1) of MI 62-104	s.94.8(1)
TOB/IB – Duty to prepare and send directors' circular	s.2.17 of MI 62-104	s.95(1)–(4) of *Securities Act* and s.3.2 of OSC Rule 62-504

TOB/IB – Notice of change	s.2.18 of MI 62-104	s.95.1(1) and (2) of *Securities Act* and s.3.4 of OSC Rule 62-504
TOB/IB – Filing directors' circular or notice of change	s.2.19 of MI 62-104	s.95.2
TOB/IB – Change in information in director's or officer's circular or notice of change	s.2.20(2) of MI 62-104	s.96(2)
TOB/IB – Form of director's or officer's circular	s.2.20(3) of MI 62-104	s.96(3) of *Securities Act* and s.3.3 of OSC Rule 62-504
TOB/IB – Send director's or officer's circular or notice of change to securityholders	s.2.20(5) of MI 62-104	s.96(5)
TOB/IB – File and send to offeror director's or officer's circular or notice of change	s.2.20(6) of MI 62-104	s.96(6)
TOB/IB – Form of notice of change for director's or officer's circular	s.2.20(7) of MI 62-104	s.96(7) of *Securities Act* and s.3.4 of OSC Rule 62-504
TOB/IB – Consent of expert, directors' circular, etc.	s.2.21 of MI 62-104	s.96.1

TOB/IB – Delivery and date of offeree issuer's documents	s.2.22(1) of MI 62-104	s.96.2(1)
TOB/IB – Consideration	s.2.23(1) of MI 62-104	s.97(1)
TOB/IB – Variation of consideration	s.2.23(3) of MI 62-104	s.97(3)
TOB/IB – Prohibition against collateral agreements	s.2.24 of MI 62-104	s.97.1(1)
TOB/IB – Proportionate take up and payment	s.2.26(1) of MI 62-104	s.97.2(1)
TOB/IB – Financing arrangements	s.2.27(1) of MI 62-104	s.97.3(1)
TOB/IB – Minimum deposit period	s.2.28 of MI 62-104	s.98(1)
TOB/IB – Prohibition on take up	s.2.29 of MI 62-104	s.98(2)
TOB/IB – Obligation to take up and pay for deposited securities	s.2.32 of MI 62-104	s.98.3
TOB/IB – Return of deposited securities	s.2.33 of MI 62-104	s.98.5
TOB/IB – News release on expiry of bid	s.2.34 of MI 62-104	s.98.6
TOB/IB – Language of bid documents	s.3.1 of MI 62-104	n/a
TOB/IB – Filing of documents by offeror	s.3.2(1) of MI 62-104	s.98.7 of *Securities Act* and s.5.1(1) of OSC Rule 62-504

TOB/IB – Filing of documents by offeree issuer	s.3.2(2) of MI 62-104	s.5.1(2) of OSC Rule 62-504
TOB/IB – Time period for filing	s.3.2(3) of MI 62-104	s.5.1(3) of OSC Rule 62-504
TOB/IB – Filing of subsequent agreement	s.3.2(4) of MI 62-104	s.5.1(4) of OSC Rule 62-504
TOB/IB – Certification of bid circulars	s.3.3(1) of MI 62-104	s.99(1)
TOB/IB – All directors and officers sign	s.3.3(2) of MI 62-104	s.99(2)
TOB/IB – Certification of directors' circular	s.3.3(3) of MI 62-104	s.99(3)
TOB/IB – Certification of individual director's or officer's circular	s.3.3(4) of MI 62-104	s.99(4)
TOB/IB – Obligation to provide security holder list	s.3.4(1) of MI 62-104	s.99.1(1)
TOB/IB – Application of Canada Business Corporations Act	s.3.4(2) of MI 62-104	s.99.1(2)
TOB/IB – Early Warning	s.5.2 of MI 62-104	s.102.1(1) – (4) of *Securities Act* and s.7.1 of OSC Rule 62-504
TOB/IB – Acquisitions during bid	s.5.3 of MI 62-104	s.102.2(1) and (2) of *Securities Act* and s.7.2(1) of OSC Rule 62-504
TOB/IB – Copies of news release and report	s.5.5 of MI 62-104	s.7.2(3) of OSC Rule 62-504

with the following:

Take-over bid and issuer bid requirements	NI 62-104

3. This Instrument comes into force on [●].

ANNEX F

PROPOSED AMENDMENTS TO
MULTILATERAL INSTRUMENT 13-102 *SYSTEM FEES FOR SEDAR AND NRD*

1. Multilateral Instrument 13-102 System Fees for SEDAR and NRD is amended by this Instrument.

2. Subsection 1(1) is amended

(a) by replacing the definition of "issuer bid***" with the following:***

"issuer bid" means an issuer bid to which Part 2 of National Instrument 62-104 *Take-Over Bids and Issuer Bids* applies; ***, and***

(b) by replacing the definition of "take-over bid***" with the following:***

"take-over bid" means a take-over bid to which Part 2 of National Instrument 62-104 *Take-Over Bids and Issuer Bids* applies. **.**

3. This Instrument comes into force on [●].

ANNEX G

PROPOSED AMENDMENTS TO
NATIONAL INSTRUMENT 43-101 *STANDARDS OF DISCLOSURE FOR MINERAL PROJECTS*

1. National Instrument 43-101 Standards of Disclosure for Mineral Projects is amended by this Instrument.

2. Section 1.1 is amended by adding the following definition:

"initial deposit period" has the meaning ascribed to that term in section 1.1 of National Instrument 62-104 *Take-Over Bids and Issuer Bids*. **.**

3. Subparagraph 4.2(5)(a)(ii) is amended by replacing "expiry of the take-over bid***" with "***the expiry of the initial deposit period***".***

4. This Instrument comes into force on [●].

ANNEX H

PROPOSED AMENDMENTS TO
MULTILATERAL INSTRUMENT 51-105 *ISSUERS QUOTED IN THE U.S. OVER-THE-COUNTER MARKETS*

1. Multilateral Instrument 51-105 Issuers Quoted in the U.S. Over-the-Counter Markets is amended by this Instrument.

2. Section 16 is amended by replacing "Multilateral***" with "***National***".***

3. This Instrument comes into force on [●].

ANNEX I

PROPOSED CHANGES TO
COMPANION POLICY 55-104CP *INSIDER REPORTING REQUIREMENTS AND EXEMPTIONS*

1. The changes proposed to Companion Policy 55-104CP Insider Reporting Requirements and Exemptions are set out in this Schedule.

2. Subsection 3.2(3) is changed

(a) by replacing "Multilateral***" with "***National***", and***

(b) by deleting "and in Ontario, subsection 90(1) of the Ontario Act***".***

3. These changes become effective on [●].

ANNEX J

PROPOSED AMENDMENTS TO
MULTILATERAL INSTRUMENT 61-101 *PROTECTION OF MINORITY SECURITY HOLDERS IN SPECIAL TRANSACTIONS*

1. Multilateral Instrument 61-101 Protection of Minority Security Holders in Special Transactions is amended by this Instrument.

2. Section 1.1 is amended

(a) by replacing "Multilateral***" with "***National***" and deleting "***, and in Ontario, a formal take-over bid or formal issuer bid as defined in section 89(1) of the *Securities Act*" in the definition of "***bid***",***

(b) by replacing "Multilateral***" with "***National***" and deleting "***, and in Ontario, section 89(1) of the *Securities Act*" in the definition of "***issuer bid***",***

(c) by replacing "Multilateral***" with "***National***" and deleting "***and in Ontario, section 91 of the *Securities Act,*" in the definition of "***joint actors***",***

(d) by replacing "Multilateral***" with "***National***" wherever the expression occurs, deleting "***and in Ontario, subsections 1.3 (1), (2) and (3) of Ontario Securities Commission Rule 62-504 *Take-Over Bids and Issuer Bids,*" and deleting "***and in Ontario, subsections 1.3 (1), (2) and (3) of OSC Rule 62-504 *Take-Over Bids and Issuer Bids,*" in the definition of "***market capitalization***",***

(e) by replacing "Multilateral***" with "***National***" and deleting "***, and in Ontario, section 89(1) of the *Securities Act*" in the definition of "***offeree issuer***",***

(f) by replacing "Multilateral***" with "***National***" and deleting "***, and in Ontario, section 89(1) of the *Securities Act*" in the definition of "***offeror***", and***

(g) by replacing "Multilateral***" with "***National***" and deleting "***, and in Ontario, section 89(1) of the *Securities Act*" in the definition of "***take-over bid***".***

3. Subsection 1.6(2) is amended

(a) by replacing "the following provisions apply:***" with "***the provisions of section 1.8 of National Instrument 62-104 *Take-Over Bids and Issuer Bids* apply.***",***

(b) by repealing paragraph 1.6(2)(a), and

(c) by repealing paragraph 1.6(2)(b).

4. Paragraph 2.2(1)(d) is amended

(a) by replacing "Multilateral***" with "***National***", and***

(b) by deleting "and in Ontario, Form 62-504F2 *Issuer Bid Circular* of OSC Rule 62-504 *Take-Over Bids and Issuer Bids*,***".***

5. Paragraph 4.2(3)(a) is amended

(a) by replacing "Multilateral***" with "***National***", and***

(b) by deleting "and in Ontario, Form 62-504F2 *Issuer Bid Circular* of OSC Rule 62-504 *Take-Over Bids and Issuer Bids*,***".***

6. Paragraph 5.3(3)(a) is amended

(a) by replacing "Multilateral***" with "***National***", and***

(b) by deleting "and in Ontario, Form 62-504F2 *Issuer Bid Circular* of OSC Rule 62-504 *Take-Over Bids and Issuer Bids*,***".***

7. Section 6.10 is amended

(a) by replacing "Multilateral***" with "***National***", and***

(b) by deleting "and in Ontario, sections 94.7 and 96.1 of the *Securities Act*,***".***

8. This Instrument comes into force on [●].

ANNEX K

PROPOSED CHANGES TO
COMPANION POLICY 61-101CP TO MULTILATERAL INSTRUMENT 61-101
PROTECTION OF MINORITY SECURITY HOLDERS IN SPECIAL TRANSACTIONS

1. The changes proposed to Companion Policy 61-101CP to Multilateral Instrument 61-101 Protection of Minority Security Holders in Special Transactions are set out in this Schedule.

2. Section 4.1 is changed by replacing "Subsection 2.2(1)(d) of the Instrument requires, for an insider bid, the disclosure required by Form 62-104F1 *Take-Over Bid Circular* of Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids*, and in Ontario, Form 62-504F1 *Take-Over Bid Circular* of OSC Rule 62-504 *Take Over Bids and Issuer Bids*, and by Form 62-104F2 *Issuer Bid Circular* of Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids*, and in Ontario, Form 62-504F2 *Issuer Bid Circular* of OSC Rule 62-504 Take Over Bids and Issuer Bids, appropriately modified. In our view, Form 62-104F2 and in Ontario, Form 62-504F2, disclosure would generally include, in addition to Form 62-104F1 and in Ontario, Form 62-504F1, disclosure,***" with "***For an insider bid, in addition to the disclosure required by Form 62-104F1 *Take-Over Bid Circular* of National Instrument 62-104 *Take-Over Bids and Issuer Bids*, subsection 2.2(1)(d) of the Instrument requires the disclosure required by Form 62-104F2 *Issuer Bid Circular* of National Instrument 62-104 *Take-Over Bids and Issuer Bids*, appropriately modified. In our view, Form 62-104F2 disclosure would generally include***".***

3. Section 4.2 is changed by deleting ", and in Ontario, Form 62-504F2,***" wherever the expression occurs.***

4. These changes become effective on [●].

ANNEX L

PROPOSED AMENDMENTS TO
NATIONAL INSTRUMENT 62-103 *THE EARLY WARNING SYSTEM*
AND RELATED TAKE-OVER BID AND INSIDER REPORTING ISSUES

1. National Instrument 62-103 The Early Warning System and Related Take-Over Bid and Insider Reporting Issues is amended by this Instrument.

2. Subsection 1.1(1) is amended

(a) by replacing "MI***" with "***NI***" and deleting "***and, in Ontario, has the meaning ascribed under paragraphs (a.1) to (f) of the definition of "associate" in subsection 1(1) of the *Securities Act* (Ontario)***" in the definition of "***associate***",***

(b) by replacing "MI***" with "***NI***" and deleting "***and, in Ontario, subsections 102.1(1) and 102.1(2) of the *Securities Act* (Ontario)***" in the definition of "***early warning requirements***",***

(c) by replacing the definition of "formal bid***" with the following:***

"formal bid" means a take-over bid or issuer bid made in accordance with Part 2 of NI 62-104; ***,***

(d) by repealing the definition of "MI 62-104***",***

(e) by replacing "MI***" with "***NI***" and deleting "***and, in Ontario, subsection 102.1(3) of the *Securities Act* (Ontario)***" in the definition of "***moratorium provisions***",***

(f) by adding the following definition:

"NI 62-104" means National Instrument 62-104 *Take-Over Bids and Issuer Bids*;***,***

(g) by replacing "MI***" with "***NI***" and deleting "***and, in Ontario, subsection 89(1) of the *Securities Act* (Ontario)***" in the definition of "***offeror***", and***

(h) by replacing "MI***" with "***NI***" and deleting "***and, in Ontario, subsection 89(1) of the *Securities Act* (Ontario)***" in the definition of "***offeror's securities***".***

3. Appendix D is amended

(a) by replacing "MI 62-104***" with "***NI 62-104***" wherever the expression occurs, and***

(b) by replacing "Subsections 1(5) and 1(6) and sections 90 and 91 of the *Securities Act* (Ontario)***" with "***Subsections 1(5) and 1(6) of the *Securities Act* (Ontario) and sections 1.8 and 1.9 of NI 62-104***".***

4. This Instrument comes into force on [●].

ANNEX M

Schedule M-1

Proposed Amendments to *Alberta Securities Commission Rules* (General)

1. The Alberta Securities Commission Rules (General) are amended by this Instrument.

2. Subsection 26(2) is amended by replacing "Multilateral***" with "***National***" wherever it occurs.***

3. This Instrument comes into force on ●

Schedule M-2

Proposed Adoption of Multilateral Instrument 13-102
***System Fees for SEDAR and NRD* as an Alberta Securities Commission Rule**

In Alberta Multilateral Instrument 13-102 *System Fees for SEDAR and NRD* (**MI 13-102**), including the proposed changes, is being proposed to be adopted as a rule of the Alberta Securities Commission. MI 13-102 is currently incorporated by reference into the Securities Regulation (Alberta). The proposed adoption of MI 13-102 will not result in additional fees under this proposal.

PART 1
DEFINITIONS AND INTERPRETATION

Definitions
1. (1) In this Instrument,

"annual information form" means an "AIF" as defined by National Instrument 51-102 *Continuous Disclosure Obligations* or an annual information form for the purposes of Part 9 of National Instrument 81-106 *Investment Fund Continuous Disclosure*;

"initial filer profile" means a filer profile filed in accordance with subsection 5.1(1) of National Instrument 13-101 *System for Electronic Document Analysis and Retrieval (SEDAR)*;

"issuer bid" means an issuer bid to which Part 2 of National Instrument 62-104 *Take-Over Bids and Issuer Bids* applies;

"shelf prospectus" means a prospectus filed under National Instrument 44-102 *Shelf Distributions*;

"take-over bid" means a take-over bid to which Part 2 of National Instrument 62-104 *Take-Over Bids and Issuer Bids* applies.

(2) In this Instrument, a term referred to in Column 1 of the following table has the meaning ascribed to it in the Instrument referred to in Column 2 opposite that term.

Column 1 **Defined Term**	**Column 2** **Instrument**
CPC instrument	National Instrument 45-106 *Prospectus Exemptions*
firm filer	National Instrument 31-102 *National Registration Database*
individual filer	National Instrument 31-102 *National Registration Database*
long form prospectus	National Instrument 41-101 *General Prospectus*

	Requirements
MJDS prospectus	National Instrument 71-101 *The Multijurisdictional Disclosure System*
NRD	National Instrument 31-102 *National Registration Database*
principal jurisdiction	Multilateral Instrument 11-102 *Passport System*
principal regulator	Multilateral Instrument 11-102 *Passport System*
rights offering	National Instrument 45-101 *Rights Offerings*
SEDAR	National Instrument 13-101 *System for Electronic Document Analysis and Retrieval (SEDAR)*
short form prospectus	National Instrument 41-101 *General Prospectus Requirements*
sponsoring firm	National Instrument 33-109 *Registration Information*, in Form 33-109F4 *Registration of Individuals and Review of Permitted Individuals*

Inconsistency with other instruments

2. If there is any conflict or inconsistency between this Instrument and National Instrument 13-101 *System for Electronic Document Analysis and Retrieval (SEDAR)* or National Instrument 31-102 *National Registration Database*, this Instrument prevails.

PART 2
SEDAR SYSTEM FEES

Local system fees

3. In Québec, a person or company making the type of filing described in Column C of Appendix A with the Autorité des marchés financiers must pay to the Autorité des marchés financiers the system fee specified in Column D of that Appendix.

System fees

4. (1) A person or company making a filing, in the local jurisdiction, of the type described in Column B of Appendix B, and of the category referred to in Column A of that Appendix, must pay to the securities regulatory authority the system fee specified in Column C or D of that Appendix, as the case may be.

(2) Despite subsection (1), if a person or company pays a fee referred to in item 1 or 2 of Appendix B, the person or company is not required to pay a fee with respect to any other filing referred to in that item made during the calendar year in which the payment was made.

(3) Despite subsection (1), in the calendar year that a person or company files its initial filer profile, the fee referred to in item 1 or 2 of Appendix B is prorated in accordance with the following formula:

$A \times B / 12$, where

A = the amount referred to in item 1 or 2 of Appendix B, as applicable, and

B = the number of months remaining in the calendar year following the month in which the initial filer profile was filed.

PART 3
NRD SYSTEM FEES

Enrolment Fee

5. If the local jurisdiction is a firm filer's principal jurisdiction, the firm filer must pay to the securities regulatory authority an enrolment fee of $500 upon enrolment in NRD.

NRD submission fee

6. (1) A firm filer must pay an NRD system fee in respect of an individual filer to the securities regulatory authority in the local jurisdiction if

(a) the firm filer is the sponsoring firm for the individual filer, and

(b) through the filing of a Form 33-109F4 *Registration of Individuals and Review of Permitted Individuals*, the individual filer registers or reactivates their registration in the local jurisdiction.

(**2**) The NRD system fee payable to the securities regulatory authority under subsection (1) by a sponsoring firm in respect of an individual filer is,

(a) if the securities regulatory authority is the principal regulator of the individual filer, $75.00, and

(b) in any other case, $20.50.

Annual NRD system fee

7. On December 31 of each year, a firm filer must pay an annual NRD system fee to the securities regulatory authority in the local jurisdiction equal to the total of the following:

(a) if the securities regulatory authority in the local jurisdiction is the principal regulator of one or more individuals who are individual filers on that date, and for which the firm filer is the sponsoring firm in that jurisdiction,

$75.00 × the number of those individuals, and

(b) if there are individual filers on that date for which the securities regulatory authority in the local jurisdiction is not the principal regulator, and for which the firm filer is the sponsoring firm in that jurisdiction,

$20.50 × the number of those individuals.

PART 4
PAYMENT OF FEES

Means of payment

8. A fee under section 3, 4, 6 or 7 must be paid through SEDAR or NRD, as the case may be.

PART 5
EXEMPTION

Exemption

9. (1) The regulator or the securities regulatory authority may grant an exemption from this Instrument, in whole or in part, subject to such conditions or restrictions as may be imposed in the exemption.

(2) Despite subsection (1), in Ontario, only the regulator may grant such an exemption.

(3) Except in Ontario, an exemption referred to in subsection (1) is granted under the statute referred to in Appendix B of National Instrument 14-101 *Definitions*, opposite the name of the local jurisdiction.

PART 6
EFFECTIVE DATE

Effective Date

10**.** This Instrument comes into force on ●.

Appendix A – Local SEDAR System Fees

(Section 3)

Column A **Local Jurisdiction**	**Column B** **Category of Filing**	**Column C** **Type of Filing**	**Column D** **System Fee**
Québec	Securities Offerings	Prospectus distribution to person outside Québec, if made from within Québec (section 12 of *Securities Act* (Québec))	$130.00

Appendix B – Other SEDAR System Fees

(Section 4)

Item	Column A Category of Filing	Column B Type of Filing	Column C System Fee Payable to Principal Regulator	Column D System Fee Payable to Each Other Securities Regulatory Authority
1	Annual filing fee for continuous disclosure - investment funds *Note: Excludes the annual information form and all other filings listed separately in items 3 to 21.*	Initial filer profile or annual financial statements (for investment funds)	$495.00	N/A
2	Annual filing fee for continuous disclosure *Note: Excludes the annual information form and all other filings listed separately in items 3 to 21.*	Initial filer profile or annual financial statements (for reporting issuers other than investment funds)	$705.00	$74.00
3	Investment fund issuers / securities offerings	Simplified prospectus, annual information form and fund facts (National Instrument 81-101 *Mutual Fund Prospectus Disclosure*)	$585.00, which applies in total to a combined filing, if one annual information form and one simplified prospectus are used to qualify the investment fund securities of more than one investment fund for distribution	$162.50, which applies in total to a combined filing, if one annual information form and one simplified prospectus are used to qualify the investment fund securities of more than one investment fund for distribution

Item	Column A Category of Filing	Column B Type of Filing	Column C System Fee Payable to Principal Regulator	Column D System Fee Payable to Each Other Securities Regulatory Authority
4		Long form prospectus	$715.00	$212.50
5	Investment fund issuers / continuous disclosure	Annual information form (National Instrument 81-106 *Investment Fund Continuous Disclosure*) for investment fund if not a short form prospectus issuer	$455.00	N/A
6	Investment fund issuers / continuous disclosure	Annual information form (National Instrument 81-106 *Investment Fund Continuous Disclosure*) for investment fund if short form prospectus issuer	$2,655.00	N/A
7	Investment fund issuers / exemptions and other applications	Exemptions and other applications (National Instrument 81-102 *Investment Funds*)	$195.00	$40.00
8		Exemptions and other applications in connection with a prospectus filing	$195.00	$82.50
9	Other issuers / securities offerings	Short form prospectus (National Instrument 44-101 *Short Form Prospectus Distributions*)	$390.00	$115.00
10		Shelf prospectus	$390.00	$115.00
11		MJDS Prospectus (National Instrument 71-101 *The Multijurisdictional Disclosure System*)	$390.00	$115.00
12		Long form prospectus	$715.00	$212.50
13		Rights offering material	$325.00	$115.00
14		Prospectus governed by CPC instrument (TSX Venture Exchange)	$715.00	$212.50
15	Other issuers / continuous disclosure	Annual information form, if neither an investment fund nor a short form prospectus issuer	$455.00	N/A

Item	Column A Category of Filing	Column B Type of Filing	Column C System Fee Payable to Principal Regulator	Column D System Fee Payable to Each Other Securities Regulatory Authority
16		Annual information form, if a short form prospectus issuer (other than an investment fund)	$2,655.00	N/A
17	Exemptions and other applications (if not an investment fund)	Exemptions and other applications in connection with prospectus filing	$195.00	$82.50
18	Other issuers / going private / related party transactions	Going private transaction filings	$325.00	$115.00
19		Related party transaction filings	$325.00	$115.00
20	Other issuers/securities acquisitions	Issuer bid filings	$195.00	$82.50
21	Third party filers/third party filings	Take-over bid filings	$195.00	$82.50

Submission by Ad Hoc Senior Securities Practitioners Group

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marches 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

June 26, 2015

c/o The Secretary
Ontario Securities Commission
20 Queen Street West
19th Floor, Box 55
Toronto, Ontario M5H 2S8

- and -

Anne-Marie Beaudoin
Corporate Secretary
Autorité des marches financiers
800, square Victoria, 22e étage
C.P. 246, tour de la Bourse
Montréal, Québec H4Z 1G3

Dear Sirs and Mesdames:

We are writing in response to the notice and request for comment issued by the Canadian Securities Administrators (**CSA**) on March 31, 2015 (the **Request for Comment**) proposing 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*, and Proposed Consequential Amendments (the **Proposed Bid Amendments**).

We are providing these comments in our personal capacities. They reflect our individual views and not those of our respective firms. Some of our respective firms (or other practitioners in our respective firms) may be making separate submissions to you in response to the Request for Comments, and the views of other practitioners within our respective firms may differ from ours on the issues discussed below.

We are writing regarding the proposed majority tender requirement in the Proposed Bid Amendments, which would require a formal bid to be accepted by holders of more than 50% of the affected securities. We wish to draw a potential issue with the requirement to your attention and to suggest a possible approach for addressing the point.

Background

By way of background, we wrote on July 11, 2013, advocating changes to the take-over bid rules in response to the CSA's proposals of March 14, 2013 regarding security holder rights plans and the consultation launched concurrently by the Autorité des marches financiers into securities regulators' response to defensive tactics. We believe that the CSA has, through the Proposed Bid Amendments,

made significant progress in developing a more balanced approach to the regulation of take-over bids, and we support the Proposed Bid Amendments for the reasons outlined in our July 11, 2013 letter. In our view, the amendments would provide boards of directors with a larger role in overseeing the target shareholder response to a proposed change of control transaction and would reduce potential structural coercion.

As noted in our July 11, 2013 letter, we agree with the proposed majority tender requirement, which is designed to address structural coercion. Shareholders faced with a take-over bid may feel forced to tender their shares even if they do not want the bid to succeed. Failing to tender may result in the shareholder either being left with an illiquid security and not participating in the benefit of any control premium implicit in the bid, or being subject to a forced "squeeze-out" transaction in which it would receive the same consideration but on a delayed basis. The new rule would, instead, allow shareholders to act collectively in making decisions regarding change of control transactions that are initiated by way of a take-over bid rather than a voting transaction.

Issue for Consideration

There may, however, be circumstances where the majority tender requirement would prevent a non-coercive bid from proceeding. For example, a control block holder or other insiders may not support the transaction because they have a stake in the outcome that is different from that of the minority shareholders. This could arise if they have a role in management or if there are related party arrangements that make the status quo important to those shareholders. Depending on the size of their investments taken together, it may not be practically possible for a bidder to achieve the 50% mandatory minimum tender condition. The question is whether, in those circumstances, the other shareholders should be able to accept the offer if the bidder is willing to proceed without acquiring the "insider" block and whether allowing that to occur would have a coercive impact on the holders of that block.

One approach to dealing with this scenario would be to exclude shares held in a control block or by insiders from being counted as part of the 50% condition. That would, in theory, allow a "disinterested" group of shareholders to determine collectively the outcome of the take-over bid. The risk of this being coercive to the holders of the control block and insiders would be mitigated by the Proposed Bid Amendment requiring the bidder to extend the bid for a minimum of 10 days when all of the conditions have been satisfied or waived. If 50% of the shares (other than shares held by a control block and insiders) are tendered, the holders of the excluded shares would still have the opportunity to tender during the mandatory extension period. As well, the insiders would in the contemplated fact situation hold sufficient shares to resist being forced out in a subsequent "squeeze out" transaction.

We recognize that these facts would be unusual[1]. In our view, the right approach will also ultimately turn on the facts of the particular case and there may be circumstances where control block or insider shares ought not to be excluded. It is difficult, if not impossible, to anticipate each potential future fact situation and to develop a rule that would fairly address each of those cases.

For that reason, we believe that it would be preferable to deal with potential unintended consequences by relying on the general exemption power under section 6.1 of the proposed amended National Instrument 62-104. This power would allow securities regulators to provide tailored relief from the new majority tender requirement where they determine it is appropriate to do so. We would also support the CSA including in National Policy 62-203 guidelines outlining the circumstances in which securities regulators

[1]This type of situation arose in the take-over bid by Hudbay Minerals Inc. for the shares of Augusta Resource Corporation. In that case, management of Augusta and certain other shareholders who together held approximately 33 percent of the shares of Augusta indicated they did not intend to tender to Hudbay's offer.

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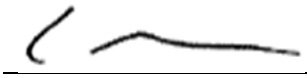
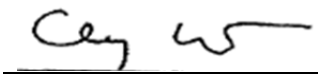
would be likely to grant exemptive relief from the majority tender requirement. Those guidelines could include a statement to the effect that it is not expected that exemptive relief would be granted in respect of *de minimis* insider holdings absent special circumstances. This would avoid exemptive relief being sought on a routine basis for small director and officer shareholdings, given these will regularly arise but will generally be unlikely to affect the outcome of the bid.

Respectfully submitted by:



William J. Braithwaite



Clay Horner

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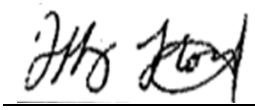

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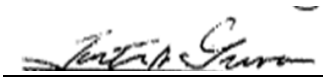
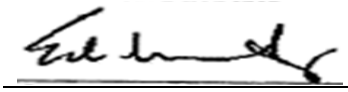


Garth M. Girvan

Vincent A. Mercier

Stephen H. Halperin



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June 29, 2015

The Secretary
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Me Anne-Marie Beaudoin
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Dear Sir/Madam:

I enclose my submission regarding the Proposed National Instrument relating to takeover bid law in Canada.

Thank you for your consideration.

Yours truly,

Anita Anand

Encl.

1. Introduction

When faced with an unwanted acquisition proposal, a target board may seek shareholder approval for a shareholder rights plan or "poison pill" to prevent acquisitions of its securities above the 20 percent legislative takeover bid threshold. The pill provides time for the target board to negotiate with the bidder for an enhanced bid, to solicit competing bids, or to propose some other alternative to its shareholders.[1] In the absence of a higher offer from the bidder and no alternatives coming forward, case law says that "the pill must go"[2] and the original bidder can proceed with its proposed acquisition transaction.[3] But poison pills, even those ratified by shareholders, can remove the decision about whether a bid proceeds from the hands of shareholders, leaving it to rest with incumbent target management and the board who may not necessarily act in the shareholders' best interests.

The Canadian Securities Administrators (CSA) recently proposed a new framework for the regulation of takeover bids.[4] The framework contains the most significant reforms to the takeover bid regime in Canada in decades.[5] Under the Proposal, takeover bids would have an irrevocable 50 percent minimum tender condition and would remain open for a minimum of 120 days.[6] The 50 percent condition means that a bid would succeed only if a majority of independent shareholders tendered their securities in response to the bidder's offer (securities of the bidder and its joint actors

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[1] Marcel Kahan and Edward B Rock, "How I learned to Stop Worrying and Love the Pill" 69 (2002) University of Chicago Law Review 871.

[2] See *Re Royal Host Real Estate Investment Trust* (1999), 8 ASCS 3672, online: Alberta Securities Commission <http://www.asc.ca/Notices%20Decisions%20Orders%20%20Rulings/Issuers/6974_Royal_Host_Real_Estate_Investment_Trust_(The)_-_Reasons_-_1999-11-24.pdf> [*Royal Host*].

[3] Certain cases have evidenced an alternative regulatory approach, but they are the exception rather than the norm. See e.g. *Re Neo Materials Technologies Inc.*, 2009 LNONOSC 638, online: Ontario Securities Commission <https://www.osc.gov.on.ca/documents/en/Proceedings-RAD/rad_20090901_neo-material.pdf>; *Re Pulse Data Inc.*, 2007 ABASC 895, online: Alberta Securities Commission <http://albertasecurities.com/Notices%20Decisions%20Orders%20%20Rulings/Issuers/Pulse%20Data%20Inc_Nov30.pdf>.

[4] CSA Notice And Request For Comment "Proposed Amendments To Multilateral Instrument 62-104 Take-Over Bids And Issuer Bids Proposed Changes To National Policy 62-203 Take-Over Bids And Issuer Bids And Proposed Consequential Amendments" online: http://www.osc.gov.on.ca/documents/en/Securities-Category6/csa_20150331_62-104_rfc-proposed-admendments-multilateral-instrument.pdf (March 31, 2015)[hereafter "*50-10-120*," the "*CSA Proposal*" or the "*Proposal*"].

[5] In terms of actual legislation, Canada's takeover bid regime was introduced following the significant recommendations contained in the *Report of the Attorney General's Committee on Securities Legislation in Ontario* (Toronto: Queen's Printer, 1965) [*Kimber Report*]. For history see Condon et al, Securities Law in Canada: Cases and Commentary, 2d ed. (Toronto: Emond Montgomery, 2010).

[6] CSA Proposal, *supra* note 4 at 2.

would not be counted in the 50 percent). Once the condition is met, the proposed rules would require an additional ten-day right to tender for undecided shareholders.

The CSA Proposal is a watershed moment in Canadian securities regulation: it contains important substantive amendments to the legislative regime and represents a united front for the provincial and territorial jurisdictions that comprise the CSA. The Proposal has been released for comment but even when the comment period closes, the CSA will be hard-pressed to amend the proposal in a material way given the difficulty in reaching the current compromise.[7] Thus, the Proposal may well represent the takeover bid law that will apply across the country.

2. Poison Pills

Poison pills are a defensive tactic that enable the corporation to shield itself against hostile or unwelcome bidders. By adopting the pill, the target board deters potential acquirers from purchasing twenty percent (i.e. threshold which triggers the takeover bid rules) or more of the target's shares. The pill makes the acquisition expensive and is attractive for the board and management who may believe that a bid is not in the best interests of the corporation. They may wish to steer the corporation away from the bid and towards another transaction or approach for the corporation. In Canada, unlike in the U.S., the pill provides the board with flexibility to respond to the takeover bid rather than to eschew it altogether.

The target may adopt a poison pill prior to any hostile bid being launched or they may be asked to do so in the face of a bid (a so-called "tactical" pill). Once shareholders ratify the pill, the decision rests with the board regarding whether to trigger it, though, in reality, this rarely happens as the hostile bidder typically attempts to negotiate with the target or launches a proxy contest to replace the target board altogether. To be sure, if triggered, the poison pill would allow existing shareholders, except the bidder, to purchase shares at a discount so as to dilute the bidder's holdings

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[7] At one point in the process, the Autorité des Marchés Financiers and the Ontario Securities Commission were divided in their approaches to the issues. For the early AMF position, see *An Alternative Approach to Securities Regulators' Intervention in Defensive Tactics (*Autorité des Marchés Financiers, 2013), online: http://www.lautorite.qc.ca/files//pdf/consultations/juin-2013/2013mars14-avis-amf-62-105-cons-publ-en.pdf [*AMF Report*]. See also CSA Notice 62-306
"Update on Proposed National Instrument 62-105 *Security Holder Rights Plans* and AMF Consultation Paper "*An Alternative Approach to Securities Regulators' Intervention in Defensive Tactics"* *http://www.osc.gov.on.ca/en/SecuritiesLaw_rule_20140911_62-306_update-holder-rights-plan.htm*.

in the target.[8] In this way, the pill (and by implication, the legal rules that permit the use of this defensive tactic) discriminates (or allows discrimination) as between the bidder *qua* shareholder and all other shareholders of the target. This discrimination runs contrary to the principle of equal treatment in securities regulation embodied in provisions such as the identical consideration provision (which ensures that all shareholders receive the same price for their shares).[9]

What then is the rationale for poison pills? These defensive tactics were meant to prevent hostile bidders from encouraging target shareholders to tender to an unreasonably low bid. In theory, the pill makes it prohibitively costly for the hostile bidder to obtain control of the target without the target board's cooperation.[10] But the pill also places a wedge between the bidder and the target shareholders to whom it has made the offer. It puts management and the board in the driver's seat by increasing the cost of the bid and by forcing the bidder to negotiate with the board as opposed to the shareholders. The pill allows management and the board to bargain on behalf of shareholders, to seek out a higher or more attractive offer so that shareholders do not fall prey to the tactics of the hostile bidder.[11] Without a pill, a bidder could exploit coordination problems among widely disseminated shareholders and pay less for control than if the target were to face an auction.

But placing the bargaining power with the board and management gives rise to a concern that these parties may be conflicted.[12] As rational, self-interested actors, directors may well act in their own best interests rather than in the corporation's, regardless of their ongoing fiduciary duty.[13] In the face of a hostile takeover bid where they may lose their positions following a change of control,

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[8] This is known as a "flip-in" provision (the most common type) which typically states that upon the acquisition of a certain percentage (10 or 20 percent) of the target's outstanding securities, each right other than those held by the bidder entitles its holder upon payment to acquire the target's securities having a market value equal to some multiple (e.g. two times) of the exercise price. See "Poison Pill", online: Macabacus <https://www.macabacus.com/defense/poison-pill>.

[9] OSA, s 97(1) and s 97.2(1). On the concept of equality in securities regulation, see Anita Anand, "Regulating Issuer Bids: The Case of the Dutch Auction" (2000) 45 McGill LJ 133. See also Jeffrey MacIntosh, "Poison Pills in Canada: A Reply to Dey and Yalden" in (1991) 17 CBLJ 323 at 334 [*A Reply to Dey and Yalden*], written in reply to Peter Dey and Robert Yalden, "Keeping the Playing Field Level: Poison Pills and Directors' Fiduciary Duties in Canadian Take-Over Law" (1991) 17 CBLJ 252.

[10] Jeffrey G MacIntosh, "The Poison Pill; A Noxious Nostrum for Canadian Shareholders" (1989) 15 CBLJ 276 [*Nostrum*].

[11] MacIntosh, *Nostrum ibid.* at 278-279. See also Jeffrey MacIntosh, *A Reply to Dey and Yalden*, *supra* note 8.

[12] Kimber Report *supra* note 5; *347883 Alberta Ltd v Producers Pipelines Ltd* (1991), 80 DLR (4th) 359 (Sask CA) [*Producers Pipelines*].

[13] As Jensen and Meckling explain, if both parties to an agency relationship "are utility maximizers, there is good reason to believe that the agent will not always act in the best interests of the principal." Michael C Jensen & William H Meckling, "Theory of the Firm: Managerial Behaviour, Agency Costs, and Ownership Structure" (1976) 3 Journal of Financial Economics 305 at 309.

management and the board may make efforts to perpetuate themselves in office.[14] They may simply seek to retain their current position or even to "extract higher wages and larger perquisites from shareholders, and obtain more latitude in determining corporate strategy."[15]

The concern with management entrenchment provides the historic rationale of Canadian takeover bid law.[16] Yet, some question the validity of the so-called "management entrenchment hypothesis." First, one cannot determine with certainty that directors and management seek to entrench themselves in any given situation. Second, the theory ignores senior managers' and directors' attempts to fulfill their fiduciary duties. The OSC has recognized that target boards of directors genuinely attempt to fulfill their fiduciary duties to the corporation, holding that a measure of deference should be accorded to board decisions.[17] However, the question is not whether managers and the board *will* put their own interests ahead of the corporation and its stakeholders but rather whether they *may* do so. As long as management and the board have the opportunity to prioritize their own interests above the corporation's, management entrenchment retains relevancy.

Why not then strip senior management and the board of their powers outside of the takeover context and let shareholders make all major decisions? As discussed above, takeover contests are not the ordinary course of business. Given that there is a change of control on the immediate horizon, takeovers intensify the threat of management entrenchment as directors and senior managers contemplate a potential loss of board seats and/or employment. Thus the applicable legal regime must minimize the impact of potential conflicts of interest at the board and senior management level.

The legislative rationale for poison pills in Canada is set forth in National Policy 62-202, which articulates two underlying principles regarding a board's implementation of takeover defences. First, unrestricted auctions produce the most desirable results in takeover situations. Second, shareholders of the target should generally be given an opportunity to determine the ultimate outcome of the hostile bid by making a fully informed decision.[18] As a consequence of these

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[14] See *Producers Pipelines*, *supra* note 12 and MacIntosh *Nostrum supra* note 10. In the era of high executive compensation, the MEH continues to have force and relevance.
[15] Andrei Shleifer & Robert W Vishny, "Management Entrenchment: The Case of Manager-Specific Investments" (1989) 25 Journal of Financial Economics 123.
[16] Kimber Report, *supra* note 5 and *Producers Pipelines*, *supra* note 12.
[17] *Neo Materials Technologies Inc.*, *supra* note 3 at 91, 103.
[18] *National Policy* 62-202, Take-Over Bids: Defensive Tactics [NP 62-202].

principles, Canadian securities commissions have historically allowed target boards to use defensive tactics solely to attempt to obtain a better bid, rather than to reject a bid outright.

This may sounds straightforward but it's not. Poison pill cases turn on the specific facts of the case and these facts always differ.[19] Securities commissions, which are administrative bodies that are not required to adhere to a system of precedent, have held that a number of factors must be considered in making the determination of whether a defensive tactic can remain in place, including whether the bid is coercive or unfair to target shareholders; when the pill was adopted; whether the board obtained shareholder approval of the pill; and the status of any auction process being conducted by the target in order to source a higher offer.[20] The case-specific approach has injected unwelcome uncertainty into the market.[21] This uncertainty potentially hampers bids, since market participants cannot know ex ante what rules will apply to their bid, whether the bid will be permitted to proceed, or what the corresponding timeframe will be. Arguably, decisions about takeover bids should not rest only with the board or with the regulator, but with those who are most affected by the transaction: the target shareholders.

Now one could argue that uncertainty is not necessarily disadvantageous to the target shareholders if it results from a period during which the board is exploring alternatives. While this argument has merit, it does not take into account the potential for management and the board to search for alternatives that are more self-serving than the original offer. The lengthier the bid period, the more leeway for the board to delay or forgo decisions that may be in the shareholders' best interests.

3. Reform of Takeover Bid Regime?

In light of the uncertainty emanating from the case law, the question persists as to whether reform of Canada's takeover bid law regime, including as contemplated in the CSA Proposal, is warranted. The CSA Proposal, dubbed "50-10-120," seeks to strike a certain balance between the interests of

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[19] See *Re Royal Host Real Estate Investment Trust* (1999), 8 ASCS 3672, online: Alberta Securities Commission <http://www.asc.ca/Notices%20Decisions%20Orders%20%20Rulings/Issuers/6974_Royal_Host_Real_Estate_Investment_Trust_(The)_-_Reasons_-_1999-11-24.pdf> [*Royal Host*].
[19] See *Re Baffinland Iron Mines Corp,* 2010 LNONOSC 904; *Lions Gate Entertainment Corp,* 2010 BCSECCOM 432.
[20] *See HudBay Minerals Inc and Augusta Resource Corporation,* (Re) 2014 BCSECCOM 153 [*Hudbay]*
[21] See *Re Neo Materials Technologies Inc.*, 2009 LNONOSC 638, online: Ontario Securities Commission <https://www.osc.gov.on.ca/documents/en/Proceedings-RAD/rad_20090901_neo-material.pdf>; *Re Pulse Data Inc.*, 2007 ABASC 895, online: Alberta Securities Commission <http://albertasecurities.com/Notices%20Decisions%20Orders%20%20Rulings/Issuers/Pulse%20Data%20Inc_Nov30.pdf>.

target shareholders and the target board. Under the Proposal, bids would be subject to a mandatory (i.e. unwaivable) minimum tender condition of more than 50 percent of all outstanding target securities, excluding those held by the bidder and its joint actors. Bids would therefore only succeed with the support of a majority of independent shareholders.

The 50-percent minimum tender condition is consistent with the arguments above as it weighs in favour of shareholder decision-making. The underlying rationale is that in a hostile bid, "each shareholder must ultimately be given access to an offer and the opportunity to tender."[22] Akin to a shareholder vote, this approach allows majority shareholders the ability to determine whether the takeover bid will succeed. Minority shareholders who wish to tender but whose views deviate from the majority who do not tender, will not have their shares taken up pursuant to the bid. In an era where shareholders are increasingly sophisticated,[23] it makes sense to allow bidders to "speak to" target shareholders directly – especially in the case of poison pills that are not approved by shareholders.

The minimum tender condition will prevent bidders from being able to corner target shareholders into the undesirable choice of selling into an underpriced offer or being stuck with illiquid shares.[24] While this aspect of the CSA Proposal is laudable, the 120-day bid period is ill-conceived. Hostile bidders will likely feel exposed under the 120-day period since their bid for remains open and a white knight can come forward during this time.[25] Further, financing will likely be more expensive and more risky. Financial resources that bidders have allocated to purchase the target's shares remain in limbo (i.e. unusable) while the 120-day clock ticks.

The 120-day bid period will, as a result, deter bids and certainly hostile bids from occurring, which is optimal from neither an economic efficiency nor an investor protection standpoint. It is true that the target board can reduce the 120-day period as it might in a friendly transaction. If it does, the bid must remain open for a minimum of 35 days and all bids would

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[22] See James C Tory et al, "Canadian securities regulators' decisions on poison pills diverge" (30 July 2010), online: Torys <www.torys.com>.
[23] See Jeffrey Macintosh, "The Role of Institutional and Retail Investors in Canadian Capital Markets" 31:2 Osgoode Hall Law Journal 372.
[24] See Anita Anand, "New Canadian Securities Administrators' Rules would discourage takeover bids," *The National Post* (April 1, 2015).
[25] See MacIntosh states in *A Reply to Dey and Yalden*, *supra* note 9 at 332.

be subject to the same period.[26] But the argument here is that 35 days should be the ceiling, not the floor, in terms of the time during which the target board has to act. The justification for such a lengthy bid period, including the negative implications for target shareholders, bidders and takeover bids generally, has not been made in the CSA Proposal.

If implemented, the CSA Proposal means that specific requirements relating to majority approval and bid periods will govern takeover bids. The law relating to takeover bids will, therefore be more certain and will lead to less poison pill litigation. In this way, the CSA Proposal is, generally, an improvement on the law that it would leave behind. But it could be the case that instead of relying on poison pills, target boards will then implement other defensive tactics (asset sales or private placements, for example) as they will have a lengthy period of 120 days in which to do so. It seems plausible that regulatory intervention may occur as a result of tactics *other than* poison pills. Furthermore, nothing seems to prohibit target boards from implementing tactical pills prior to the expiry of the 120-day bid period. With no national securities regulator in place, it is possible that individual jurisdictions will address tactical pills differently and the fragmentation that has plagued the takeover bid regime in the past will continue.

4. Conclusion

Poison pills adopted without shareholder approval remove decisions about a hostile bid from shareholders, allowing them to rest with the target board. As long as agency costs in the takeover bid context exist, shareholders should be able to decide the fate of their investment. A 120-day bid period during which the bid can remain open disadvantages both target shareholders and bidders and would ultimately deter bids from occurring. It is counterintuitive for takeover bid rules to have the effect of discouraging bids; surely a solution, which better attends to shareholder interests, can be found.

[26] CSA Proposal, *supra* note 4 at section 2.28.

June 29, 2015

BY 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 (New Brunswick)
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Nunavut

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and

Me Anne-Marie Beaudoin, Corporate Secretary
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Dear Sirs/Mesdames:

Re: Proposed Amendments to Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids*, Proposed Changes to National Policy 62-203 *Take-Over Bids and Issuer Bids* and Proposed Consequential Amendments (the "Proposed Amendments")

The Canadian Advocacy Council[1] for Canadian CFA Institute[2] Societies (the CAC) appreciates the opportunity to comment on the questions relating to the Proposed Amendments.

[1]The CAC represents the 14,000 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.

As a general comment, we strongly support the harmonization of the proposed amendments to the take-over bid rules throughout Canada, which will simplify the process for bidders and target companies. We also agree with the introduction of the minimum tender requirement, the additional 10 day extension as well as the minimum deposit period of 120 days as an improvement over the wholesale adoption of either of the previous CSA proposal or AMF proposal and over maintaining the status quo.

We would have preferred to see additional rights and protections for minority shareholders addressed in the Proposed Amendments. While the proposed 10 day extension period does help address concerns with respect to the potential coercion of minority shareholders, the Proposed Amendments do not tackle issues raised by the use of rights plans and other defensive tactics. While the use of such measures may fall out of favour if a longer deposit period is implemented, the Proposed Amendments do not address the problems related to board entrenchment that can occur with the use of a rights plan. We supported the portion of the CSA's proposal which would have allowed an offeree board to maintain a rights plan if a majority of equity or voting securities (excluding certain securities) were voted in favour of the plan. We also believe that additional guidance on when the securities regulatory authorities will intervene to cease trade a rights plan would be helpful to market participants.

1. *The Proposed Bid Amendments contemplate the reduction of the minimum deposit period for take-over bids in the event that the offeree board issues a deposit period news release. Do you anticipate any difficulties with the application of the Proposed Bid Amendments as they relate to a deposit period news release and the ability of an offeror to reduce the initial deposit period for its bid as a result of the issuance of a deposit period news release*?

We are of the view that a reduction in the initial deposit period to 35 days may be an acceptable time period, in the expected circumstances where the board has, in the exercise of its fiduciary duties and acting in the best interests of shareholders, chosen to support the bid. The relevant materials will be immediately available on SEDAR for consideration by investors such that they will have sufficient time to make an informed decision whether or not to tender; it may otherwise take some time to receive the materials in the mail, thereby effectively shortening the 35 day period.

2. *The Proposed Bid Amendments provide that the minimum deposit period for an outstanding or future take-over bid for an issuer must be at least 35 days if the issuer announces that it has agreed to enter into, or determined to effect, an "alternative transaction". The Proposed Bid Amendments include a definition of "alternative*

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[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 119,000 members in 147 countries and territories, including 112,000 CFA charterholders, and 143 member societies. For more information, visit www.cfainstitute.org.

transaction" that is intended to encompass transactions generally involving the acquisition of an issuer or its business. Do you agree with the scope of the definition of "alternative transaction"? If not, please explain why you disagree with the scope and what changes to the definition you would propose.

We agree with the breadth of the definition of "alternative transaction" and that its scope is sufficiently comprehensive.

3. *Do you anticipate any difficulties with the application of the Proposed Bid Amendments as they relate to alternative transactions? Does the proposed policy guidance in sections 2.13 and 2.14 of NP 62-203 assist with interpretation of the alternative transaction provisions*?

We do not anticipate any difficulties with the application of the Proposed Bid Amendments as they relate to alternative transactions.

4. *The Proposed Bid Amendments include a number of provisions that are specific to partial take-over bids. In particular, the Proposed Bid Amendments contemplate that an offeror making a partial take-over bid is only obligated to take up, at the expiry of the initial deposit period and assuming all pre-conditions to the bid are met, the maximum number of securities it can without contravening the pro rata take up requirement (s. 2.32.1(6)). Then, at the expiry of the mandatory 10 day extension period, the offeror must complete the pro rata take up obligation in respect of securities previously deposited (but not taken up) and securities deposited during the mandatory 10 day extension period (s. 2.32.1(7)). Would policy guidance concerning the interpretation or application of the Proposed Bid Amendments as they relate to partial take-over bids be useful? If so, please explain*.

Additional policy guidance could be helpful with respect to the number of securities that can be taken up subsequent to the initial deposit period but prior to the end of the mandatory 10 day extension period (i.e. a numerical example).

5. *The Proposed Bid Amendments include revisions to the take up and payment and withdrawal right provisions in the take-over bid regime. Do you agree with these proposed changes or foresee any unintended consequences as a result of these changes? In particular, do you agree that there should not be withdrawal rights for securities deposited to a partial take-over bid prior to the expiry of the initial deposit period for so long as they are not taken up until the end of the mandatory 10 day extension period*?

While withdrawal rights empower shareholders and we are of the view that security holders should generally be permitted to withdraw their shares, we agree that in the narrow circumstance related to securities deposited under a partial take-over bid prior to take-up permitting withdrawal rights could defeat the purpose of the 10 day extension period and could possibly result in a failed bid.

6. *Are the current time limits set out in subsections 2.17(1) and (3) sufficient to enable directors to properly evaluate an unsolicited take-over bid and formulate a meaningful recommendation to security holders with respect to such bid*?

We are not aware of any practical issues resulting from the current time limits; it would be beneficial for shareholders if directors made their recommendation as soon as possible.

7. *Do you anticipate any changes to market activity or the trading of offeree issuer securities during a take-over bid as a result of the Proposed Bid Amendments? If so, please explain.*

We do not have a view as to whether any changes to market activity or trading of offeree issuer securities will result from the Proposed Amendments. If market participants wish to try to profit from price discrepancies or otherwise they will likely continue to do so within the regulatory framework regardless of the final form of the rules.

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) *Cecilia Wong*

Cecilia Wong, CFA
Chair, Canadian Advocacy Council

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June 29, 2015

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
The 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 (New Brunswick)
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Northwest Territory
Superintendent of Securities, Nunavut

The Secretary
Ontario Securities Commission
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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

Dear Sirs/Mesdames:

Re: 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

Thank you for the opportunity to comment on the proposed amendments to Multilateral Instrument 62-104 Take-Over Bids and Issuer Bids (**MI 62-104**) and changes to National Policy 62-203 Take-Over Bids and Issuer Bids (**NP 62-203**), (collectively, the **Proposed Bid Amendments**), both of which were published for comment on March 31, 2015. We appreciate the opportunity to be a part of the CSA's regulatory reform process and to contribute to these important developments.

Hurt Capital Inc. is a research-driven investment and venture advisory firm. Since 2008, our investment selections in the capital markets have outpaced the S&P 500. This was achieved with minimal trading, and predominantly a buy-and-hold approach to investing. We attribute this success to an investment methodology rooted in academic research, alongside the traditional value investing principles taught by Ben Graham at Columbia University in the 1930's and espoused by Warren Buffett with much success in recent years. Our research in this field has a reasonable prospect of enhancing the competitiveness of Canada's capital markets and advancing the future of the Canadian economy.

Overall, we are supportive of the intent of the Proposed Amendments to allow issuers subject to an unsolicited bid time to adequately evaluate and consider competing proposals. In extending the period, however, a careful balance must be maintained to minimize the cost burdens and risk exposure for offerors. The 120 day period may act as a deterrent to offerors, providing disincentive for potential transactions that would otherwise enhance value.

We appreciate the CSA's significant efforts to strike a balance between the rights of security holders, offeree issuers and offerors. Our comments that follow are general in nature with a view to informing the overall trajectory of securities reform, including the policy objectives of the Proposed Bid Amendments and the take-over bid regime.

"An Indeterminate Theory of Canadian Corporate Law",[1] published in the University of British Columbia Law Review and made publicly available on SSRN, lays the foundation of a distinct theory for the enhanced efficiency of public corporations. In revisiting the *BCE* decision, this article uncovers fresh insights and reveals new theoretical implications on this otherwise challenging development in corporate governance. Within a detailed analysis of Canadian corporate law, elements of Warren Buffett's approach to corporate governance are compared to Canada's distinctive fiduciary duty, both essentially rejecting central tenets of shareholder primacy and stakeholder theory. In considering Buffett's control position in Berkshire Hathaway, which in turn holds a controlling interest in numerous other companies, this research posits that the existence of ethical dominant shareholders may enhance the economic efficiency of publicly traded firms. In militating against agency costs, companies with powerful shareholders may benefit from greater efficiencies, provided that an inversely correlated "discriminatory problem" is mitigated. Anecdotal evidence is drawn from Warren Buffett's preference for concentrated ownership structures combined with an approach to corporate governance that reduces "discriminatory costs", a variant of the agency costs pervasive in widely dispersed U.S. corporations.

In Canada, legal mechanisms have developed over a forty-year period in response to a prevalence of controlling shareholders and dual class share structures in public markets. The theoretical underpinning of Canadian corporate law has evolved within this context, which is almost precisely obverse to the principal-agent ownership structure observed by Berle and Means[2] in 1932 – specifically, the separation of ownership and control in U.S. firms. In contrast, the Canadian regime has advanced along a trajectory that contemplates a divergence of interests between dominant and dispersed shareholders, alongside conventional agency issues.

In a study on U.S. firms, funded by the Investor Responsibility Research Center Institute and conducted by Institutional Shareholder Services Inc., researchers found that controlled companies are on the rise. In 2002, the S&P 1500 Composite had 87 controlled firms; by 2012 this number was up 31% to 114. Within these firms, 79 contained multi-class capital structures with unequal voting rights, while 35 were controlled through a single class of voting stock.[3] Examples of this trend are found in Google's (U.S. $367 billion, market capitalization) multi-class share split to concentrate voting control in the hands of two shareholders, as is the control position of a single shareholder over Facebook ($246 billion).

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[1] Claudio R Rojas, "An Indeterminate Theory of Canadian Corporate Law" (2014) 47:1 UBC L Rev 59, online: SSRN <http://ssrn.com/abstract=2391775>.
[2] Adolf Berle & Gardiner Means, *The Modern Corporation and Private Property* (1932), (New York: Harcourt, Brace and World, 1967).
[3] Investor Responsibility Research Center Institute, "Controlled Companies in the Standard & Poor's 1500: A Ten Year Performance and Risk Review" (October 2012), online: <http://irrcinstitute.org>.

Concentrated shareholdings are also found in Berkshire Hathaway ($345 billion), Wal-Mart ($232 billion), Amazon ($201 billion) and Oracle ($178 billion). The aggregate market capitalization of these six firms is $1.57 trillion. Restated, a small group of individuals dictates corporate policy over firms holding a combined market capitalization of approximately one-twelfth the value of all S&P 500 companies ($19.76 trillion).[4] This is reminiscent of Canada's experience with concentrated shareholders holding significant influence or control over the country's largest public corporations.

Research out of Stanford University and Columbia Law School goes further. In a paper by Ronald J. Gilson and Jeffrey N. Gordon, *Agency Capitalism: Further Implications of Equity Intermediation*,[5] the authors contend that "the U.S. Supreme Court will come to realize what the Chancery Court has recognized for some time – that the doctrine of substantive coercion as a basis for takeover defense must give way as Delaware corporate law adapts to the very different shareholder distribution the capital market has now given us". The implication is that share ownership patterns in the U.S. equity markets reveal a gradual consolidation between ownership and control – restated, the landscape of U.S. capital markets is shifting.

Academic attention from prominent U.S. and UK scholars is intensifying on these issues. In "The Long-Term Effects of Hedge Fund Activism"[6], Bebchuk (Harvard), Brav (Duke) and Jiang (Columbia) uncover empirical evidence that shareholder interventions are followed by improvements in five-year operating performance. Edmans (Wharton), in "Blockholders and Corporate Governance"[7], reviews theoretical and empirical literature on the impact of large shareholders on governance and firm value. In "Corporate Governance According to Charles T. Munger"[8], Larcker and Tayan (Stanford) explore the connection between economic efficiency and business ethics. A noteworthy body of research from scholars at Harvard, Yale, Oxford, and Cambridge delves further (see e.g. Armour & Cheffins[9]; Armour, Hansmann & Kraakman[10]; Enriques, Hansmann & Kraakman,[11]; Cheffins,[12]; Bebchuk,[13]). Together, these studies suggest that shareholder power leveraged within a suitable ethical framework enhances economic efficiency, thereby benefiting the various constituents that depend on a corporation's sustainable operating performance.

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[4] As of June 29, 2015. All figures in U.S. dollars.

[5] Ronald J Gilson & Jeffrey N Gordon, "Agency Capitalism: Further Implications of Equity Intermediation" (2014). Stanford Law and Economics Olin Working Paper No. 456; Columbia Law and Economics Working Paper No. 461, online: SSRN <http://ssrn.com/abstract=2359690>.

[6] Lucian A Bebchuk, Alon Brav & Wei Jiang, "The Long-Term Effects of Hedge Fund Activism" (2015). Harvard Law School John M. Olin Center Discussion Paper No. 802; Columbia Law Review, Vol. 115, No. 5, pp. 1085-1156, June 2015, online: SSRN <http://ssrn.com/abstract=2291577>.

[7] Alex Edmans, "Blockholders and Corporate Governance" (2014). ECGI - Finance Working Paper No. 385, online: SSRN <http://ssrn.com/abstract=2285781>.

[8] David F Larcker & Brian Tayan, "Corporate Governance According to Charles T. Munger" (2014). Stanford University, *Closer Look Series: Topics, Issues and Controversies in Corporate Governance and Leadership* No. CGRP-38, online: SSRN <http://ssrn.com/abstract=2404077>.

[9] John Armour, & Brian R Cheffins, "The Rise and Fall (?) of Shareholder Activism by Hedge Funds" (2009). ECGI - Law Working Paper No. 136/2009, online: SSRN <http://ssrn.com/abstract=1489336>.

[10] John Armour, Henry Hansmann & Reinier Kraakman, "Agency Problems, Legal Strategies, and Enforcement" (2009). Oxford Legal Studies Research Paper No. 21/2009; Yale Law, Economics & Public Policy Research Paper No. 388; Harvard Law and Economics Research Paper Series No. 644; ECGI - Law Working Paper No. 135/2009, online: SSRN <http://ssrn.com/abstract=1436555>.

[11] Luca Enriques, Henry Hansmann & Reinier Kraakman, "The Basic Governance Structure: The Interests of Shareholders as a Class" in R Kraakman et al, eds, *The Anatomy of Corporate Law: A Comparative and Functional Approach*, 2d ed (New York: Oxford University Press, 2009); Luca Enriques, Henry Hansmann, & Reinier Kraakman, "The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies" in Kraakman et al, *ibid*.

[12] Brian R Cheffins, "Corporate Ownership and Control: British Business Transformed" (2008). Oxford University Press, online: SSRN <http://ssrn.com/abstract=1304194>.

[13] Lucian A Bebchuk, "The Case for Increasing Shareholder Power" (2005). Harvard Law Review, Vol. 118, No. 3, pp. 833-914, online: SSRN <http://ssrn.com/abstract=387940>.

In the U.S., the era of the Berle-Means corporation is in decline. The magnitude of this shift is underappreciated, yet seismic in its implications on corporate governance theory and securities regulation. Increasingly, shareholders wield the power to determine or significantly influence corporate policy in U.S. firms. In focusing upon this evolution in ownership structure – specifically, narrowing within the separation between ownership and control – a distinct economic theory for the enhanced efficiency of public corporations is emerging.

We encourage the CSA to consider the unique characteristics of Canada's capital markets, particularly with regard to concentrated share ownership patterns[14] and the inherent efficiencies that are implicitly shifting the U.S. landscape towards greater levels of shareholder influence over corporate policy.

Thank you for considering these comments.

Yours very truly,

Claudio R. Rojas

[14] Brian R Cheffins, "Hedge Fund Activism Canadian Style" (2014) 47:1 UBC L Rev 1. University of Cambridge Faculty of Law Research Paper No. 3/2013, online: SSRN <http://ssrn.com/abstract=2204294> ("the fact that the presence of dominant shareholders is a deterrent to offensive shareholder activism is highly relevant in the Canadian context… This ownership pattern discourages hedge fund activism in Canada").

Canadian Coalition for
GOOD GOVERNANCE

THE VOICE OF THE SHAREHOLDER

June 29, 2015

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Dear Sir/Madams:

Re: CSA Notice and Request for Comments on proposed amendments to Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids* and proposed changes to National Policy 62-203 *Take-Over Bids and Issuer Bids* (the "Proposed Amendments")

The Canadian Coalition for Good Governance ("CCGG") has reviewed the Proposed Amendments and we thank you for the opportunity to provide our comments. We are commenting only on those aspects of the Proposed Amendments which are of significant importance to our members.

CCGG's members are Canadian institutional investors that together manage approximately $3 trillion in assets on behalf of pension funds, mutual fund unit holders, and other institutional and individual investors. CCGG promotes good governance practices in Canadian public companies and the improvement of the regulatory environment in order to best align the interests of boards and management with those of their shareholders and to promote the efficiency and effectiveness of the Canadian capital markets. A list of our members is attached to this submission.

OVERVIEW

CCGG supports the CSA's endeavour to improve the take-over bid regime through the Proposed Amendments. While we support the majority of the Proposed Amendments because we believe they will help to address some important deficiencies in the existing regime, we do not support all of the components for the reasons discussed below.

The CSA articulates a two pronged goal it hopes to accomplish with the Proposed Amendments: (i) to enhance the quality and integrity of the take-over bid regime; and (ii) to rebalance the current dynamics among bidders, target boards, and target shareholders. CCGG supports the first of these goals but questions the assumptions underlying, and thus the need for, certain aspects of the second goal, in particular to the extent a rebalancing may permit boards to usurp shareholder decision-making power.

We provide our comments below on whether the Proposed Amendments are likely to achieve the CSA's stated goals and the extent to which we support those goals.

We also point out that once the CSA has decided on the new bid period (whether it be 120 days or, as we suggest in this letter, 90 days) it is essential that the CSA make it perfectly clear that a board will not be permitted to use a poison pill to extend the bid period any further.

COMMENTS ON PROPOSED AMENDMENTS

The Minimum Tender Requirement and the 10 Day Extension Requirement

CCGG supports the adoption of the Minimum Tender Requirement and the 10 Day Extension Requirement because together they address several problems with the existing system and will serve the laudable goal of enhancing the quality and integrity of the take-over bid regime.

In essence, the Minimum Tender Requirement mechanism allows for collective action on the part of shareholders responding to a bid that is comparable to a majority shareholder vote and prevents a change of control without the support of a majority of independent shareholders. Together with the 10 Day Extension Requirement it also mitigates the coercion to tender that can result, for example, when a shareholder does not support a bid but is afraid to be left in a minority position and miss out on a takeover bid premium if other shareholders tender to the bid and it goes ahead. They allow for a more informed tender than is guaranteed under the current regime in that shareholders can know the extent of shareholder support for a bid before tendering. Further they provide a mechanism to enable coordinated action on the part of shareholders and allow all shareholders to be treated equally in the context of a hostile bid. In short, they succeed at the CSA's expressed desire to facilitate "the ability of target shareholders to make voluntary, informed and co-ordinated tender decisions".

The second goal of the proposed amendments is to rebalance the current dynamics among bidders, target boards and target shareholders. As discussed in our earlier 2013 submission to the CSA and AMF[1] (the 2013 Submission), CCGG believes that the appropriate balance among the various players in a take-over bid regime is to place the decision about whether a bid is acceptable in the hands of the target shareholders and not the target board, although the board does have a role to play. To the extent that bidders are able to coerce shareholders to tender to a bid under the current system for fear of being left

[1] CCGG comments on CSA Proposals on Shareholder Rights Plans, July2013

behind, we agree that the power balance should shift and that this pressure to tender should be removed. For this reason as well we support the Minimum Tender Requirement and the 10 Day Extension Requirement because we believe they would achieve this rebalancing.

The 120 Day Requirement

The benefits of the Minimum Tender Requirement and the 10 Day Extension Requirement would accrue with or without an extended bid period requirement. However other benefits accrue to boards and shareholders with a bid period greater than the current regulatory requirement of 35 days. CCGG supports the establishment of a longer bid period in order to provide boards more time to consider and respond to unsolicited take-over bids by seeking value-maximizing alternatives or developing and articulating their views on the merits of the bid.

There is no correct answer as to what number of days should constitute the bid period, but we believe 90 days (rather than the current 35 day period which typically is extended to 45-60 days when a target board adopts a poison pill) is a supportable compromise that will provide the benefits of more time without the disadvantages of an overly long bid period. Accordingly, CCGG supports the 90 day minimum bid requirement proposed earlier by the CSA in its request for comments on proposals to amend the takeover bid regime issued on March 14, 2013.[2] For the reasons provided below, we believe that 120 days is excessive and the negatives will outweigh the benefits that accrue from more time and will not contribute to enhancing the quality and integrity of the take-over bid regime or rebalance the current regime in a positive way.

To begin with, there are additional costs (such as financing, legal, and investment banking and possible opportunity costs) involved for a bidder in a 120 day bid period rather than a 90 day bid period.

Further, the 120 Day Requirement would appear to be based on the argument that the current balance of power lies with the bidder to the detriment of the target board and shareholders and that this balance needs to be shifted towards the target board in order to avoid the 'fire sale' of the company or the inevitability of the company being acquired.[3]

The CSA has not provided any empirical evidence, nor has it provided a cost/benefit analysis, to support the proposed 120 Day Requirement. To the extent there is empirical evidence in Canada, however, it does not support the foregoing interpretation of the existing power balance. According to a 2015 study by law firm Fasken Martineau[4] approximately 28% of the targets of first-mover bids remain independent, which means that a sale of the company is by no means inevitable. Further, as we pointed out in our 2013 Submission, the fact that targets tend to be sold once a bid has been made rather than remain independent has not been shown to be a bad thing. Many target companies are underperformers and the market for corporate control functions as one of the most effective disciplines on management. The Fasken Study provides evidence that it may be, in fact, better for shareholders

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[2] CSA Notice and Request for Comment Proposed National Instrument 62-105

[3] Various comment letters to the CSA Notice and Request for comment proposed a 120 day minimum bid requirement and relied on this argument. See for example, Submission by Ad Hoc Senior Securities Practitioners Group, July 11, 2013

[4] 2015 Canadian Hostile Take-over Bid Study, Fasken Martineau LLP (the "Fasken Study"). The Fasken Study is the most relevant empirical evidence of which we are aware in Canada that relates to the 120 Day Requirement and therefore we refer to it several times in this letter.

generally that targets tend to be sold: on the first anniversary of the date of the announcement of the bid where the target remained independent, more than 60% of the targets trade at a discount to the final bid price. Accordingly, CCGG does not accept the view that power needs to be shifted from bidders to the target board in order to address negative consequences of the existing system.

CCGG believes that 120 days would serve, as will be discussed in more detail below, to shift power to target boards in a way that could be detrimental to shareholders and bidders and does not rebalance the system in a desirable way.

Do directors need more leverage?

The requirement in the Proposed Amendments that a bid remain open for a 120 day period appears to be modeled on proposals found in comment letters[5] submitted to the CSA and AMF in response to their 2013 proposals to amend the takeover bid regime.[6] As such, it is relevant to review the strength of those arguments for adopting a 120 day time period.

One group of commentators[7] acknowledges that "there is a lack of consensus as to what period of time would be sufficient to overcome" concerns about the length of time needed for a board to attempt to surface and consider alternatives to an unsolicited bid and asserts that a "minimum bid period of at least 120 days is critical to our proposal and is based on our experience advising both targets and bidders". They then go on to argue:

> "this *is fundamentally not merely about allowing a target board adequate time to identify and solicit interest from other bidders. The adequacy of the time period is also driven by the need to create negotiating leverage opposite the unsolicited bidder.* ... To advance alternatives and create effective negotiating leverage, the target board needs a *period long enough to create real uncertainty as to whether an unsolicited offer will succeed and to make obtaining the target board's cooperation valuable* to the bidder, therefore encouraging an unsolicited bidder and potential competing bidders to the bargaining table. *Without that tension, a target board is effectively required to conduct a 'fire sale' process* in which it is unlikely to achieve the best results for its shareholders. We do not believe that the 90 day period in the CSA Proposal is sufficient to change the current dynamic".[8] (Italics added)

Several points are relevant here.

Fire sale not inevitable

The submission by the Ad Hoc Senior Securities Practitioners Group was made before the empirical evidence published in the Fasken Study. As noted above, empirical evidence in the Fasken Study belies the claim that without bidders being forced to negotiate with the target board, a sale is inevitable.

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[5] See for example, Submission by Ad Hoc Senior Securities Practitioners Group, July 11, 2013

[6] Ibid see footnote 1; AMF Consultation Paper An Alternative Approach to Securities Regulators' Intervention in Defensive Tactics

[7] Submission by Ad Hoc Senior Securities Practitioners Group, ibid

[8] Submission by Ad Hoc Senior Securities Practitioners Group, ibid

Purpose of the 120 day period

Under the above-quoted view, a 120 day bid period is not just about providing adequate time to identify and solicit interest from other bidders. It would appear that another major purpose, and perhaps even the primary purpose, is to put the bidder in a position of uncertainty that will provide leverage to the target board. CCGG continues to believe that under corporate law takeover bids are unique in that the offer to tender is made directly by a bidder to target shareholders without the need for board approval. In effect, the relationship is one between bidder and target shareholders and is not intended that it be mediated by the target board.[9] Directors are asked only to make a recommendation to shareholders (or explain why not) but the decision whether to tender is a right of shareholders. We believe that uncertainty as to whether a bid will succeed should come from whether the quality and terms of the bid are acceptable to shareholders, not because the target board has been able to create that uncertainty by keeping the bid open for excessive periods of time.

Directors are not without power in the face of a hostile takeover bid

It is important to note that directors' recommendations carry substantial weight and empirical evidence suggests that boards are not in fact without power in the face of a hostile bid. The Fasken Study found that board support is a "prized asset" and that hostile bidders had a near-perfect record when securing the board's support and fared poorly without it: "where a bidder ultimately won the support of the target board, the bid succeeded in all but one contest, or 98% of the time. In contrast, a hostile bid succeeded only 22% of the time in the absence of board support".

Contrary to what many claim, under the current regime boards already have influence and power. The Fasken Study states that the "relatively greater alignment between the board's recommended outcome and the outcome that prevails may suggest that the board has a relatively greater degree of influence, and therefore leverage, in directing that outcome." As we noted in our 2013 Submission[10], boards' recommendations carry weight because of boards' superior knowledge of the company. Boards may use company resources when communicating those recommendations to shareholders and boards also can engage with shareholders to explain their views. The fact that shareholders tend to vote with management recommendations generally should not be discounted when assessing a board's power. The point is that shareholders should be free to accept or reject a board's recommendation and that the recommendation should not be determinative.[11]

120 days is not needed to bring out competing bids

The Fasken Study found that the vast majority of competing bids emerged after the expiry of the statutory 35 day minimum bid period but before 95 days, with 63% emerging between 35 days and 94 days. The highest percentage of 21% emerged between 35 to 44 days after the first mover bid. In the

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[9] Unlike arrangements or amalgamations which require board approval before they go to shareholders for approval

[10] Ibid, footnote 1, page 3

[11] We noted in our earlier submission that boards did make the choice of whether or not to accept the board's recommendation in the high profile proxy fights at CP and Agrium: in one case shareholders did not accept the board's arguments and in the other they did.

Fasken Study, no competitive bids emerged between 95 and 149 days after the first bid, although one did emerge 150 days after. This evidence does not support the argument that 120 days is needed to find and elicit more bids. The suggested 120 days is based on anecdotal experience rather than empirical evidence. According to the submission by the Ad Hoc Senior Securities Practitioners Group, 120 days also serves to provide board leverage by creating uncertainty for the bidder, but as stated above CCGG believes the appropriate uncertainty is whether shareholders will see the bid as desirable.

It is difficult to see the benefits for investors or the capital markets of a 120 day bid period. CCGG does not agree that a goal of our takeover bid regime is to provide directors with leverage above and beyond what is needed to enhance shareholder options, decision-making and value.

Board's ability to waive 120 Day Requirement

For the same reasons stated above where we argue that 120 days is too long, we also believe that providing the target board with the ability to waive the 120 day minimum bid period (which, as stated above, we believe should be a 90 day bid period) is not necessarily beneficial to shareholders. The uncertainty it creates would indeed provide more leverage to boards and would pressure a bidder to negotiate with a board in the hope that the board will shorten the bid period but the board's ability to waive will not necessarily provide shareholders with more options.

For example, boards that shorten the bid period for a particular bid or alternative transaction they favour to 35 days could preclude other bidders from coming forward that may need a longer time period to undertake the necessary analysis to present an alternative bid. The certainty of knowing that a bid must be open 90 days provides a more stable context for counter bidders to assess the factors involved, carry out due diligence and put financing in place. Shareholders do not gain from a compressed time period if alternatives are discouraged by boards having the ability to act unilaterally.

In addition, to the extent that directors, or a CEO supported by the board, can gain personal advantage through favouring a particular bid before others have time to emerge, such as by obtaining an agreement with the bidder that they will continue on in their respective roles, shareholders are not served.

On principle, we also question whether the ability to decide the length of the bid period should fall to the board without the need for shareholder approval. In our view, it places too much power in the hands of the board rather than shareholders. The effect will be to give the board the sole power to determine how long a bid must remain outstanding within the statutorily mandated 35 and the proposed 120 days, one arguably too short and the other arguably too long. We believe that if the board is to be given the ability to waive the statutory bid period, then that decision should be subject to shareholder approval.

SUMMARY

CCGG supports the Minimum Tender Requirement and the 10 Day Extension Requirement on the basis that they help to ensure the equal treatment of shareholders, a collective approval of take-over bids by an independent majority of shareholders and the removal of bidder coercion to tender. They achieve both goals of the Proposed Amendments: they serve to enhance the quality and integrity of the take-over bid regime and they rebalance the current dynamics among bidders, target boards, and target shareholders in a desirable way.

CCGG does not support the 120 Day Requirement but instead we support a 90 day bid period. CCGG also does not support the ability of boards to waive the 120 Day Requirement (or, as we support, a 90 day bid requirement). The supposed benefits of such a lengthy time period are not based on empirical evidence and will provide more leverage to the board, as will board discretion to waive the bid period, which may not be beneficial to shareholders, thus moving the balance of power in a take-over bid situation away from shareholders where it should be and rather towards the target board. As such these proposals meet neither of the goals of the Proposed Amendments.

Regardless of the bid period selected by the CSA, the CSA must make it clear that poison pills cannot be used by a board to extend the bid period any further.

Thank you for the opportunity to provide you with our comments. If you have any questions regarding the above, please feel free to contact our Executive Director, Stephen Erlichman, at 416.847.0524 or serlichman@ccgg.ca or our Director of Policy Development, Catherine McCall, at 416.868.3582 or cmccall@ccgg.ca.

Yours very truly,

Daniel E. Chornous /CRM

Daniel E. Chornous, CFA
Chair of the Board
Canadian Coalition for Good Governance

CCGG MEMBERS - 2015

Alberta Investment Management Corporation (AIMCo)
Alberta Teachers' Retirement Fund (ATRF)
BlackRock Asset Management Canada Limited
BMO Asset Management Inc.
BNY Mellon Asset Management Canada Ltd.
British Columbia Investment Management Corporation (bcIMC)
Burgundy Asset Management Ltd.
Canada Pension Plan Investment Board (CPPIB)
Canada Post Corporation Registered Pension Plan
CIBC Asset Management Inc.
Colleges of Applied Arts and Technology Pension Plan (CAAT)
Connor, Clark & Lunn Investment Management Ltd.
Desjardins Global Asset Management
Fiera Capital Corporation
Franklin Templeton Investments Corp.
Greystone Managed Investments Inc.
Healthcare of Ontario Pension Plan (HOOPP)
Industrial Alliance Investment Management Inc.
Jarislowsky Fraser Limited
Leith Wheeler Investment Counsel
Lincluden Investment Management Limited
Mackenzie Financial Corporation
Manulife Asset Management Limited
NAV Canada
New Brunswick Investment Management Corporation (NBIMC)
Northwest & Ethical Investments L.P. (NEI Investments)
OceanRock Investments Inc.
Ontario Municipal Employee Retirement Board (OMERS)
Ontario Pension Board
Ontario Teachers' Pension Plan Board (OTPP)
OPSEU Pension Trust
PCJ Investment Counsel Ltd.
Public Sector Pension Investment Board (PSP Investments)
RBC Global Asset Management Inc.
Régime de retraite de la Société de transport de Montréal (STM)
Russell Investments Canada Limited
Scotia Global Asset Management
Sionna Investment Managers Inc.
State Street Global Advisors, Ltd. (SSga)
Sun Life Investment Management Inc.
TD Asset Management Inc.
Teachers' Retirement Allowances Fund

The United Church of Canada Pension Fund
UBC Investment Management Trust Inc.
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June 25, 2015

Re: Notice and Request for Comment – Proposed Amendments to Multilateral Instrument 62-104 TAKEOVER BIDS AND ISSUER BIDS; Proposed Changes to National Policy 62-203 TAKEOVER BID AND ISSUER BIDS; and Proposed Consequential Amendments

Dear Sir/Madam,

ISS is a leading provider of corporate governance solutions to the global financial community, including corporate governance analysis and voting recommendations for institutional investors (also referred to as proxy advisory services). More than 1,700 global clients rely on ISS'

expertise in providing background research and voting recommendations to help them make more informed voting decisions.

Although takeover bids do not require a shareholders' meeting and therefore do not require vote (or vote recommendations), in the course of providing our clients with proxy advisory services, ISS sometimes has occasion to review the terms of certain takeover bids within the context of shareholder rights plans and related regulatory rulings. ISS also regularly follows board responses to unsolicited takeover bids in the Canadian market, which often take the form of a board approved plan of arrangement or merger, as an alternative to a hostile bid, in which case a shareholder vote is required and ISS will provide its clients with an analysis and a vote recommendation.

We note that ISS submitted a comment letter ..\..\2013\SRPs\ISS Comment Letter_Proposed NI 62-105 SRPs and Proposed CP 62-105CP and Proposed Consequential Amendments_July 8 2013.pdf on the 2013 CSA and AMF proposals.

ISS appreciates the opportunity to provide comments on the Proposed Amendments to Multilateral Instrument 62-104 Takeover Bids and Issuer Bids; Proposed Changes to National Policy 62-203 Takeover Bids and Issuer Bids, and Proposed Consequential Amendments. We hope that you will find our comments and suggestions useful.

ISS supports certain elements of the Proposed Bid Amendments that would serve to (i) facilitate the ability of tender offerees to make voluntary, informed and co-ordinated tender decisions, and (ii) provide the offeree board with additional time to respond to a take-over bid and find an alternative transaction that would maximize shareholder value. However, reiterating our comment in our submission on the original CSA and AMF 2013 proposals[1], since a takeover bid is made by an offeror directly to the target shareholders for their consideration and acceptance or refusal to tender their shares, the board's role is, and should be, limited to making a recommendation to shareholders on the merits of the bid or lack thereof, and if the bid is not supported by the board of directors then the board's role should be expanded to that of presenting an alternative to the bid that will better maximize shareholder value. This may include convincing shareholders that the company's future performance on a stand-alone basis is the more attractive option. Thus since the dynamics of a "first mover" takeover bid are primarily and substantially between the bidder and the target shareholders, there appears to be little compelling rationale for proposed changes to rebalance the dynamics to provide boards of directors with additional discretion that may result in the ability to delay or prevent shareholders from considering the acceptance of a bid for their shares.

More specifically, in ISS' view the proposed amendments to the current takeover bid regime to require that all non-exempt takeover bids must be supported by 50% +1 of the outstanding securities of the class that are subject to the bid, excluding securities beneficially owned or over which control or direction is exercised by the offeror or any person acting jointly or in concern with the offeror (the **Minimum Tender Requirement**), is a supportable proposition. From a corporate governance perspective, this is an important improvement that achieves the dual

[1] 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; Autorité des marches financiers Consultation Paper: An Alternative Approach to Securities Regulators' Intervention in Defensive Tactics; March 14, 2013

goals of allowing collective action by security holders that equates to majority approval of a plan of arrangement or merger transaction, while still preventing creeping acquisitions of effective control of a company without the approval of a majority of the independent shareholders.

Additionally, the extension of the bid for a 10-day period (the **10 Day Extension Requirement**) in the event that all conditions of a bid have been met or waived, is supportable as it removes much of the coercive pressure a shareholder might feel to tender into a takeover bid for fear of missing the opportunity to tender securities and being left with potentially illiquid, minority holdings of a controlled company. Both of these conditions have long been a part of ISS' proxy voting policy framework with respect to shareholder rights plans that determine the acceptability of a rights plan's "permitted bid" provision.

The third significant proposed bid amendment to establish a 120-day minimum bid period (the **120 Day Requirement**) does, however, raise several concerns, particularly when combined with a board of directors' ability to issue a news release and reduce the minimum bid period.

A requirement that a takeover bid must remain open for at least 120 days is, in ISS' view, too long a period of time for shareholders to have to wait to know the outcome of a bid for their shares and whether the target board of directors intends to offer an alternative board recommended transaction, given the potential for substantial significant market changes and developments that can occur in a four month time frame that may impact investment decision making.

For illustrative purposes, a review of the timeframe involved in one of the more complex transactions in the last two years indicates that a period of 90 days should be a sufficient minimum bid period to structure even the most complex alternative transaction. Specifically, on January 13, 2014 Goldcorp announced its intention to launch a hostile takeover bid to acquire Osisko Mining in exchange for consideration comprising shares of Goldcorp and cash. Prior to the opening of financial markets on April 16, 2014 (a period of 93 days after the announcement of Goldcorp's hostile bid) Osisko Mining announced that it had entered into a Joint Offer Arrangement with Agnico Eagle Mines and Yamana Gold pursuant to which Osisko would be acquired for consideration consisting of cash plus 0.07264 of an Agnico Eagle Share plus 0.26471 of a Yamana Share and one New Osisko Share. Given that all parties to this alternative Arrangement were able to negotiate and present an offer to shareholders within a period of 93 days, including dealing with a legal proceeding against Goldcorp and providing a board recommendation on a revised offer from Goldcorp in the interim, suggests that a Minimum Bid period of 90 days would be much more reasonable than the proposed 120 day period, and still provide sufficient time for even the most complex alternative transaction to be negotiated by a target board of directors. A 90 day minimum bid requirement would provide a substantial increase over the current statutory 35 day minimum bid requirement.

Further, the proposed discretion that would be afforded to a target board of directors to reduce the minimum bid period to any period between 35 days and 120 days stands to create uncertainty and confusion for shareholders. Shareholders should be able to rely on a reasonably established minimum bid period during which they know with certainty that they have a fixed and standardized amount of time to consider a "first mover" bid and that also provides adequate time for any competing bids to surface, including those that are not board negotiated. In fact, ISS reviews numerous shareholder rights plans each year that are adopted by boards of directors who state that the need for increased time beyond the statutory 35 day minimum bid

period is the primary reason for adopting a shareholder rights plan. It therefore, seems unnecessary and contradictory to this board argument to then permit boards to reduce the minimum bid period to 35 days in any event, which would result in a reduction in the minimum bid period for any then-outstanding takeover bid or subsequent contemporaneous takeover bid to 35 days rather than 120 days. In addition, according to a 2015 empirical analysis of Canadian hostile bid activity published by Fasken Martineau[2], the additional time provided by the permitted bid terms of a shareholder rights plan adopted by an issuer proved critical in permitting sufficient time for competing takeover bids to emerge as almost two-thirds of the time, competition emerged after the statutory 35 day minimum bid period. Further, the Fasken study indicates that for first mover bids, any competition emerged on average 41 days after initiation of the bid, whether or not the target issuer had adopted a shareholder rights plan. The permitted bid provisions found in shareholder rights plans in Canada have established a 60-day minimum bid period which does not appear to have negatively impacted the possibility of competing bids, which experience may support the need for a fixed minimum bid period of between 60 and 90 days.

In addition, we believe that the ability of a board of directors to issue multiple deposit period news releases, as per the proposed changes to NP 62-203 section 2.12, will result in further confusion and unwarranted uncertainty for target shareholders and potentially for competing bidders as well. Although stated to be "likely rare", an offeree issuer would be able to further shorten a previously stated acceptable initial deposit period for a takeover bid, or decide to state an acceptable shorter initial deposit period for a takeover bid after it had previously stated an acceptable initial deposit period for another takeover bid. And further to that, the shortest initial deposit period stated in a deposit period news release then applies to all contemporaneous takeover bids. This ability to issue multiple deposit period news releases may have a deleterious effect on the probability of competing bids and thus prevent the maximization of shareholder value by means of multiple bids. The establishment of a reasonable fixed minimum bid period would remove much of this potential complexity and uncertainty.

In conclusion, we submit that the proposed Minimum Tender Requirement and the 10-Day Extension Requirement are important improvements to Canadian Takeover Bid regulations that will establish a majority acceptance standard for all takeover bids, and remove much of the coercive pressure to tender shares to a takeover bid out of fear of being left behind. These improvements, together with a reasonable mandatory fixed minimum bid period of 60 days up to 90 days, should be sufficient to adequately rebalance the current dynamics among offerors, offeree issuer boards of directors, and offeree issuer security holders in a manner that does not negatively impact each party's ability to fulfill their responsibilities with respect to a takeover bid, and that should not impede the ability of shareholders to consider and accept or refuse a bid for their shares.

Respectfully,

Debra L. Sisti,
Executive Director,
Head of Canadian Research,
Institutional Shareholder Services

[2] 2015 Canadian Hostile Takeover Bid Study, Fasken Martineau LLP, A. Atkinson and B. Freelan

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June 29, 2015

BY E-MAIL

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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 (New Brunswick)
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Northwest Territories
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Dear Sirs/Mesdames:

Re: Proposed Amendments to Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids* and National Policy 62-203 *Take-Over Bids and Issuer Bids*

We are pleased to have the opportunity to comment on the proposed changes to the Canadian take-over bid regime, as set out in the CSA Notice and Request for Comment dated March 31, 2015.

We recognize that a uniform approach to the regulation of take-over bids among the Canadian jurisdictions is essential, and we view the latest proposals as constituting a reasonable compromise between the two positions put forward by the Canadian Securities Administrators and the Autorité des marchés financiers in March 2013. We particularly favour the “Minimum Tender Requirement” and the

"10 Day Extension Requirement", as they will remove the coercive aspect of take-over bids. In fact, those two requirements might logically be applied to issuer bids that are used as the first step by a control person or management to take an issuer private or to solidify a control position, although the rarity of those occurrences in recent years militates against increasing the complexity of the instrument to provide for them.

The "120 Day Requirement" is an improvement over the existing 35-day mandatory take-over bid period which is insufficient for many targets to adequately respond to unsolicited bids, although we believe that the imposition of the requirement will reduce the level of hostile bid activity, perhaps substantially. Potential bidders that are not completely deterred by the requirement will be more likely to negotiate with the target so as to reduce the bid period, thereby lessening bid financing costs in some cases and possibly decreasing the likelihood of the emergence of competing bidders. While the negotiation process will often result in a beneficial result for security holders, a shorter period, such as the 90 days in the previous CSA proposal for security holder rights plans, would have served as a somewhat lesser deterrent to hostile bids and struck a more even-handed balance between bidder and target, particularly in combination with the Minimum Tender and 10 Day Extension requirements.

The proposals do not address inconsistencies among the securities regulatory authorities in their application of National Policy 62-202 *Take-Over Bids – Defensive Tactics*, in particular with respect to the weight to be given to the approval of a defensive tactic such as a security holder rights plan by the target's security holders during a hostile bid. We note that National Policy 62-202 continues to include the statement "Prior shareholder approval of corporate action would, in appropriate cases, allay such concerns." Some additional policy guidance on this subject would be helpful.

Our specific comments on the proposed amendments to National Instrument 62-104 are set out below:

Section 1.1 Definitions –

"alternative transaction":

> In the definition of "alternative transaction", the reason for the inclusion of subparagraph (a)(iii) is unclear to us. A transaction under which an issuer's equity securities are expropriated could affect the holders of those securities in a manner analogous to a take-over bid followed by a squeeze-out or second step acquisition even if the transaction involved a subsidiary of the issuer. If the subparagraph were to remain, consideration might be given to confining its application to a wholly-owned subsidiary.
>
> Consideration might also be given to including in the definition an issuer bid for equity securities of the issuer, unless the issuer bid is exempt from Part 2 of the Instrument or from the formal valuation requirement in section 3.3 of Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions*.

"partial bid":

> We suggest that the words "not held by the offeror" be added to the definition.

Section 2.12 Variation of terms

In subsection (4), consider deleting the words "and any extension of the bid, other than an extension in respect of the mandatory 10 day extension period, resulting from the waiver". Since the subsection exempts the bidder from the requirement to extend under the circumstances described, it does not appear that there would be an extension "resulting" from the waiver (other than the mandatory 10 day extension period which is covered by section 2.31.1, rather than section 2.12).

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Section 226.1 Proportionate take up and payment – partial take-over bids

Consider making the wording consistent with subsection 2.26(1), i.e. “bound to acquire” vs. “bound or willing to acquire”.

Section 2.28.2 Shortened deposit period – deposit period news release

In paragraph (2)(b), for added clarity we suggest either deleting “and the bid is made” or changing “made” to “commenced”.

Section 2.28.3 Shortened deposit period – alternative transaction

In paragraph (b), we suggest the same change as in section 2.28.2 above.

In the draft of the amending instrument (section 11 of that instrument), the word “bid” is missing from subparagraph (b)(ii).

Section 2.30 Withdrawal of Securities

While most readers of subsections (1.1) and (2) are likely to understand that those subsections only prescribe exceptions to paragraphs (1)(a) and (1)(b), respectively (and do not otherwise remove withdrawal rights), it may provide greater clarity to maintain the current introductory wording of subsection (2) and use similar wording in subsection(1.1).

In paragraph 14(c) of the draft amending instrument, we suggest adding “after paragraph (2)(a)” to the introductory words.

In subparagraph (2)(b)(i), it might be clarified that the 10-day limit applies only to the initial deposit period.

Section 231.1 Mandatory 10 day extension period – take-over bids

In clause (b)(iv)(B), consider deleting “and in any event”, inserting “business” before “day” and including the 3 business day payment requirement as in clause (b)(iv)(A).

Section 232.1 Obligation to take up and pay for deposited securities – take-over bids

In subsection (4), we suggest changing “at any time subsequent to” to “beyond” or ”to a date that is after”.

In subsections (7) and (8), consider inserting “business” before “day”.

We have one comment on the proposed changes to National Policy 62-203:

Section 2.15 Change in Information

Consider having this section also cover a variation of the terms of a bid, with reference to subsection 212(3.1) of the Instrument.

Thank you for considering these comments. Any questions or comments regarding this submission may be directed to Ralph Shay at ralph.shay@dentons.com or 416-863-4419.

Yours truly,

"Dentons Canada LLP"

June 29, 2015

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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

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Dear Sirs/Mesdames:

Re: Request for Comment – Proposed Amendments to Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids*, Proposed Changes to National Policy 62-203 *Take-Over Bids and Issuer Bids* and Proposed Consequential Amendments

This letter is provided to you in response to the Notice and Request for Comment – Proposed Amendments to Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids*, Proposed Changes to National Policy 62-203 *Take-Over Bids and Issuer Bids* and Proposed Consequential Amendments (the "**Notice and Request for Comment**", and the proposed amendments, the "**Proposed Amendments**") dated March 15, 2015.

This comment letter reflects my personal views only and not the views of the law firm at which I am a partner or any client of the firm.

The Proposed Amendments arise out of the prior the CSA proposal (proposed National Instrument 62-105 *Security Holder Rights Plans*) (the "**Prior Proposal**") and the competing proposal from the Autorité des marchés financiers (the "**AMF**") in its

consultation paper entitled *An Alternative Approach to Securities Regulators' Intervention in Defensive Tactics* (the "**AMF Proposal**").

While there are other issues with the application of the mandatory minimum tender requirement (the "**MTR**") in the Proposed Amendments[1], I submit there is no reason to include the MTR where the offeror (whether alone or with joint actors) already exercises legal control over the target issuer.

The rationale introduced in the CSA release for the MTR is as follows:

"The Minimum Tender Requirement establishes a mandatory majority acceptance standard for all take-over bids, whether a bid is made for all or only a portion of the outstanding securities. *The purpose of the majority standard is to address the current possibility that control of, or a controlling interest in, an offeree issuer can be acquired through a take-over bid without a majority of the independent security holders of the offeree issuer supporting the transaction if the offeror elects, at any time, to waive its minimum tender condition (if any) and end its bid by taking up a smaller number of securities*. **[Emphasis added]**

The Minimum Tender Requirement allows for collective action by security holders in response to a take-over bid in a manner that is comparable to a vote on the bid. Collective action for security holders in response to a take-over bid is difficult under the current bid regime, where an unsolicited offeror's ability to reduce or waive its minimum tender condition may impel security holders to tender out of concern that they will miss their opportunity to tender and be left holding securities of a controlled company. Coupled with the 10 Day Extension Requirement, the Minimum Tender Requirement is intended to mitigate this "pressure to tender"."

The CSA Release justification for the MTR makes reference to an acquisition of control, which has no application where the offeror and its joint actors already exercise legal control. The CSA Release also refers to the existing ability of a bidder to waive a condition in an all cash bid and just take up the securities that are deposited and then end its bid, thereby creating a "coercion" to tender. However, "coercion" is addressed by the 10 Day Extension Requirement (the "**ETR**"). There is no possibility with the ETR that holders will tender out of concern that they will miss their opportunity to tender. They will always have an ability to tender with knowledge that the bid is "successful" and will not have to tender out of fear of being left behind.

In the context of an "insider bid" by a shareholder with legal control, there is already a requirement for a "majority of the minority" to force out minority shareholders in a subsequent business combination[2]. While a minority shareholder can determine that it

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[1] Collective action is not an end in itself, and in the absence of coercion, it is not clear why collective action is to be based on a determination of a subset of shareholders (some of whom may have objectives or interests that differ from other shareholders that would like to accept the bid) rather than collective action by all shareholders.

[2] Among other things, to count shares tendered to the bid in a subsequent business combination, the insider bid must disclose the intention of the offeror to effect such a transaction. Further, if a minimum

does not want to tender to an insider bid, there is no basis that it and other like-minded shareholders should be able to prevent (non-coerced) shareholders that wish to accept a bid from doing so. In fact, if a majority of minority is not achieved by the offeror (assuming it is proposing to effect a subsequent business combination if it is able to do so) and the offeror does take up shares, the power of the non-tendering shareholders to hold onto their shares in the future is *increased*, as it is likely to be more difficult for the offeror to acquire a majority of the remaining shares to effect a business combination at a later point in time.

I would note as well that the issue of whether the "collective action" of one subset of shareholders should be able to prevent other shareholder holders from having their shares acquired in a bid as a result of failure to satisfy the MTR can be accentuated in a bid by a shareholder with legal control, as a 10% shareholder effectively becomes equivalent to at least a 20% holder in a widely held corporation.

Where there are shareholders with sufficient shares to prevent a majority of the shares from being tendered to the bid by a shareholder with legal control, the shareholder with legal control may acquire additional shares (i) through the private agreement exemption, which would permit a payment of up to 115% of the market price (as defined) to up to 5 holders; (ii) pursuant to the 5% normal course purchase exemption, which can be also be effected through a private agreement at the market price (as defined); (iii) by acquiring 5% in the market during a take-over bid; or (iv) through jurisdictionally exempt purchases.[3] It is not a justifiable result that exempt transactions are permissible (and will not be blocked because the legal control holder will prevent the adoption of a rights plan) and non-coerced purchases pursuant to a formal bid are not permissible (as they may be blocked by the decisions of other minority shareholders).

A simple drafting fix would be to provide that the MTR is not applicable to a bid by a holder (whether alone or with joint actors) that already has legal control of an issuer.

Yours very truly,

Donald G. Gilchrist

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tender condition were waived, the shareholder that did not want to tender and wanted to hold onto its shares would be protected from being squeezed out.

[3] The controlling shareholder could also acquire additional shares from shareholders that wished to dispose of their shares in a voting transaction if two thirds of the shares voted at the meeting were voted in favour of the transaction.

HANSELL

June 29, 2015

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VIA EMAIL

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

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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.

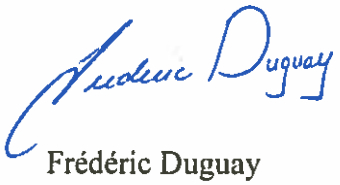
25 *ARC Equity*, *supra*, at paras. 116 to 118.

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).

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June 30, 2015

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 (New Brunswick)
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Nunavut

c/o
The Secretary
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and

Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
800, square Victoria, 22 etage
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Consultation-en-cours@lautorite.qc.ca

Dear Sirs/Mesdames:

Re: CSA Notice and Request for Comment re: Proposed Amendments to Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids,* and National Policy 62-203 *Take-Over and Issuer Bids* (the "Proposed Amendments") and OSC Notice and Request for Comment re: Proposed Adoption of Proposed National Instrument 62-104 *Take-Over Bids and Issuer Bids*

Thank you for the opportunity to comment on the Proposed Amendments. Our letter addresses the specific questions that you have sought comment on.

1. *The Proposed Bid Amendments contemplate the reduction of the minimum deposit period for take-over bids in the event that the offeree board issues a deposit period news release. Do you anticipate any difficulties with the application of the Proposed Bid Amendments as they relate to a deposit period news release and the ability of an offeror to reduce the initial deposit period for its bid as a result of the issuance of a deposit period news release?*

The Proposed Amendments will create a more dynamic situation from a legal perspective if the first offer for the securities of an offeree issuer is unsolicited. This dynamism will require more readiness with respect to things like final documentation for credit arrangements and depositary arrangements and any other corporate events that may have been planned around the original expiry date (if any acceleration of the original initial expiry date can be accommodated at all or in part). However, if the timing advantage is important to preserve, for an increased offer perhaps, presumably these planning matters can be overcome in the normal course.

2. *The Proposed Bid Amendments provide that the minimum deposit period for an outstanding or future take-over bid for an issuer must be at least 35 days if the issuer announces that it has agreed to enter into, or determined to effect, an "alternative transaction". The Proposed Bid Amendments include a definition of "alternative transaction" that is intended to encompass transactions generally involving the acquisition of an issuer or its business. Do you agree with the scope of the definition of "alternative transaction"? If not, please explain why you disagree with the scope and what changes to the definition you would propose.*

We have a few comments on the proposed definition of "alternative transaction":

(a) We wonder why clause (a) of the definition is not restricted to such transactions where there is a termination of equity interests that also results in a change of control of the offeree issuer. Also with respect to clause (a), we suggest the phrase "or any other transaction" be replaced with "or any other transaction or series of related transactions".

(b) If clause (a) were maintained in its proposed form, we question whether clause (a)(i) is needed given how rarely such a circumstance would arise.

(c) In clause (b) the phrase "acquire the issuer" seems in the context of the proposed definition both duplicative and somewhat unclear. If clause (a) addresses the termination of equity interests and clause (c) addresses asset sale transactions, it is not clear what is intended to be covered by clause (b). In light of our comment above, perhaps clause (b) should in concept be combined with clause (a).

3. *Do you anticipate any difficulties with the application of the Proposed Bid Amendments as they relate to alternative transactions? Does the proposed policy guidance in sections 2.13 and 2.14 of NP 62-203 assist with interpretation of the alternative transaction provisions?*

An existing offeror may face difficulties when attempting to make a fast decision as to whether its pre-existing offer with a long expiry date can be immediately varied to accelerate the expiry date based only on a news release by the offeree issuer announcing that it has agreed to enter

into an alternative transaction. As recognized by the proposed changes to National Policy 62-203, in some cases the interpretation of what constitutes an "alternative transaction" may not be straightforward and the offeror will likely only have the press release of the offeror to rely upon (as it may take up to 10 days for the related material agreements to be available publicly) to make that decision in a timely fashion. Query whether the news release contemplated by s.2.28.3 of proposed National Instrument 62-104 should contain the same specificity as that contemplated by a "deposit period news release". Consideration should be given to requiring the offeror to make a positive statement in its news release or other timely disclosure document about the treatment of its announcement for the purposes of s.2.28.3 to avoid any uncertainty in the market and for pre-existing bidders.

The proposed policy guidance is of some assistance but the introduction in the policy guidance at s.2.14 of the concepts of reasonable interpretation and issuer disclosure statements only to protect against erroneous interpretation seem as likely to create controversy at they are to avoid it. We think it is preferable that the objective standard set out in the Instrument be maintained and not softened by the policy guidance - either an announced transaction by the issuer is an "alternative transaction" for the purposes of the legislation or it is not and perhaps, as noted above, the offeree issuer should be required to make a positive statement in that regard.

4. *The Proposed Bid Amendments include a number of provisions that are specific to partial take-over bids. In particular, the Proposed Bid Amendments contemplate that an offeror making a partial take-over bid is only obligated to take up, at the expiry of the initial deposit period and assuming all pre-conditions to the bid are met, the maximum number of securities it can without contravening the pro rata take up requirement (s. 2.32.1(6)). Then, at the expiry of the mandatory 10 day extension period, the offeror must complete the pro rata take up obligation in respect of securities previously deposited (but not taken up) and securities deposited during the mandatory 10 day extension period (s. 2.32.1(7)). Would policy guidance concerning the interpretation or application of the Proposed Bid Amendments as they relate to partial take-over bids be useful? If so, please explain.*

Policy guidance providing numerical examples as to the application of the Proposed Amendments to partial bids and the pro ration considerations that arise in combination with the 10 day mandatory extension would be of assistance. Policy guidance on the treatment of partial bids generally will likely also be of assistance as we have continuing concerns that in the interests of finding a suitable compromise to provide boards with more time to deal with unsolicited take-over bids, some desirable transactions, although perhaps rare, have been effectively precluded by the requirement to obtain majority approval, including partial bids in certain circumstances where they effectively amount to block trades at a premium of more than 15% to market price.

Currently, if a purchaser wishes to acquire a block of shares at more than a 15% premium to market it may do so provided it makes the same offer open to all shareholders pursuant to a formal take-over bid offer. In order to ensure that the targeted block is acquired in its entirety and that no pro-ration is applied such offer must be made on an "any and all" basis and presumably the seller of the block agrees to irrevocably lock-up to the "any and all" offer. In such specific circumstances, the endorsement of a majority of shareholders should not be required as it may deny other shareholders the ability to participate in a premium offer and it may prevent block-holders from disposing of their block to a purchaser at a significant premium - a value it is possible for such block-holder to obtain in the right circumstances currently.

5. *The Proposed Bid Amendments include revisions to the take up and payment and withdrawal right provisions in the take-over bid regime. Do you agree with these proposed changes or foresee any unintended consequences as a result of these changes? In particular, do you agree that there should not be withdrawal rights for securities deposited to a partial take-over bid prior to the expiry of the initial deposit period for so long as they are not taken up until the end of the mandatory 10 day extension period?*

The lack of withdrawal rights following the initial expiry date for securities deposited is an essential feature of a bid regime that contemplates a mandatory 10 day extension period. An offeror should not have its bid forcibly extended for an additional 10 days if it cannot at least rely on the fact that the securities tendered at the initial expiry date will not have been withdrawn. The same logic should apply to partial bids unless it were possible to limit the number of securities withdrawn to not exceed the number after which pro-ration of the take-up of the offer would not be required. The other possible exceptional circumstance for permitting securities to be withdrawn during the 10 day mandatory extension period is where an offer would traditionally have been regarded as "any and all" offer.

6. *Are the current time limits set out in subsections 2.17(1) and (3) sufficient to enable directors to properly evaluate an unsolicited take-over bid and formulate a meaningful recommendation to security holders with respect to such bid?*

We believe that the current time limits set out in subsections 2.17(1) and (3) together with the related procedures set out in s.2.17(2) and (3) continue to be sufficient to enable directors to properly evaluate an unsolicited take-over bid and formulate a meaningful recommendation to security holders with respect to a bid. While the time required for an offeree issuer's board to issue a directors' circular is not exactly the same as the corresponding deadline under United States' law, it's close proximity has proven convenient and useful for inter-listed issuers and any consideration of a change in these time limits should take this cross-border coordination exercise into consideration.

7. *Do you anticipate any changes to market activity or the trading of offeree issuer securities during a take-over bid as a result of the Proposed Bid Amendments? If so, please explain.*

We do not anticipate any material changes.

In addition to the questions raised in the CSA Notice and Request for Comment for specific comment, we also wanted to take the opportunity to note our strong support for the complete national harmonization of take-over bid rules in Canada as Ontario proposes to adopt the National Instrument 62-104 being proposed by the CSA.

We note that in order to adopt the proposed National Instrument 62-104 in Ontario, the Ontario Securities Commission intends to seek legislative amendments to remove the detailed take-over bid provisions from Part XX of the *Securities Act (Ontario)* and include general "platform provisions" in their place. We wish to indicate our strong support for the necessary changes that must be enacted by the Legislative Assembly of Ontario in order for this important step toward uniform take-over bid regulation in Canada to be completed.

If we can be of further assistance, please do not hesitate to contact Ian Michael (imichael@mccarthy.ca 416-601-8023) or Graham Gow (ggow@mccarthy.ca 416-601-7677) of our office.

Yours truly,

McCarthy Tétrault LLP

ICM/mcj

mcmillan

Date June 26, 2015

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
The 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 (New Brunswick)
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Northwest Territory
Superintendent of Securities, Nunavut

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C.P. 246, tour de la Bourse
Montréal, Québec H4Z 1G3

Dear Sirs/Mesdames:

Re: Submissions and comments with respect to proposed amendments to Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids* (the "**Proposed Rule**"), proposed changes to National Policy 62-203 *Take-Over Bids and Issuer Bids* (NP 62-203) (the "**Proposed Policy**") and proposed consequential amendments

We are writing in response to the request for comments by the Canadian Securities Administrators (the "**CSA**") with respect to the Proposed Rule, the Proposed Policy and proposed consequential amendments (collectively, the "**CSA Proposal**"). In Part I of this submission, we outline recommended changes to the CSA Proposal which we believe address key policy objectives of the Proposed Rule or the take-over bid regime. In Part II of this submission, we provide specific drafting suggestions for changes to the language of the Proposal Rule. In Part III, we respond directly to the questions set out under "Request for Comments" in

the CSA Proposal. Finally, in Part IV we discuss certain specific concerns regarding the impact of the Proposed Rule on outstanding shareholder rights plans ("**Plans**").

PART I: RECOMMENDED CHANGES BASED ON POLICY OBJECTIVES

We recognize the considerable efforts the CSA has made for compromise in the CSA Proposal between the rights of security holders, offeree issuers and offerors. In light of the apparent difficulty in establishing the harmonized approach, we have not sought to suggest material changes to this proposed regime. However, we note below several aspects of the CSA Proposal that we believe warrant further consideration before the Proposed Rule is implemented, as certain aspects may depart from or appear to be inconsistent with the policy objectives underlying the Proposed Rule or the take-over bid regime. To the extent that we have suggested changes in Part I, we have not drafted amended language to the Proposed Rule. However, we would be prepared to provide amended language, if requested.

Section 1(1): Issues around the concept of an "alternative transaction"

We note that the definition of "alternative transaction" was based primarily on the definition of "business combination" found in Multilateral Instrument 61-01 – *Protection of Minority Security Holders in Special Transactions*. However, a business combination is a transaction that leads to the termination of an equity interest in an issuer without the consent of the holder of such equity interest. On the other hand, the purpose of the "alternative transaction" exception is as noted on page 3 of the CSA Proposal :

> The purpose of this exception is to avoid unequal treatment of offerors when a board supported change of control transaction is proposed to be effected through an "alternative transaction" rather than by way of a "friendly" take-over bid. As well, since the purpose of the 120 day minimum deposit period is to provide offeree boards with a longer period of time to respond to an unsolicited bid, there is no need for the 120 day minimum deposit period to apply where the offeree issuer has determined that an alternative transaction is appropriate.

Accordingly, we would suggest that using the definition of "business combination" as a starting point does not fully address the policy objectives underlying this exception. We believe a broader definition of "alternative transaction" is required which is focused on change of control transactions supported by the board of the offeree. We would therefore suggest that the Proposed Rule be modified to import the concept of a transaction agreed to by the offeree issuer's board that "affects materially the control" of the issuer. Without this change, an offeree issuer could undertake transactions that materially alter the control of the issuer without shareholder approval, such as a private placement of 24.99% of the voting securities of an issuer, and not trigger the application of the shortened deposit period under Section 2.28.3 of the Proposed Rule. We believe that this would run contrary to the rationale for the introduction of the alternative transaction exception. The term "affects materially the control", while not defined in securities legislation or the rules of stock exchanges, is well understood by market participants and securities practitioners, and therefore its adoption should not create difficulties with respect to its application.

We would also acknowledge that it could be suggested that this exception should be further broadened to include any transaction by the offeree issuer that may be subject to National Policy 62-202 – *Take-over Bids – Defensive Tactics* ("**NP 62-202**"): "will likely result in shareholders being deprived of the ability to respond to a take-over bid or to a competing bid". Provided that NP 62-202 remains in place, we would suggest that due to the imprecise nature of such language it should not be incorporated into the Proposed Rule. In any event, offerors will be able to pursue remedies under corporate law or NP 62-202 if a transaction would engage such language.

If the concept of "affects materially the control" is not adopted, we would suggest additional changes. In our view, the current definition of "alternative transaction" is insufficiently broad to capture the range of potential re-organization or change of control transactions currently contemplated by the policy objectives of the definition. Specifically, we believe "merger" should be expressly included in the definition to acknowledge this common form of transaction for U.S. incorporated issuers. Secondly, the definition does not capture a three-corner amalgamation where the subsidiary of an offeree issuer amalgamates with a third party. By not capturing such transactions in the definition, an offeree issuer could become a very different company without a shareholder vote and without triggering the acceleration provisions for the minimum deposit period under Section 2.28.3 of the Proposed Rule, notwithstanding that the offeree issuer's shareholders continue to hold the same shares.

Section 1(1) and Section 2.28.2(2): Shortening the deposit period

The definition of "deposit news release" under the Proposed Rule limits a deposit period news release to news releases in response to a "proposed or commenced take-over bid". In our view, an issuer should be allowed to shorten the initial deposit period, whether or not a take-over bid has been proposed or commenced. For example, an issuer could announce that for the next two years the initial deposit period for all formal take-over bids will be 40 days. We believe this change would offer greater flexibility to issuers, allowing them to encourage more take-over bids in response to shareholder requests or demands, or for other specific purposes that the issuer believes would be helpful.

To effect this change, the definition for a "deposit period news release" in Section 1.1 will need to be further amended to contemplate an ongoing reduction to the minimum deposit period by the offeree issuer. Also, Section 2.28.2(2) would need to be revised to account for a continuing reduction to the initial deposit period.

Section 2.12(1) and Section 2.16(2): Offeror news releases

As currently worded, upon a deposit period news release or an alternative transaction, the Proposed Rule requires an offeror to issue a news release and prepare and send a notice of variation to every person to whom the bid was required to be sent. We recommend that the CSA Proposal be amended to allow an offeror to account for the possibility of a reduced deposit period, as a result of the issuance of a deposit period news release or an alternative transaction, in its original bid document, and, if the reduced period is activated, the offeror would then be required to issue a news release only, rather than also having to prepare and mail a notice of

variation. We acknowledge that if the bid would expire less than 10 days following the issuance of a deposit period news release or an alternative transaction, then the offeror would still be required to keep the bid open for a minimum period of 10 days thereafter.

If an offeree issuer can lessen the initial deposit period by a press release, an offeror should be able to adopt that shorter deposit period by press release, provided that it clearly states that it reserves this option in its circular and shareholders have a minimum of 10 days to respond.

Section 2.29.1(c): Minimum Tender Requirement

It is noted in the CSA Proposal that the Minimum Tender Requirement is "comparable to a vote on the bid" and serves to mitigate any pressure to tender to a bid. An alternative process to confirm that a majority of shareholders consent to a bid, is to have persons holding a majority of the outstanding shares (other than the offeror and its joint actors) acknowledge in writing their agreement ("**Minimum Consent Requirement**"). This could be achieved in much the same manner as a consent solicitation; in that the offeror could provide in a letter of transmittal or similar form for such consent to be documented and sent to the offeror or its agent. The Minimum Consent Requirement could be defined as instruments in writing executed in counterparts by persons holding more than 50% of the outstanding securities of the class that are subject to the bid (excluding shares held by the offeror and its joint actors) evidencing their consent to the terms of the bid. Shareholders would have at least 10 days from the date of a news release announcing that the Minimum Consent Requirement had been met to tender to and accept the bid.

We would suggest that the offeror should have the option of choosing between using the Minimum Tender Requirement and the Minimum Consent Requirement.

The Minimum Consent Requirement would be particularly helpful with respect to partial take-over bids. For partial take-over bids, the Minimum Tender Requirement combined with the lack of withdrawal rights during the mandatory 10 day extension period may reduce the likelihood of a successful partial take-over bid and thus strongly discourage offerors from making partial take-over bids. If shareholders of an offeree issuer were only required to evidence their consent to a partial take-over bid and not tender their shares until during the mandatory extension period, it may somewhat counterbalance the negative implication to partial take-over bids that would be brought about by the Proposed Rule.

The CSA could also consider limiting the Minimum Consent Requirement to partial take-over bids.

PART II: SPECIFIC SUGGESTIONS FOR CHANGES TO THE LANGUAGE OF THE PROPOSED RULE

In addition to the changes noted in Part I, we believe the Proposed Rule may benefit from certain drafting changes, as outlined below. For each suggested change, we have included a reference to the section, a blackline of our changes, and a brief description of our rationale in proposing such change. Please note that the revisions set out below do not incorporate proposed language for

changes recommended under Parts I, III and IV of our submission, and only relate to changes that we believe affect either the internal consistency of the language of the Proposed Rule or would provide greater clarity.

Section 1(1): Definition of "deposit period news release"

We suggest the following changes to the definition of a "deposit period news release" under Section 1(1):

> *"**deposit period news release**" means a news release issued by an offeree issuer ~~in respect of a proposed or commenced take-over bid for the securities of the offeree issuer and~~ stating that an initial deposit period ~~for the bid of~~, in respect of a proposed or commenced take-over bid for securities of the offeree issuer, is for a period of not more than 120 days and not less than 35 days ~~that is acceptable to the board of directors of the offeree issuer~~, expressed as a number of days from the date of the bid.*

We believe the proposed changes provide greater clarity respecting the purpose of the deposit period news release. We removed the phrase "acceptable to the board of directors of the offeree issuer" because we did not see a reason why it should be included.

Section 1(1): Definition of "partial take-over bid"

We suggest the following change to the definition of a "partial take-over bid" under Section 1(1):

> ***"partial take-over bid"** means a take-over bid for less than all of the outstanding securities of the class of securities subject to the bid;*

We believe this change is necessary, as take-over bid legislation relate to bids for outstanding securities, not the entire class of securities.

Section 2.28.1(2)

We suggest the following changes to subsection 2.28.1(2):

> *2.28.1(2) Despite section 2.28.1, an offeror, other than an offeror under subsection (1), must allow securities to be deposited under its take-over bid for an initial deposit period of at least the number of days from the date of the bid as stated in the deposit period news release if either of the following applies:*
>
> > *(a) the offeror, prior to the issuance of the deposit period news release referred to in subsection (1), has commenced a take-over bid in respect of ~~the~~ securities of the offeree issuer that has yet to expire;*
> >
> > *(b) the offeror, subsequent to the issuance of the deposit period news release referred to in subsection (1), commences a take-over bid in respect*

> *of ~~the~~ securities of the offeree issuer and the bid is made prior to one of the following:*
>
> > *(i) the date of expiry of the take-over bid referred to in subsection (1),*
> >
> > *(ii) the date of expiry of a take-over bid referred to in paragraph (a).*

We believe these changes make it clearer that the bid can be in respect of a certain class of securities. We also were unsure whether the CSA was trying to imply that the deposit period news release should be limited to a specific class of securities – if so we believe that this would be unnecessary.

Section 2.28.3

We suggest the following change to Section 2.28.3:

> *2.28.3 Despite section 2.28.1, if an issuer issues a news release announcing that it has agreed to enter into, or determined to effect, or has entered into, an alternative transaction, an offeror must allow securities to be deposited under its take-over bid for an initial deposit period of at least 35 days from the date of the bid if either of the following applies:*
>
> > *(a) the offeror, prior to the issuance of the news release, has commenced a take-over bid in respect of the securities of the offeree issuer that has yet to expire;*
> >
> > *(b) the offeror, subsequent to the issuance of the news release, commences a take-over bid in respect of the securities of the offeree issuer and the bid is made prior to one of the following:*
> >
> > > *(i) the date of completion or abandonment of the alternative transaction,*
> > >
> > > *(ii) the date of expiry of a take-over bid referred to in paragraph (a).*

We believe this change precludes uncertainty regarding the application of the reduced minimum deposit period under Section 2.28.3.

Section 2.30 (1.1)

We suggest the following change to the language of Section 2.30(1.1):

> *2.30(1.1) Despite paragraph (1)(a), if an offeror that has made a partial take-over bid becomes obligated to take up securities under subsection 2.32.1(1), a*

security holder may not withdraw securities that have been deposited under the bid before the expiry of the initial deposit period but not taken up by the offeror in reliance on subsection 2.32.1(6) during the period

(a) commencing at the time the offeror became obligated to take up securities under subsection 2.32.1(1), and

(b) ending at the time the offeror becomes obligated to take up securities, under subsection 2.32.1(7) or (8), which were not taken up by the offeror in reliance on subsection 2.32.1(6) ~~under subsection 2.32.1(7) or (8), as applicable.~~

We believe this change provides greater clarity with respect to obligations of an offeror under Sections 2.32.1(7) and (8).

PART III: RESPONSE TO CSA REQUEST FOR COMMENTS

Our responses to the specific questions posed by the CSA in its request for comments are set out below. For ease of reference, we have set out below each question.

1. The Proposed Bid Amendments contemplate the reduction of the minimum deposit period for take-over bids in the event that the offeree board issues a deposit period news release. Do you anticipate any difficulties with the application of the Proposed Bid Amendments as they relate to a deposit period news release and the ability of an offeror to reduce the initial deposit period for its bid as a result of the issuance of a deposit period news release?

Section 2.12(1) of the Proposed Rule mandates that offerors must "promptly" issue and file a news release and send a notice of variation to the security holders entitled to receive such notice. Under Section 2.12(3), the new deposit period must not expire before 10 days after the date of the notice of variation. Under Section 2.16(2), the date of the notice of variation is deemed to be the date it was sent to all or substantially all of those security holders entitled to receive it. Accordingly, if an offeree issuer reduces the deposit period to 35 days on day 30 of the offeror's bid, the offeror's bid would still be open for at least 10 days after it issues a news release and prepares and mails the notice of variation. Subject to requiring that a bid be open for at least 10 days following a deposit period news release or an alternative transaction, we suggest that the CSA consider allowing for the possibility of a reduced deposit period to be built into the original bid document of an offeror such that if the reduced deposit period is activated, the offeror will be required to issue a news release only to accept such shortened period, rather than also having to prepare and mail a notice of variation. Please see our comments under "Part I: Recommended Changes Based on Policy Objectives - Section 2.12(1) and Section 2.16(2): Offeror news releases".

2. The proposed Bid Amendments provide that the minimum deposit period for an outstanding or future take-over bid for an issuer must be at least 35 days if the issuer announces that it has agreed to enter into, or determined to effect, an "alternative

transaction". The Proposed Bid Amendments include a definition of "alternative transaction" that is intended to encompass transactions generally involving the acquisition of an issuer or its business. Do you agree with the scope of the definition of "alternative transaction"? If not, please explain why you disagree with the scope and what changes to the definition you would propose.

We refer to our comments under "Part I: Recommended Changes Based on Policy Objectives – Section 1(1): Issues around the concept of an 'alternative transaction' ".

3. Do you anticipate any difficulties with the application of the Proposed Bid Amendments as they relate to alternative transactions? Does the proposed policy guidance in sections 2.13 and 2.14 of NP 62-203 assist with interpretation of the alternative transaction provisions?

We refer to our comments above under "Part I: Recommended Changes Based on Policy Objectives – Section 1(1): Issues around the concept of an 'alternative transaction' ".

Although we are generally in favour of providing guidance, we have two concerns regarding the guidance set out in Section 2.14 of the Proposed Policy. We would suggest that a transaction is either an "alternative transaction" or it is not. If the Proposed Rule is meant to apply to a transaction that "may reasonably be interpreted to be an alternative transaction", then it should be so worded. Also, the guidance to offeree issuers that if they do not consider a transaction to be an alternative transaction for the purposes of Section 2.28.3 to so state that fact in a news release in respect of the transaction only if it believes that the transaction could be erroneously interpreted as an "alternative transaction", appears unhelpful to both offerors and offeree issuers. Regardless of the views of the offeree issuer, the Proposed Rule will be interpreted by the offeror and ultimately by a securities regulator if there is a difference of opinion. There should be no guidance that insinuates that the interpretation of the offeree issuer has any bearing on the meaning to be given to the term "alternative transaction".

4. The Proposed Bid Amendments include a number of provisions that are specific to partial take-over bids. In particular, the Proposed Bid Amendments contemplate that an offeror making a partial take-over bid is only obligated to take up, at the expiry of the initial deposit period and assuming all pre-conditions to the bid are met, the maximum number of securities it can without contravening the pro rata take up requirement (s. 2.32.1(6)). Then, at the expiry of the mandatory 10 day extension period, the offeror must complete the pro rata take up obligation in respect of securities previously deposited (but not taken up) and securities deposited during the mandatory 10 day extension period (s. 2.32.1(7)). Would policy guidance concerning the interpretation or application of the Proposed Bid Amendments as they relate to partial take-over bids be useful? If so, please explain.

While any explanation would likely be helpful, we are of the view that the provisions with respect to partial take-over bids are clear. If the CSA is contemplating additional guidance, we would suggest providing an example using actual numbers in such guidance.

5. The Proposed Bid Amendments include revisions to the take up and payment and withdrawal right provisions in the take-over bid regime. Do you agree with these proposed changes or foresee any unintended consequences as a result of these changes? In particular, do you agree that there should not be withdrawal rights for securities deposited to a partial take-over bid prior to the expiry of the initial deposit period for so long as they are not taken up until the end of the mandatory 10 day extension period?

At the outset we would note that partial take-over bids are rare. Nevertheless, we believe that this option should remain a viable one to offerors. We expect that the Minimum Tender Requirement, combined with the lack of withdrawal rights during the mandatory 10 day extension period which may have the effect of discouraging security holders from depositing prior to the expiry of the initial deposit period, may reduce the likelihood of a successful partial take-over bid and thus discourage offerors from making partial take-over bids. Please see "Part I: Recommended Changes Based on Policy Objectives – Section 2.29.1(c): Minimum Tender Requirement" for our comments regarding adopting a Minimum Consent Requirement, particularly for partial take-over bids. We expect that the adoption of the Minimum Consent Requirement would assist in increasing the likelihood of a successful partial take-over bid.

We believe that the proposed mechanism described in the question above seems to be the most reasonable way to proceed and most fair to offerors, and agree with the proposed changes to the take up and payment and withdrawal rights. While the lack of withdrawal rights in respect of securities deposited before the expiry of the initial deposit period and not taken-up by the offeror may put such securities at risk for intervening events affecting the offeree and restrict a security holder's ability to deal with such securities during the mandatory 10 day extension period, we are of the view that the risk is reasonable and should lie with the security holders rather than the offeror.

6. Are the current time limits set out in subsections 2.17(1) and (3) sufficient to enable directors to properly evaluate an unsolicited take-over bid and formulate a meaningful recommendation to security holders with respect to such bid?

We believe the 7-day time limit in Section 2.17(3) is sufficient since the offeree itself is able to control the length of the initial deposit period.

The 15-day time limit in Section 2.17(1) to prepare and send a directors' circular, however, appears unnecessarily short under the CSA Proposal given the minimum deposit period of up to 120 days. We would suggest that offerees be given a minimum period of the lesser of (i) 30 days following the commencement of the bid and (ii) 20 days prior to the end of the initial deposit period.

7. Do you anticipate any changes to market activity or the trading of offeree issuer securities during a take-over bid as a result of the Proposed Bid Amendments? If so, please explain.

We are not qualified to comment.

PART IV: POSSIBLE IMPACT ON SHAREHOLDER RIGHTS PLANS

We expect that enactment of the Proposed Rule will have ramifications for existing Plans. A number of practical issues will arise upon enactment of the Proposed Rule, particularly in respect of the concept of a "permitted bid" under Plans. For example:

- Where an offeree issuer enters into an "alternative transaction", the Proposed Rule could reduce the deposit period to less than the minimum 60-day period required under a Plan's permitted bid provisions.

- The Proposed Rule's Minimum Tender Requirement may not coincide with the definition of "independent shareholders" used in many Plans for purposes of determining the group from which a majority tender is required so as to qualify as a 'permitted bid'. Plans typically exclude all acquiring persons and associates of offerors and acquiring persons.

- The Minimum Consent Requirement is not addressed in Plans and therefore if this concept is adopted, bids approved in such a manner would not constitute a 'permitted bid'.

It may be suggested that the Proposed Rule will largely deal with the primary purposes of Plans - in providing adequate time to the offeree issuer's Board to consider alternatives to unsolicited proposals and providing for equal treatment of shareholders – and therefore Plans should serve no purpose in the Canadian capital markets and, as a result, the CSA need not be concerned with this conflict. We would suggest, however, that there are a few reasons why this may not be the case.

Elements of Plans may continue to be relevant for certain issuers while not being contrary to the policy objectives of the proposed Rule. For example, Plans will continue to be relevant for offerees who are wary of 'creeping' acquisitions made by way of the 'private agreement' exemption and other exemptions from the formal takeover bid requirements.

The 'new generation' Plans supported by shareholder advisory groups such as Institutional Shareholder Services, require that shareholder approval be obtained to any waiver of a Plan's provisions or redemption of rights under a Plan. Boards of issuers with Plans in place who wish to fully comply with the Proposed Rule will effectively have their hands tied at least until the first meeting of shareholders to occur following the effective date of the Proposed Rule or a shareholders' meeting to terminate or amend a Plan is called.

Accordingly, we believe that it would be prudent for the CSA to address this issue. While we would expect that a securities regulator would move quickly to cease trade a Plan where the requirements of the Proposed Rule had been satisfied by a specific bid, it would still require that an application for relief be made by the offeror which would result in unnecessary time and expense being incurred and defeat one of the principal reasons for the CSA putting forward the Proposed Rule (i.e. putting an end to hearings regarding the cease trading of Plans).

There are several ways to deal with this matter, including a transition period to allow for issuers to amend Plans to comply with the Proposed Rule. It may be simpler to have the Proposed Rule, or regulations or securities legislation include express language that provisions in indentures, agreements or constating documents of issuers will not be binding on any person to the extent that such are contrary to the provisions of the Proposed Rule.

Finally, it may be helpful if the Proposed Policy (or NP 62-202) provides guidance on the CSA's view as to when the public interest power would be exercised if a Plan remains operational to impede a bid beyond the deposit period of such bid.

If you wish to discuss any aspect of this letter, we would encourage you to contact any one of the following lawyers who would be pleased to speak to you at your convenience:

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Yours truly,

"*McMillan LLP*"

BY E-MAIL September 27, 2015

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Authorité des marchés financiers
Superintendent of Securities, Prince Edward Island
Nova Scotia Securities Commission
Financial and Consumer Services Commission (New Brunswick)
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Nunavut

To the attention of:

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Dear Sirs/Mesdames:

RE: Comments on Proposed Amendments to Multilateral Instrument 62-104 *Take-over Bids and Issuer Bids* and Proposed Changes to National Policy 62-203 *Take-over Bids and Issuer Bids*

The following comments are submitted in response to the Notice and Request for Comments (the "Request for Comments") published by the Canadian Securities Administrators (the "CSA") on March 31, 2015 with respect to the proposed amendments (the "Proposed Bid Amendments") to Multilateral Instrument 62-104 *Take-over Bids and Issuer Bids* and National Policy 62-203 *Take-over Bids and Issuer Bids.*

Following discussions with representatives of the Ontario Securities Commission, these comments are submitted notwithstanding the fact that the comment period has expired. This letter represents my own personal comments (and not those of the law firm at which I am an associate (Stikeman Elliott LLP) or of any client of the firm) and is submitted without prejudice to any position taken or that may be taken by the firm on its own behalf or on behalf of any client. These comments are submitted only with respect to the matters dealt with herein and, given the expiry of the comment period, I have not addressed any of the specific questions outlined in the Request for Comments or provided any comments on the Proposed Bid Amendments generally.

The Proposed Bid Amendments would require that all non-exempt take-over bids remain open for a minimum deposit period of at least 120 days (the "120 Day Requirement") subject to certain exceptions in the case of a "deposit period news release" or a news release that is issued by an issuer in respect of an "alternative transaction".

The purpose of this letter is to highlight for the CSA that the 120 Day Requirement may result in the compulsory acquisition provisions of certain corporate statutes not being available to offerors following a take-over bid where the 120 Day Requirement is required to be adhered to by the offeror.

For example, under the compulsory acquisition provisions of the *Canada Business Corporations Act* (the "CBCA"), the right to acquire shares under such provisions is available only where "within one hundred and twenty days after the date of a take-over bid the bid is accepted by the holders of not less than ninety per cent of the shares of any class of shares to which the take-over bid relates…" (subsection 206(2) of the CBCA). The corporate statutes of most provinces of Canada contain substantially similar provisions.[1]

Reducing the 120 Day Requirement by a modest amount - say to 115 or 110 days – would likely not address the issue, as in practice, it is uncommon for an offeror to receive deposits of shares under a take-over bid representing 90% or more of the outstanding shares of a target at the initial expiry time of a bid. It is more common for an offeror, who has received deposits under a bid representing less than 90% of the outstanding shares but more than the minimum tender condition (i.e. 50% or 66 2/3%), to take up shares following the initial expiry time of the bid, announce the initial results and extend the bid on at least one occasion in an effort to obtain deposits of shares at or above the 90% threshold in order to use the compulsory acquisition provisions of the relevant corporate statute to acquire the remaining shares.

In light of the above, the CSA should consider the consequences of implementing the 120 Day Requirement vis-à-vis the compulsory acquisition provisions of corporate statutes as waiting for amendments to the various corporate statutes to enable the 120 Day Requirement to work in conjunction with the compulsory acquisition provisions of corporate statutes is likely not a viable/timely solution.

Thank you for the opportunity to comment on these proposals.

Regards,

"*Mike Devereux*"

Mike Devereux

[1] See for example: *Business Corporations Act* (Ontario), ss. 188(1); *Business Corporations Act* (Alberta), ss. 195(2); *Business Corporations Act* (Québec), s. 398; *Business Corporations Act* (British Columbia), ss. 300(2)(b) (within 4 months); *Business Corporations Act* (Saskatchewan), s. 188.

FAIR | Canadian Foundation *for* Advancement *of* Investor Rights

June 29, 2015

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Re: CSA Notice and Request for Comment on Proposed Amendments to Multilateral Instrument 62-104 Take-Over Bids and Issuer Bids, Proposed Changes to National Policy 62-202 Take-Over Bids and Issuer Bids and Proposed Consequential Amendments

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FAIR Canada is pleased to offer comments to the Canadian Securities Administrators (the "CSA") regarding proposed amendments to Multilateral Instrument 62-104 Take-Over Bids and Issuer Bids ("MI 62-104") and changes to National Policy 62-203 Take-Over Bids and Issuer Bids ("NP 62-203") (collectively, the "Proposed Bid Amendments").

FAIR Canada is a national, charitable organization dedicated to putting investors first. As a voice of Canadian investors, FAIR Canada is committed to advocating for stronger investor protections in securities regulation. Visit www.faircanada.ca for more information.

1. Executive Summary

1.1. FAIR Canada is generally supportive of the CSA's Proposed Bid Amendments as they increase shareholder rights and protections in the take-over bid process.

1.2. Under the current rules, take-over bids are required to be open for at least 35 days. There are no minimum tender requirements, and no requirements to extend the offer period once the securities have been tendered. Under the Proposed Bid Amendments, take-over bids will remain open for a minimum of 120 days (the "120 Day Rule"), although this

period may be reduced by target boards where friendly bids are received (referred to hereafter as "Waiver**"**). Bidders must receive 50% of the outstanding securities that are subject to the bid (excluding those owned by the bidder itself or its joint actors) (the "Minimum Tender Requirement**"**); and the take-over bid must be extended for an additional 10 day period after the 120 day deposit period is over and all other conditions have been met (the "10 Day Extension**"**).

1.3. FAIR Canada strongly supports the new rules for the Minimum Tender Requirement and 10 Day Extension and supports extending the minimum deposit period beyond 35 days as these mechanisms will provide shareholders with the capacity to engage in effective decision-making. . However, FAIR Canada does not think that the proposed deposit period of 120 days under the 120 Day Rule will help target shareholders find value maximizing alternatives in the take-over bid process. Instead, we think the 120 Day Rule will deter potential bidders from making take-over bids due to increased costs and risks associated with keeping the bid in play for 120 days. This will not be in the interests of economic efficiency or investor protection.

1.4. FAIR Canada thinks a deposit period longer than 95 days would cease to benefit shareholders and instead unduly benefit the target board. In light of benchmarking to other leading jurisdictions and existing empirical evidence, we recommend that a deposit period of no more than 95 days be required.

1.5. Furthermore, FAIR Canada questions the appropriateness of providing the Board with the Waiver option under the 120 Day Rule. FAIR Canada recommends that the target shareholders be given the ability to reduce the timeframe to 35 days rather than provide this ability to the target board.

1.6. FAIR Canada also urges the CSA to examine the take-over bid requirements in conjunction with other corporate and securities laws that may be applicable in situations where a change of control is proposed. In particular, FAIR Canada urges the CSA not to disregard other ways in which there can be a change of control, such as via changes to the composition of the board. FAIR Canada reminds the CSA of the prohibitively expensive current requirements for using proxy circulars, and continues to urge the CSA to consider reforming this area of the law. On such points, FAIR Canada provides some additional recommendations for improvement at section 3.10 below.

2. General Overview of Take-Over Bid Period

2.1. FAIR Canada believes that a properly functioning take-over regime will benefit shareholders. Bidders are likely to bring in better directors and management following a successful bid, or "improve the target's performance by reconfiguring its assets or exploiting synergies"[1] resulting in an increase in the target's value. FAIR Canada understands that extending the current bid period will allow the target board additional time to find a more suitable bidder (white knight) which may result in greater value for the target shareholders. In addition, where the directors and management believe they risk being the target of an acquisition should they mismanage the company, the prospect of a take-over is likely to keep the directors and management at the top of their game. The result of both scenarios is greater value for the target's shareholders.[2] Moreover, empirical studies show that a target's shareholders experience significant positive returns from a take-over event.[3] Given the benefits of take-over bids, particularly the benefits to the target's shareholders, FAIR Canada thinks it is important to ensure the rules governing take-over bids do not, by their design, deter potential bidders from pursing Canadian targets. Therefore, FAIR Canada supports changes to the take-over bid rules that will generate more value maximizing alternatives for shareholders to consider.

3. 120 Day Deposit Period

3.1. Under the 120 Day Rule, take-over bids will be required to remain open for a 120 day minimum deposit period as opposed to the current 35 day minimum deposit period. FAIR Canada supports introducing a longer deposit period as we believe the changes will generate more value maximizing alternatives for shareholders to consider. However, we do not agree with the CSA's proposal that take-over bids should remain open for 120 days. We believe (i) 120 days is unduly long and unnecessary given the realities of hostile bids in Canada, (ii) 120 days will ultimately hurt shareholders by discouraging take-over bids, and (iii) a deposit period beyond the 95th day is unlikely to benefit target shareholders and will instead disproportionately benefit the target board in the take-over bid process.

3.2. *Benefits of Longer Take-over Bid Periods:* FAIR Canada agrees with the CSA in that it is reasonable to provide the target board and target shareholders a longer timeframe (more than 35 days) within which they must consider and respond to an unsolicited bid. Under the current rules the target board will have to turn to defensive tactics, which are costly in terms of both time and money, in order to fend off or delay a bid. A longer bid period

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1 John Armour and David A. Skeel Jr. "Who Writes the Rules for Hostile Takeovers, and Why? The Peculiar Divergence of US and UK Takeover Regulation" 95 Geo L J 1727 at 1733 available online at: http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1686&context=faculty_scholarship. Further empirical studies have been completed to show that take-overs add value: Gregor Andrade, Mark Mitchel and Erik Stafford "New Evidence and Perspectives on Mergers" J. Econ Persp., Spring 2001 at 103, 110 (summarizing studies from 1973-1998 and finding 22.3% abnormal returns to target shareholders),Marc Goergen and Luc Renneboog "Shareholder Wealth Effects of European Domestic and Cross-Border Takeover Bids" 10 Eur Fin Mgmt 9, at 23.

2 *Ibid* at 1733.

3 *Ibid* at 1740.

would reduce the need for target boards to employ these expensive defence tactics.[4] FAIR Canada therefore supports longer bid periods to the extent they reduce the need for boards to employ expensive defensive tactics and provide more certain outcomes for target shareholders.

3.3. *The Experience in Other Jurisdictions:* While FAIR Canada supports introducing a longer bid period, we think that the current proposal for 120 days is unduly long. FAIR Canada urges the CSA to reconsider this time period, and reminds the CSA that the proposed 120 day period is considerably longer than other major common law jurisdictions such as the UK (which mandates an 81 day bid period after the formal take-over offer), Australia (which mandates a 61 day bid period after the formal take-over offer), Hong Kong (which mandates a 60 day bid period after the formal take-over offer), or New Zealand (which mandates a 30-90 day bid period after the formal take-over offer). Given that the CSA has also proposed the 10 Day Extension (discussed in section 5 of this letter and supported by FAIR Canada) the entire process would become 130 days, which seems out of line with that of other leading jurisdictions.

3.4. *Hostile Take-over Bids in Canada:* FAIR Canada does not think that 120 day bid period is required in light of the realities of hostile bids in Canada. A 2014 study of hostile bids in Canada showed that competing bids emerged "…an average of 41 days after initiation of the bid" and nearly all completing bids were announced before the 95th day of the bid.[5] FAIR Canada believes this evidence demonstrates that while targets need more than 35 days to obtain competing bids, 120 days is unnecessary as the number of bids received by targets beyond the 95th day is negligible.

3.5. Since 2005, Canada has seen an average of 14 take-over bids per year; the most in any given year was 24 take-over bids, and that occurred in 2006. However, in the past 5 years there has been an average of only 10 take-over bids per year. 2014 saw a total of only 7 take-over bids.[6] While FAIR Canada understands that many factors influence whether a take-over will be set in motion and ultimately be successful, we worry that the increased risks and costs (as discussed below in section 3.6) likely to be associated with the 120 Day Rule will reduce this number even more. This is inconsistent with the goals of economic efficiency and investor protection.

3.6. *Increased Costs and Risks:* Increased costs and risks for bidders may arise as a result of giving targets more time to consider and respond to take-over bids. Specifically, financing costs may be higher, and there is a greater chance that a white knight will be found to make an alternate bid. FAIR Canada is concerned that the combination of greater risk and higher costs would dissuade potential bidders from vying for Canadian targets, and in so

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4 *Ibid* at 1732. The UK take-over bid regime, which is structured to provide shareholders with 81 days to consider and respond to a bid, is heralded as being "quicker, cheaper and more certain" than a system such as Delaware's which has no limit and relies on traditional defensive tactics.

5 Fasken Martineau "2015 Canadian Hostile Bid Deal Study" available online at: http://www.fasken.com/hostile-takeover-bids-canada/.

6 *Ibid*.

doing, deprive shareholders of the chance to maximize their share value through the take-over bid process.

3.7. *120 Days Benefits Target Boards, not Target Shareholders* The CSA says the 120 Day Rule will afford the target board time to "respond to unsolicited take-over bids with appropriate action, such as seeking value-maximizing alternatives or developing and articulating their views on the merits of the bid."[7] A 120 day minimum deposit period would provide target boards with "leverage and time" in order to effectively negotiate with an unsolicited bidder and "make obtaining the target board's cooperation valuable to the bidder...".[8] FAIR Canada is opposed to take-over bid rules that will simply maximize value for target boards and is concerned that under the proposed 120 Day Rule the target board will be afforded additional power for that purpose. Deposit periods beyond the 95th day are unlikely to benefit target shareholders. On the contrary, additional time is likely to be unnecessary, and may actually reduce the number of bids. FAIR Canada is therefore of the opinion that this provision will benefit target boards at the expense of target shareholders, and we would urge the CSA, in light of this, to reduce the time-frame.

3.8. FAIR Canada instead believes that the take-over bid should be structured so as to maximize value for the target shareholders (the owners of the target). Nearly all target companies have found competitor bids prior to the 95th day of a bid. The target shareholders are therefore in a position to review viable alternate bids prior to the 120th day. In light of this empirical evidence and the benchmarking conducted to other leading jurisdictions (referred to in section 3.3 above) FAIR Canada recommends that the take-over bid period not remain open beyond 95 days.

3.9. *CSA should consider additional reforms:* While the CSA has proposed to change the take-over bid process with the Proposed Bid Amendments, reforms have not been proposed to address alternative transactions used to effect a change of control. Specifically, the CSA has no addressed creeping bids in the Proposed Bid Amendments nor has it considered reforms to proxy contests. Given the low number of hostile take-over bids seen in Canada, FAIR Canada recommends that the CSA reform other policies and instruments as they relate to changes of control.

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7 CSA Notice and Request for Comment "Proposed Amendments to Multilateral Instrument 62-104 – *Take-over Bids and Issuer Bids,* Proposed Changes to National Policy 62-203 – *Take-Over Bids and Issuer Bids,* and Proposed Consequential Amendments" March 31, 2015 at 3, available online at: https://www.osc.gov.on.ca/en/SecuritiesLaw_csa_20150331_62-104_rfc-proposed-admendments-multilateral-instrument.htm.

8 Letter in response to the CSA Notice and Request for Comments issued on March 14, 2014 regarding National Policy 62-105, Proposed Companion Policy 62-105CP and Proposed Consequential Amendments, "Submission by Ad Hoc Senior Securities Practitioners Group" July 11, 2013 at p 6, available online at: https://www.osc.gov.on.ca/documents/en/Securities-Category6-Comments/com_20130711_62-105_adhocsrsec.pdf.

3.10. As stated in our 2011 letter to the Toronto Stock Exchange and the Ontario Securities Commission,[9] FAIR Canada continues to recommend that securities regulators undertake a public consultation to examine reforms that would allow shareholders to put forward nominees for election to the board of directors and have their nominees listed in the management proxy circular without the onerous and expensive current legal requirements. FAIR Canada also continues to recommend that securities regulators undertake a public consultation to examine ways to allow shareholders to communicate or solicit other shareholders without the need to file a dissident proxy circular Doing so would be in the interests of shareholders and good corporate governance. We recognize that changes to corporate laws and securities laws may be required to institute these changes.

4. Waiver

4.1. In conjunction with the 120 Day Rule, the CSA has proposed to provide target boards with the power and discretion to waive the 120 day minimum deposit period to a period of no less than 35 days where it is ready to accept an offer. FAIR Canada believes this measure gives the target board an excessive amount of power and discretion over the take-over bid process; the target board would *de facto* have the power to unilaterally end the bidding process, and in doing so end the possibility of any value maximizing alternatives coming to light. The target shareholders will be denied the ability to find out what alternative bids may await, and will not have the opportunity to consider all potential options under the proposed reform by giving this discretion to the target board. FAIR Canada disagrees with providing the target board with the ability exempt itself from the minimum deposit period. In its place, we would ask that the CSA permit the minimum deposit period to be reduced only in circumstances where a majority of the target shareholders (excluding shareholders whose securities are beneficially owned, or over which control or direction is exercised by the bidder or by any person acting jointly or in concert with the bidder) vote in favour of doing so.

5. 50% Minimum Tender Requirement

5.1. FAIR Canada supports the CSA's proposed Minimum Tender Requirement which requires that more than 50% of the outstanding securities owned by the target shareholders, other than the bidder and any joint actors, must tender their shares before the bidder can take up shares under the bid (the Minimum Tender Requirement). The Minimum Tender Requirement will provide target shareholders with greater effective decision-making capacity in the take-over bid process as collective shareholder support will be required for any bid to go through. Furthermore, the Minimum Tender requirement will ensure that all target shareholders are able to benefit from control premiums offered through the take-over bid. FAIR Canada

[9] FAIR Canada, Letter to the Toronto Stock Exchange and the Ontario Securities Commission regarding proposed amendments to Party IV of the TSX Company Manual outlined in the amendments to Part IV of the TSX Company Manual – Request for Comments dated October 11, 2011, available online at: http://faircanada.ca/wp-content/uploads/2011/01/111011-FAIR-Canada-submission-to-TSX-re-Part-IV-of-the-Manual.pdf.

approves of the CSA's Minimum Tender Requirement as it ultimately works to benefit shareholders.

5.2. The purpose of the CSA's Minimum Tender Requirement "…is to address the current possibility that control of, or a controlling interest in, a [target] issuer can be acquired through a take-over bid without a majority of the independent security holders of the [target] issuer supporting the transaction if the [bidder] elects, at any time, to waive its minimum tender condition and ends its bid by taking up a smaller number of securities."[10] Moreover, the Minimum Tender Requirement will allow for "collective action by security holders in response to a take-over bid in a manner that is comparable to a vote on the bid."[11]

5.3. The Minimum Tender Requirement is more in line with the UK's take-over bid regime, which includes a 'mandatory bid rule'. Under the UK regime, when a shareholder holds 30% or more of the voting rights in the target's share capital, the shareholder (now bidder) must make an offer for the remainder of the target's share capital. The UK's 'mandatory bid rule' is intended to protect minority shareholders by ensuring that all shareholders get the opportunity to share in the payment of a control premium. FAIR Canada is pleased to see the CSA follow this approach and recognize the importance of protecting minority shareholders.

5.4. FAIR Canada further praises the CSA's proposal for the Minimum Tender Requirement as the proposed rule has incorporated requirements specific to partial take-over bids. The Minimum Tender Requirement provides guidance for partial bids, and mandates the bidder to take up 50% plus 1 of the remaining shares on a pro-rata basis. Again, we believe this will serve to further protect target shareholders during the take-over bid process.

6. 10 Day Mandatory Extension

6.1. The Proposed Bid Amendments will require the bidder to extend the offer by an additional 10 days once the 120 day deposit period has been achieved and all other conditions of the bid have been complied with or waived. The 10 Day Extension requires the bidder to promptly issue a press release disclosing that the minimum tender requirement has been satisfied, the number of securities that have been deposited, and inform all shareholders that the bid period shall remain open for an additional 10 days.

6.2. FAIR Canada strongly supports the 10 Day Extension. It will ensure that shareholders are not coerced into supporting bids in an effort to 'not get left behind'. This is of particular importance for individuals with small shareholdings in the target, as they may feel pressure to tender simply because they believe that all other shareholders will do the same. Under the new 10 Day Extension rule, shareholders will have the opportunity to 'wait and see' before committing their shares.

[10] CSA Notice and Request for Comment at s. 2.
[11] *Ibid* at s. 2.

We thank you for the opportunity to provide our comments and views in this submission. We welcome its public posting and would be pleased to discuss this letter with you at your convenience. Should you have further questions, please contact Neil Gross at neil.gross@faircanada.ca / 416-214-3408 or Kate Swanson at kate.swanson@faircanada.ca / 416-214-3442.

Sincerely,

Canadian Foundation for Advancement of Investor Rights

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June 26, 2015

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Saskatchewan Financial Services Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
New Brunswick Securities Commission
Registrar of Securities, Prince Edward Island
Nova Scotia Securities Commission
Superintendent of Securities, Newfoundland and Labrador
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Yukon
Superintendent of Securities, Nunavut

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Gentlemen and Mesdames:

CSA NOTICE AND REQUEST FOR COMMENT: PROPOSED AMENDMENTS TO MULTILATERAL INSTRUMENT 62-104 *TAKE-OVER BIDS AND ISSUER BIDS* (MI 62-104) AND CHANGES TO NATIONAL POLICY 62-203 *TAKE-OVER BIDS AND ISSUER BIDS* (NP 62-203) (THE PROPOSED BID AMENDMENTS)

This letter is submitted in response to the Request for Comments on the Proposed Bid Amendments published by the Canadian Securities Administrators (the **CSA**) on March 31, 2015. It reflects the views of a working group consisting of issuers having a combined market capitalization of more than $10 billion (the **Working Group**). We thank you for affording us an opportunity to comment on these significant amendments to the Canadian take-over bid regime.

General

It is not disputed that take-over bids (both friendly and hostile) play a legitimate role in the Canadian economy, including as a means of optimizing the productive use of corporate assets. However, the current Canadian take-over bid regime has, in its application, undermined the ability of corporate boards to take appropriately measured steps, in accordance with their legal duties, to protect their corporations and shareholders from opportunistic and predacious take-over tactics.

As mentioned in our comment letter of July 11, 2013 in response to the CSA Consultation paper on Security Holder Rights Plans and the Alternative Approach of the Autorité des marches financiers, the Working Group believes that the CSA should allow boards of directors to respond to take-over overtures, in accordance with

their corporate law fiduciary duties, in the manner they determine to be in the best interests of the corporation. The Working Group is also of the view that the securities regulatory authorities should defer to the applicable corporate law and the Canadian courts on questions of whether defensive measures taken by target boards have breached directors' fiduciary duties or effected results that are oppressive to the interests of security holders.

It is a basic tenet of Canadian corporate law that in the context of the separation of corporate ownership and management, boards of directors are entrusted with the authority and duty to supervise the management of the business and affairs of the corporation. While take-over bids raise issues of potential conflict of interest, these issues are manageable within judicially recognized constructs (e.g., independent committees), and the Working Group is still of the view that there is nothing so extraordinary about such transactions to justify the diminution of the role of the board and shifting of the ultimate decision over the corporation's future into the hands of a disparate, and often divided, group of the corporation's shareholders.

The decision to sell or privatize a corporation is, in essence, a particular business strategy or a means to pursue a business strategy. In that context, the board remains in the best position to evaluate the corporation's long-term business prospects and the viability of its business strategy and plans to achieve those prospects. The Supreme Court of Canada has recognized this fundamental role of the board in the context of takeover transactions in its decision in *BCE Inc. v. 1976 Debentureholders* (2008) S.C.C. 69 (the **BCE Decision**). The Court's decision expressly recognizes a board's right to forego maximization of short-term shareholder value in favour of pursuing long-term corporate objectives in a takeover context.

The Proposed Bid Amendments require that all non-exempt take-over bids remain open for a minimum deposit period of 120 days, unless this period is shortened by the target's board (the **120 Day Requirement**). The 120 Day Requirement represents an improvement over the current 35-day minimum bid period and should not be reduced. However, the Working Group is of the view that this lengthened minimum deposit period should not be viewed as sufficient in all cases, such as complex and regulated business entities or where arbitrageurs, activist hedge funds, event-driven investors and other short-term-oriented shareholders are actively involved in attempting to influence bid outcomes. In these contexts, some boards may not be able to fully discharge their fiduciary duties, as confirmed in the BCE Decision, even within the lengthened minimum bid period, and should have the ability to take steps to facilitate their decision-making processes.

The Proposed Bid Amendments also require that all non-exempt take-over bids receive tenders of more than 50% of the outstanding securities of the class that are subject to the bid, excluding securities beneficially owned, or over which control or direction is exercised by the offeror or by any person acting jointly or in concert with the offeror (the **Minimum Tender Requirement**) and that such bids be extended by the offeror for an additional 10 days after the Minimum Tender Requirement has been achieved and all other terms and conditions of the bid have been complied with or waived (the **10 Day Extension Requirement**). The Minimum Tender Requirement and the 10 Day Extension Requirement represent a significant regulatory improvement when compared with the current take-over bid regime as they introduce a collective element to the individual decisions of shareholders to tender to the bid. The Working Group supports these Proposed Bid Amendments, which mitigate the structural coercion of the current take-over bid regime.

CSA Consultation Paper

You will find below the comments of the members of the Working Group in response to each question set forth in the CSA Notice and Request for Comments on the Proposed Bid Amendments.

1 *The Proposed Bid Amendments contemplate the reduction of the minimum deposit period for take-over bids in the event that the offeree board issues a deposit period news release. Do you anticipate any difficulties with the application of the Proposed Bid Amendments as they relate to a deposit period news release and the ability of an offeror to reduce the initial deposit period for its bid as a result of the issuance of a deposit period news release?*

The Working Group does not anticipate major difficulties with the application of the Proposed Bid Amendments as they relate to a deposit period news release and the ability of an offeror to reduce the initial deposit period for its bid as a result of the issuance of a deposit period news release. Guidance provided in the proposed changes to National Policy 62-203 *Take-over Bids and Issuer Bids* addresses the appropriate mechanisms.

2 *The Proposed Bid Amendments provide that the minimum deposit period for an outstanding or future take-over bid for an issuer must be at least 35 days if the issuer announces that it has agreed to enter into, or determined to effect, an "alternative transaction". The Proposed Bid Amendments include a definition of "alternative transaction" that is intended to encompass transactions generally involving the acquisition of an issuer or its business. Do you agree with the scope of the definition of "alternative transaction"? If not, please explain why you disagree with the scope and what changes to the definition you would propose.*

The Working Group generally agrees with the definition of "alternative transaction"; however, since the CSA's approach is to propose a concept of "alternative transaction" principally based on the definition of "business combination" currently found in Multilateral Instrument 61-101 *Protection of Minority Shareholders in Special Transactions* (**MI 61-101**), the Working Group is of the view that subparagraph (a)(iii) of the proposed definition of "alternative transaction" should be conformed to the concept of "downstream transaction" included in MI 61-101. Accordingly, the exclusion to the concept of "alternative transaction" for a "transaction between the issuer and a subsidiary of the issuer" should read instead a "transaction between the issuer and an entity to which the issuer is a control person".

3 *Do you anticipate any difficulties with the application of the Proposed Bid Amendments as they relate to alternative transactions? Does the proposed policy guidance in sections 2.13 and 2.14 of NP 62-203 assist with interpretation of the alternative transaction provisions.*

The Working Group is concerned that the Proposed Bid Amendments which provide that if an issuer issues a news release announcing that it has agreed to enter into, or determined to effect, an "alternative transaction", the minimum deposit period for any then outstanding take-over bid or subsequent take-over bid (commenced before the completion or the abandonment of the alternative transaction or expiry of any other outstanding take-over bid) must be at least 35 days, rather than 120 days, from the date of the bid. Since "alternative transactions" usually take more than 35 days to be completed, such Proposed Bid Amendments will provide the other take-over bids the advantage to close prior to the completion of the "alternative transaction". In light of the uncertainty of success of an "alternative transaction", securityholders may be tempted to sell their securities in a bid that closes earlier than the "alternative transaction", even if at a lower price. It may also have the unintended effect of encouraging the use of competing bids rather than alternative transactions to avoid an advantage to a bidder. In order to avoid the results of unequal timing and to effectively balance the participants' interests, the Working Group recommends that the minimum deposit for any then outstanding take-over bid or subsequent take-over bid be the expiry date of the "alternative transaction", rather than 35 days.

4 *The Proposed Bid Amendments include a number of provisions that are specific to partial take-over bids. In particular, the Proposed Bid Amendments contemplate that an offeror making a partial take-over bid is only obligated to take up, at the expiry of the initial deposit period and assuming all pre-conditions to the bid are met, the maximum number of securities it can without contravening the pro rata take up requirement (s. 2.32.1(6)). Then, at the expiry of the mandatory 10 day extension period, the offeror must complete the pro rata take up obligation in respect of securities previously deposited (but not taken up) and securities deposited during the mandatory 10 day extension period (s. 2.32.1(7)). Would policy guidance concerning the interpretation or application of the Proposed Bid Amendments as they relate to partial take-over bids be useful? If so, please explain.*

While we recognize the need for partial bids to provide certainty for shareholders and that therefore a 10 Day Extension Period is appropriate, the application of two *pro rata* take ups, at the end of the original deposit period and then subsequently at the end of the 10 Day Extension, may create confusion for

offerors and target shareholders and increase administrative costs. The Working Group would appreciate guidance concerning the application of the Proposed Bid Amendments as they relate to partial take-over bids, with examples of how the take ups would be done in practice, including in cases where the bid includes a share component.

5 *The Proposed Bid Amendments include revisions to the take up and payment and withdrawal right provisions in the take-over bid regime. Do you agree with these proposed changes or foresee any unintended consequences as a result of these changes? In particular, do you agree that there should not be withdrawal rights for securities deposited to a partial take-over bid prior to the expiry of the initial deposit period for so long as they are not taken up until the end of the mandatory 10 day extension period?*

The Working Group generally agrees that the Proposed Bid Amendments should include revisions to the take up and payment and withdrawal right provisions in the take-over bid regime.

6 *Are the current time limits set out in subsections 2.17(1) and (3) sufficient to enable directors to properly evaluate an unsolicited take-over bid and formulate a meaningful recommendation to security holders with respect to such bid?*

The Working Group considers that the current time limits as set out in subsections 2.17(1) and 2.17(3) may be insufficient to enable directors to properly evaluate an unsolicited take-over bid and formulate a meaningful recommendation to securityholders with respect to such bid. Since the minimum deposit period must be at least 120 days (unless such period is shortened to not less than 35 days), the Working Group believes that the 15 day period provided in subsection 2.17(1) is too short for boards of directors to consider a take-over bid and prepare a circular. The Working Group proposes that the 15 day period be replaced by a 28 day period which would allow more time for boards of directors to properly consider a take-over bid; such a delay would also align with the ultimate recommendation period which is at least 7 days before the scheduled expiry of a take-over bid as provided in subsection 2.17(3) where the initial period is shortened to 35 days.

7 *Do you anticipate any changes to market activity or the trading of offeree issuer securities during a take-over bid as a result of the Proposed Bid Amendments? If so, please explain.*

The Working Group does not anticipate important changes to market activity or the trading of offeree issuer securities during a take-over bid as a result of the Proposed Bid Amendments at the time take-over bids will be announced. However, with the Minimum Tender Requirement and the 10 Day Extension Requirement, there should be less speculation related to the issue of the success of take-over bids.

Conclusion

The Working Group is of the view that the Proposed Bid Amendments represent a significant improvement over the current take-over bid regime. The Working Group hopes that this is the first step in a series of amendments to the take-over bid regime to realign with the fundamental principles of corporate law, by recognizing target board of directors authority to direct the management of a corporation in the best interests of the various corporate stakeholders, free of coercion from an ultimate sale of the corporation.

Thank you for allowing us to comment on this subject.

Yours very truly,

(signed)

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Dear Sirs/Mesdames:

Re: Request for Comment – Proposed Amendments to Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids,* Proposed Changes to National Policy 62-203 *Take-Over Bids and Issuer Bids* and Proposed Consequential Amendments

This letter is provided to you in response to the Notice and Request for Comment – Proposed Amendments to Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids,* Proposed Changes to National Policy 62-203 *Take-Over Bids and Issuer Bids* and Proposed Consequential Amendments (the "**Notice and Request for Comment**", and the proposed amendments, the "**Proposed Amendments**") published on March 31, 2015.

This comment letter is divided into two parts – firstly, it offers up some feedback on the Proposed Amendments generally, and secondly offers up some more specific views on

the seven specific questions posed by the CSA in conjunction with the Proposed Amendments.

I. Feedback on the Proposed Amendments

We are supportive of the Proposed Amendments. We believe that they offer an improved balancing as compared to the status quo of the competing objectives inherent in the regulation of take-over bids. In particular, we are supportive of the extension of the initial deposit period to 120 days, subject to the ability of the Board of Directors of the target company to reduce that period to as little as 35 days in appropriate circumstances.

In addition we have the following specific observations:

Lack of guidance on shareholder rights plans: We recommend that the CSA provide specific guidance on the permitted use of shareholder rights plans under the revised take-over bid regime. The Proposed Amendments replace the Prior Proposal, which would have created a new regime governing the use of rights plans. We have inferred that the CSA is of the view that the Proposed Amendments have significant implications for the continued use of rights plans, and we would encourage the CSA to provide guidance in that regard. In particular, if the view of the CSA is (as we infer) that rights plans will no longer have a role to play in providing a board of directors with more time in response to an unsolicited take-over bid, other than in exceptional circumstances, and will otherwise be cease-traded, then we recommend that the CSA articulate that view. Failing to do so risks, among other things, uncertainty as to the regime that will govern take-over bids,, undermining the objective of getting the CSA out of the business of cease trading rights plan and the prospect of inconsistent decisions from different provincial regulators, to the detriment of the Canadian capital markets.

Similarly, we see a continued role for rights plans in connection with "creeping bids" by control block holders. We believe specific guidance or confirmation from the CSA in this regard would be of assistance.

Status of NP 62-202: The Notice and Request for Comment also states that the CSA are not contemplating any changes to National Policy 62-202 at present. We would encourage the CSA in due course to engage in a review process for NP 62-202 in light of its age, brevity and limitations, all of which have in our view become apparent over the course of the vigorous debate regarding the regulation of contested transactions that has taken place in Canada in recent years.

Control block holders and other large shareholders: As a general matter, it appears likely that one of the trade-offs inherent in the Proposed Amendments is to increase to some extent the leverage that large shareholders may wield in determining the outcomes of contested transactions (or in preventing them from occurring at all) as a result of the

operation of the mandatory irrevocable minimum tender condition as formulated - i.e. it excludes the shares held by the offeror but not any shares held by other large shareholders, including management or related parties. Issuers that have two or more control block holders may therefore encounter situations where it is effectively impossible for either group to make a successful take-over bid, regardless of how enthusiastic the remaining minority shareholders might be about a particular proposal. We have reviewed the submissions of the Ad Hoc Senior Securities Practitioners Group in their letter of even date regarding this issue and agree with the potential concerns and approach expressed therein.

Treatment of competing bids and alternative transactions: We make the following observations on the proposed deposit period regime set forth in the Proposed Amendments:

- The Proposed Amendments provide for potentially different outcomes for an unsupported ("hostile") bidder depending on whether the competing supported ("friendly") transaction is structured as a take-over bid or as an alternative form of transaction.

- This use of a supported take-over bid structure will allow a target board to "equalize timing" between the competing transactions to an extent that is not currently possible (and that would not be available for an alternative form of transaction.) An example of how timing equalization could occur is as follows:

  Day 1: Hostile Bid A is announced and launched for Target, expiring on day 120 (i.e. reflecting the required minimum deposit period)

  Day 30: Friendly Bid B is announced and launched for Target with initial expiry date of day 150 (i.e. retaining the 120 day deposit period on announcement)

  Day 55: Target issues a deposit period news release to the effect that a 35 day initial deposit period is acceptable; Bid B is concurrently amended to revise the expiry date to day 65.

  Day 56: Bid A is amended to revise the expiry date to day 66

  Note that in this example, given the need for Bidder A to react to the notice of variation from Bidder B and engage in the necessary logistics to print and mail a notice of variation without the benefit of the advance notice afforded to Bidder B, the target would have succeeded in creating a situation in which the initial Bid A actually expires after Bid B.

- The use of a supported take-over bid structure could also eliminate a potentially very significant timing advantage for a hostile bidder in situations where the initial friendly transaction is subject to relatively long regulatory approval timelines to which the hostile bidder would not be subject. Imposing a common timetable of at least 120 days on all bidders removes (at least in part) the potential timing advantage that such hostile bidders would otherwise enjoy. An example would be as follows:

  Day 1: Target announces friendly transaction with Bidder A, which is a foreign-based strategic buyer in the same industry – regulatory approvals (e.g. Investment Canada, Competition Act and foreign antitrust) are expected to take 120-180 days to obtain. Accordingly, Bidder A and Target structure their transaction as a take-over bid and Target does not shorten the prescribed initial 120-day deposit period.

  Day 20: Bidder B announces a competing bid for Target – despite not requiring the same regulatory timeline (no Investment Canada approval and more straightforward antitrust process) it must maintain an initial deposit period of 120 days.

  Day 50: Bidder B obtains all required regulatory approvals for its transaction.

  Day 110: Bidder A extends initial deposit period until day 130 (anticipated date of receipt of final regulatory approvals)

  Day 130: Bidder A receives final regulatory approvals for its transaction; expiry of initial deposit period for Bid A.

  Day 140: Expiry of Bidder B's initial deposit period.

  In this example, Bidder A and Target have been able to prevent Bidder B from pressing its regulatory advantage by using the takeover bid structure and deliberately not compressing the 120 day initial deposit period. Had Bid A been structured as a plan of arrangement (or other "alternative transaction" structure), under the Proposed Amendments Bidder B would have been in a position to have its bid expire on or around day 55, i.e. very shortly after receipt of its regulatory approvals.

- There appear to be at least three other alternatives to the Proposed Amendments: (i) an automatic contraction to 35 days (or some other shorter default period) upon the announcement by a target of a supported transaction, regardless of the

structure adopted; (ii) an initial deposit period of 120 days regardless of any alternative transactions (or structure of same; or (iii) an ability by targets to enforce equalization of timing beyond 120 days. The existing rights plan jurisprudence has generally reflected the principle that equalizing timing between a hostile bidder and a friendly acquirer is not an appropriate role for rights plans. In our view, the choice of regime in this regard should be driven by a determination of the best outcome for the Canadian capital markets rather than merely following the existing jurisprudence. The members of our firm have a variety of viewpoints on this issue but we believe on balance that maintaining some ability on the part of the board of directors to respond to the specific circumstances of a contested situation in accordance with their fiduciary obligations is appropriate.

II. Responses to the Specific Questions Posed by the CSA

We have reproduced the seven questions contained in the Notice and Request for Comment for ease of reference, with our views on each immediately following.

1. The Proposed Bid Amendments contemplate the reduction of the minimum deposit period for take-over bids in the event that the offeree board issues a deposit period news release. Do you anticipate any difficulties with the application of the Proposed Bid Amendments as they relate to a deposit period news release and the ability of an offeror to reduce the initial deposit period for its bid as a result of the issuance of a deposit period news release?

Please see our comments in the prior section with respect to the broader treatment of "alternative transactions" as opposed to competing take-over bids.

2. The Proposed Bid Amendments provide that the minimum deposit period for an outstanding or future take-over bid for an issuer must be at least 35 days if the issuer announces that it has agreed to enter into, or determined to effect, an "alternative transaction". The Proposed Bid Amendments include a definition of "alternative transaction" that is intended to encompass transactions generally involving the acquisition of an issuer or its business. Do you agree with the scope of the definition of "alternative transaction"? If not, please explain why you disagree with the scope and what changes to the definition you would propose.

We think the definition is appropriate – presumably the CSA would be prepared to consider exemptive relief in circumstances where it would catch transactions that are not genuine alternatives to a take-over bid.

3. Do you anticipate any difficulties with the application of the Proposed Bid Amendments as they relate to alternative transactions? Does the proposed policy

guidance in sections 2.13 and 2.14 of NP 62-203 assist with interpretation of the alternative transaction provisions?

No comments.

4. The Proposed Bid Amendments include a number of provisions that are specific to partial take-over bids. In particular, the Proposed Bid Amendments contemplate that an offeror making a partial take-over bid is only obligated to take up, at the expiry of the initial deposit period and assuming all pre-conditions to the bid are met, the maximum number of securities it can without contravening the pro rata take up requirement (s. 2.32.1(6)). Then, at the expiry of the mandatory 10 day extension period, the offeror must complete the pro rata take up obligation in respect of securities previously deposited (but not taken up) and securities deposited during the mandatory 10 day extension period (s. 2.32.1(7)). Would policy guidance concerning the interpretation or application of the Proposed Bid Amendments as they relate to partial take-over bids be useful? If so, please explain.

We believe that including an example of the multi-stage take up for a partial bid in the policy guidance would be of assistance. Given the complexities inherent in ensuring over-all proportionate take up from shareholders who have deposited before and after a partial initial take-up, we believe providing one or more illustrative examples would assist in reducing inadvertent errors.

5. The Proposed Bid Amendments include revisions to the take up and payment and withdrawal right provisions in the take-over bid regime. Do you agree with these proposed changes or foresee any unintended consequences as a result of these changes? In particular, do you agree that there should not be withdrawal rights for securities deposited to a partial take-over bid prior to the expiry of the initial deposit period for so long as they are not taken up until the end of the mandatory 10 day extension period?

We generally agree with the proposed changes in this area, including with respect to withdrawal rights in the context of partial take-over bids. We further note that partial bids are in any event not common even under the existing regime, and are likely to become even less common if the Proposed Amendments are implemented. As a practical matter, our experience has been also been that most bidders take up immediately in any event to avoid the risk of withdrawals.

6. Are the current time limits set out in subsections 2.17(1) and (3) sufficient to enable directors to properly evaluate an unsolicited take-over bid and formulate a meaningful recommendation to security holders with respect to such bid?

We believe there may be merit to providing boards of directors with additional time to issue a directors circular in light of the revised 120-day initial deposit period - the current

15 days requirement was formulated as part of the much shorter current timelines, and does often result in a compressed board process following the initial receipt of an unsolicited bid. That said, it is worth noting that it is consistent with the U.S. approach of requiring the filing of a Schedule 14D-9 within ten business days following the commencement of a tender offer.

7. Do you anticipate any changes to market activity or the trading of offeree issuer securities during a take-over bid as a result of the Proposed Bid Amendments? If so, please explain.

We generally agree with the expected impacts described in the "Anticipated Impact of Proposed Bid Amendments" section of the Notice and Request for Comments. We don't otherwise expect a dramatic change in the trading practices of market participants in the wake of implementing the Proposed Amendments.

We would be pleased to discuss any of the foregoing at the request of the CSA.

Yours very truly,

(signed)

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July 9, 2015

BY E-MAIL

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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 (New Brunswick)
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Nunavut

c/o

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Dear Sirs/Mesdames:

Re: Request for Comments - Proposed Amendments to Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids* (MI 62-104) and Proposed Changes to National Policy 62-203 *Take-Over Bids and Issuer Bids* (NP 62-203)

We are pleased to submit this letter in response to the request for comments of the Canadian Securities Administrators (the "**CSA**") published March 31, 2015 on the 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**").

The CSA note that the Proposed Bid Amendments are intended to enhance the quality and integrity of the take-over bid regime and rebalance the current dynamics among

offerors, offeree issuer boards of directors (offeree boards), and offeree issuer security holders by (i) facilitating the ability of offeree issuer security holders to make voluntary, informed and co-ordinated tender decisions, and (ii) providing the offeree board with additional time and discretion when responding to a take-over bid.

In order to achieve the above-stated objectives, the CSA has proposed a (i) Minimum Tender Requirement, (ii) 10 Day Extension Requirement, and (iii) 120 Day Requirement (each as defined in the Proposed Bid Amendments). While we generally support the Minimum Tender Requirement and the 10 Day Extension Requirement given that they address the coercive aspects of the current tender process, namely the collective action problem and pressure to tender, we have concerns about the proposed extension of the minimum bid period by 85 days.

In that regard, while the CSA are proposing to rebalance the current bid dynamics, we note that the CSA are not proposing to amend National Policy 62-202 ("**NP 62-202**") which recognizes that "take-over bids play an important role in the economy by acting as a discipline on corporate management and as a means of reallocating economic resources to their best uses". Accordingly, for the reasons expressed below, we support extending the minimum bid period from the current 35-day period, but are concerned that extending the period to 120 days could have consequences that conflict with the principles enunciated in NP 62-202.

As we note in our 2015 Canadian Hostile Take-Over Bid Study (available at http://www.fasken.com/hostile-takeover-bids-canada/), which analysed all 143 unsolicited take-over bids for legal control of a Canadian-listed public company during the ten-year period ended December 31, 2014:

1. A sale of the company was by no means inevitable: of the 127 "first-mover" bids, approximately 55% were successful, while 28% of the targets of first-mover bids remained independent twelve months after the initiation of the bid. We believe that this finding may call into question the degree to which the current dynamics among offerors, offeree boards, and offeree issuer security holders need to be rebalanced.

2. The current 35-day period was insufficient to allow most competition to emerge (as competition emerged an average of 41 days after the initiation of a first-mover bid and almost two-thirds of those competing transactions emerged 35 days or more after the initiation of the bid); however, it remains to be seen whether a 120-day period strikes the balance needed to ensure sufficient time for a board to respond to the bid while not dissuading bidders from coming forward in the first place.

3. Competition cut a bidder's odds of success in half and resulted in a 69% increase, on average, in the final premium offered by a hostile bidder. The potential for increased competition inherent in a longer bid period and the impact that may have on the potential purchase price could be expected to cause bidders to carefully evaluate whether to proceed with a bid at all.

Our concerns regarding the significant extension of the minimum bid period are heightened by the fact that the CSA are not proposing to provide guidance concerning their position on the potential use of shareholder rights plans to further extend the bid period or otherwise impede unsolicited bids. While we would anticipate that the CSA would generally take an unfavorable view of such action, we believe that market participants would benefit from a clear articulation of the CSA's position on this issue.

Given the increased risks and potential costs to bidders (including the costs of maintaining financing commitments for an extended period or, in the case of a share exchange bid, the risk of extended exposure to market volatility) if the 120 Day Requirement is enacted -- particularly in the absence of additional guidance on the CSA's position on rights plans -- we are concerned that we may well witness a decrease in the number of unsolicited bids, and perhaps of greater importance, a weakening of the very threat of a bid, creating an environment in which the economic benefits of take-over bids, which are expressly recognized by the CSA, are less likely to be realized.

* * *

Thank you for this opportunity to comment on the Proposed Bid Amendments. Note that this letter represents the general comments of the authors (and not those of the firm generally or any client of the firm) and are submitted without prejudice to any position taken or that may be taken by our firm on its own behalf or on behalf of any client. Should you wish to discuss any of our comments, please contact Richard Steinberg (416.865.5433), Aaron Atkinson (416.865.5492) or Bradley Freelan (416.865.4423).

Yours truly,

(Signed) "Richard Steinberg"
Richard Steinberg

(Signed) "Aaron Atkinson"
Aaron Atkinson

(Signed) "Bradley Freelan"
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VIA EMAIL

June 9, 2015

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 (New Brunswick)
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Nunavut

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Re: 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 Amendments")

Canadian Oil Sands Limited ("**COS**") appreciates the efforts of the Canadian Securities Administrators (the "**CSA**") to regulate take-over bids in a way that provides boards with sufficient time to properly assess an offer and to respond in a way that allows directors to ensure that they have carefully considered the optimal result for the corporation. COS also appreciates the opportunity to be a part of the CSA's regulatory reform process.

COS holds a 36.74% working interest in the Syncrude joint venture, providing a pure investment opportunity in Syncrude's crude oil producing assets. Located near Fort McMurray, Alberta, Syncrude operates large oil-sands mines and an upgrading facility that produces a light, sweet crude oil on behalf of its joint venture owners. COS' primary business is its ownership in Syncrude and the marketing and sale of crude oil derived from such ownership.

COS has the following comments on the Proposed Amendments:

120 Day Requirement

We believe that 120 days will give a board sufficient time to effectively respond to a take-over bid and ensure that shareholders have sufficient information to make a fully informed decision. Provincial securities commissions will generally intervene to "cease trade" a shareholder rights plan within 45 to 60 days after the launch of an unsolicited take-over bid. This is beyond the 35 day minimum tender period for a take-over bid, but in many situations may not be enough time for a board of directors to satisfy its fiduciary duty and duty of care and to properly communicate with shareholders.

50% Minimum Tender Requirement and 10 Day Extension Requirement

As discussed in the CSA consultation paper, under the current regulatory regime shareholders will often feel pressured to tender to an unsolicited take-over bid that they do not support. We agree with the CSA that the 50% minimum tender and 10 day extension requirements will help mitigate this problematic aspect of the current regulatory regime. Standard shareholder rights plans already include provisions equivalent to the 50% minimum tender and 10 day extension requirements.

Directors' Response

We are of the view that boards of directors should be allowed 30 days to respond to a take-over bid, especially given the requirement in the Proposed Amendments that a take-over bid must be open for a minimum of 120 days. Boards currently have 15 days after the launch of a take-over bid to make their recommendation regarding the bid to shareholders. In many situations, we do not believe that 15 days is a sufficient amount of time for directors to properly discharge their fiduciary duty and duty of care. In order to fulfill its statutory duties and properly respond to shareholders, a board must review and evaluate complex information, put together a multidisciplinary team of advisors, potentially identify and negotiate competing offers or pursue value maximizing alternatives, formulate a response to shareholders and communicate that response to shareholders and other stakeholders.

Shareholder Rights Plans

The Proposed Amendments are silent on the treatment of shareholder rights plans. The Proposed Amendments should provide more guidance to issuers regarding the treatment of shareholder rights plans after the expiry of the 120 day period, as well as with respect to exempt take-over bids. Provincial securities commissions have had conflicting views regarding the treatment of shareholder rights plans in the past and further guidance from the CSA may help to provide greater market clarity.

Thank you for the opportunity to comment on the Proposed Amendments.

Yours truly,

CANADIAN OIL SANDS LIMITED

"Shaun Wrubell"

Shaun Wrubell
Assistant Corporate Secretary and Senior Legal Counsel
SMW/ss

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Donald J. Lowry, Chairman of the Board
Wesley R. Twiss, Chairman of the Audit Committee
Sarah E. Raiss, Chairman of the Corporate Governance and Compensation Committee
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BY E-MAIL June 30, 2015

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Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission of New Brunswick
Superintendent of Securities, Prince Edward Island
Nova Scotia Securities Commission
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Yukon Territory
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Dear Sirs / Mesdames,

Re: Comments on Proposed Amendments to National Instrument 62-104 *Take-over Bids and Issuer Bids* and National Policy 62-203 *Take-over Bids and Issuer Bids*

The following comments are submitted in response to the Notice and Request for Comments (the "**Request for Comments**") published by the Canadian Securities Administrators (the "**CSA**") on March 31, 2015 with respect to proposed amendments (the "**Proposed Bid Amendments**") to National Instrument 62-104 *Take-over Bids and Issuer Bids*

("**NI 62-104**"and the "**NI 62-104 Amendments**") and National Policy 62-203 *Take-over Bids and Issuer Bids* ("**NP 62-203"**).

Thank you for the opportunity to comment on the Proposed Bid Amendments. This letter represents our own personal comments (and not those of the firm generally or any client of the firm) and are submitted without prejudice to any position taken or that may be taken by our firm on its own behalf or on behalf of any client.

We are submitting these comments with respect to specific aspects of the Proposed Bid Amendments, primarily in respect of the application of the NI 62-104 Amendments that we believe could benefit from greater clarity and consistency.

Comments on NI 62-104 Amendments

Definitions

In respect of the proposed definition of "alternative transaction," we suggest the CSA consider the following:

- clarifying that the definition is not intended to include a conventional redemption feature;

- including in subsection (iii) "a transaction solely between the issuer and ~~a subsidiary~~ one or more subsidiaries of the issuer or any such subsidiaries…" or words having a similar effect; and

- excluding in subparagraph (c) any such sale, lease, etc. to a subsidiary.

"business day" – Consider the implications of the fact that what is a business day will vary among the Canadian jurisdictions and how to address the complications that may arise with respect to the date and timing calculations that are to be made throughout NI 62-104.

"deposit period news release" – Consider revising the term "issued by an offeree issuer" given that the offeree issuer could refuse or fail to issue the news release and clarifying that the date should be not less than 35 days "from the date of the bid or date of announcement of the bid" (in both instances)." In our view, NP 62-203 should clarify that clarify that the board's decision in this respect is not required to be unanimous.

"issuer bid" – Consider whether the exceptions should include the acquisition, redemption, etc. of securities in accordance with their terms, as well a dissolution or winding up. Paragraph (b) should perhaps also specify that the vote should be of the particular class of securityholders.

"partial take-over bid" – The definition should exclude securities subject to the bid, "other than, if applicable, the offeror's securities."

"published market" – This definition should be clarified and modernized, including, for example, to clarify whether markets such as U.S. pink sheets, TSX Private Markets and other

such sources are intended to be included and by specifying that the prices should be disseminated electronically on a regular basis. The CSA should also consider whether reference is still required to paid circulation.

"standard trading unit" – Consider whether this definition is required.

"take-over bid" – The reference to "last address as shown on the books" should be clarified and modernized given the prevalence of beneficial holdings of shares and of registered ownership being with depositories such as CDS. Reference to "vote of security holders" at the end of the definition should perhaps also be limited to "of that class."

Section 1.4 - definition of "control" – The reference to "interests" of the partnership should be to "equity securities."

Section 1. 5 - Computation of time – See the comment made with respect to the definition of "business day "above. Given the definition of business day will differ among Canadian jurisdictions it should be clarified which jurisdiction applies for the purposes of the computation.

Section 1.6 - Expiry of Bid – Paragraph (b) of the interpretation should take into account any extension to the time that the offeror becomes obligated to take up or reject the securities deposited.

Section 1.8 - Deemed beneficial ownership – The calculation to determine ownership with respect to convertible, exchangeable securities, etc., should be made on a fully diluted basis as calculation on a partially diluted basis frequently results in over-statement of the offeror's proportionate interest. Consider whether the exception in paragraph (4) for agreements, commitments, etc. should be limited only to non-exempt take-over or issuer bids or might also apply to exempt bids. Consider whether the specific clarification in (5) should apply outside Quebec also.

Section 1.9 - Acting jointly or in concert - Subparagraph (b)(ii) should not apply in the circumstances of an ordinary proxy solicitation where a person is appointed as proxy for a securityholder. In subparagraph (3) consider whether the exception for agreements, commitments, etc. should be limited only to non-exempt take-over or issuer bids or might also apply to exempt bids.

Section 1.0 - Application to indirect bids - We suggest that anti-avoidance purpose language should be added to this section. It should also be clarified whether this is limited only to the acquisition indirectly of a controlled entity via the acquisition of securities of the controlling entity or whether it is also intended to apply to the acquisition of voting or equity securities underlying convertible, exchangeable or exercisable securities.

Section 1.11 - Determination of market price - See our comments above with respect to the definition of "business day" where business day is defined with reference to each jurisdiction. All references to "average" in this section should also be to "simple average".

Part 2 – BIDS

Subsection 2.2(2) – As per our comments above, consider whether this exception should also apply to exempt bids.

Subsection 2.2(2)) – It should be clarified whether these purchases may themselves constitute a take-over bid (i.e. that result in ownership of greater than 20% by the offeror) to address the type of situation, which was not addressed, that arose *In the Matter of Falconbridge Limited* (Reasons of the OSC dated August 17, 2006).

Subsection 2.2(3)

- Subsection 2.2(3)(d)(ii) – The wording appears a bit awkward since all persons referred to are offerors.

- Subsection 2.2(3)(d)(iii), (iv), (v) and (vi) should specifically refer to "securities purchased" or "price paid" by the offeror. Subsection 2.2(3)(d)(vii) should refer to the securities "owned by the purchaser or the offeror".

- Subsection 2.2(4) should refer to the acquisition of the "convertible" securities as opposed to "as converted" as they will not, at that time, be converted.

Subsection 2.4(1)

- It should be clarified in subparagraph 2.4(1)(a)(i) that reference is to the highest consideration paid "by the offeror" and in subparagraph 2.4(1)(a)(ii) at what time the cash equivalent is to be determined.

Subsection 2.7(2)

- Given prior decisions, this subsection should refer to the intention or "potential" intention of the offeror (as the intention may not have been crystalized at that time) and should permit for disclosure in a news release in addition to the bid circular.

Section 2.8 – Consider whether the wording can be interpreted to imply that a non-exempt take-over bid can be made only in one jurisdiction.

Section 2.9 – Publication should be permitted to be made in an acceptable electronic format and as per our comments above, consider whether reference is still required to "paid circulation".

Subsection 2.10(2)(b) should allow for delivery of the bid circular as soon as practicable after receipt of the list of security holders as it is often quite difficult to prepare and deliver the bid circular in the proper form within the 2 business day period.

Subsection 2.11(1)(b) and subsection 2.12(1)(b) should allow for sending to current security holders at the option of the offeror since the security holders may have changed from the time of sending of the original bid.

Subsection 2.12(5) – Consider the application of this provision to a share exchange issuer bid.

Subsection 2.16(1) – An acceptable method of electronic delivery should be specifically contemplated.

Subsection 2.17(3) – This should refer to the "scheduled expiry as it may be extended…."

Subsection 2.18(1) – See the comment in respect of 2.11(1)(b) above in respect of the security holders changing since the bid being commenced.

Subsection 2.23(1) –This should refer to all holders of the same class "in Canada" being offered identical consideration since the bid is otherwise determined on a jurisdiction by jurisdiction basis, and tax and securities law in other countries may require adjustments and should not constitutionally be regulated by Canadian provincial law.

Subsection 2.23(3) – This section should refer to an increase in the consideration only, and not value, as the consideration could increase due to a change in share value of the securities subject to the bid.

Subsection 2.26(1) and Subsection 2.26.1(1) – It should be clarified how the proportionate take-up and payment applies in the local jurisdiction, nationally or otherwise.

Subsection 2.26(1) and Subsection 2.26.1(1) – It should be clarified whether the offeror's securities are excluded for the purposes of this determination and whether the proportionate take-up applies across each local jurisdiction.

Subsection 2.26.1(2) – We question how this would work in practice; in particular, whether it could preclude a partial bid subsequently.

Subsection 2.27 – Consider whether reference should be expressly made to the requirements where a condition is subsequently added.

Subsection 2.28.1 – Consider whether the offeror should be permitted to shorten the period if later and whether it could allow for two alternatives.

Subsection 2.28.2(i) and (ii) – Consider the implications in (i) given that the bid may be shortened to 35 days and in (ii) where there is a second bid.

Subsection 2.28.3 – Consider whether the offeror should be permitted to shorten the period if later, whether it could allow for two alternatives and whether an alternative transaction could include a substantial issuer bid. In this respect, we would also urge the CSA to ensure the regulators have the powers (for example, under section 104 of the *Securities Act* (Ontario) or the equivalent in other jurisdictions) to address any potential defensive measures that may frustrate the policy rationale underlying NI 62-104. This would include, for example, the ability to prescribe a shorter period bid period in respect of a particular issuer. Guidelines setting out the circumstances in which such powers could be exercised should similarly be set out NP 62-203.

Subsection 2.29.1 (c) – This condition will be very difficult for small partial bids. Consider whether the board of the target should be able to exempt the offeror from this condition.

Subsection 2.30(2)(b)(i) – The value of the consideration could be reduced in the case of a share-exchange. Subsection 2.30(2)(b)(i) and (iii) – Consider whether the security holder should not be able to withdraw as it may no longer wish to sell. Subsection 2.30(2)(b)(iii) should refer to an increase in the "value" of the consideration.

Section 2.31 - In our view, the words proposed to be deleted from this provision are still required.

Section 2.31.1 (b)(iv), 2.32(3) and 2.32.1(7) – The requirement to take-up the securities within the prescribed period should take into consideration the circumstances where a subsequence material adverse change occurs and whether the implication is that the offeror must nonetheless acquire the securities.

Section 2.31.1 (b)(iv)(B) – This should also allow for a period of 3 business days to take-up and pay for the securities, given the possibility of holidays or weekends.

Thank you for the opportunity to comment on these proposals.

Regards,

« Simon A. Romano »
« Ramandeep K. Grewal »

Simon A. Romano
Ramandeep K. Grewal

Institute of Corporate Directors
Institut des administrateurs de sociétés

29 June, 2015

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 (New Brunswick)
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Nunavut

Attention:

The Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor, Box 55
Toronto, Ontario M5H 2S8

Me 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

CSA NOTICE AND REQUEST FOR COMMENT: PROPOSED AMENDMENTS TO MULTILATERAL INSTRUMENT 62-104 TAKE-OVER BIDS AND ISSUER BIDS, PROPOSED CHANGES TO NATIONAL POLICY 62-203 TAKE-OVER BIDS AND ISSUER BIDS AND PROPOSED CONSEQUENTIAL AMENDMENTS

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This letter is submitted on behalf of the Institute of Corporate Directors ("ICD") in response to the invitation to comment on the CSA's proposed amendments to Multilateral Instrument 62-104 Take-Over Bids and Issuer Bids (MI 62-104) and changes to National Policy 62-203 Take-Over Bids and Issuer Bids (NP 62-203) (collectively, the Proposed Bid Amendments).

The ICD is a not-for-profit, member based association with more than 10,000 members and eleven chapters across Canada. We are the pre-eminent organization in Canada for directors in the for-profit, not-for-profit and Crown Corporation 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.

Summary of the ICD Position

In the ICD's comment letter dated June 12, 2013, in response to the CSA's proposed National Instrument 62-105 and the AMF's consultation paper regarding defensive tactics, we noted that it had been nearly thirty years since National Policy 38 on defensive tactics was introduced. We, therefore, welcomed the scrutiny our regulators were giving the take-over bid regime, not least because Canada had become a highly bidder-friendly jurisdiction.

In that letter, the ICD firmly supported the AMF proposal. We continue to believe that such an approach would give Boards of Directors the greatest ability to exercise their judgment in the best interests of the corporation and all of its stakeholders, including its shareholders. We recognize, however, that the CSA had a duty to consider the views of each provincial regulator as well as the views of diverse participants in our capital markets.

In the circumstances, we believe the approach now proposed by the CSA merits advancement. It is important, however, that this approach be re-assessed in the future to ensure that target boards will have sufficient latitude to respond to unsolicited bids in the best interests of the corporation.

Key Proposed Amendments

The so-called "50-10-120" approach proposed by the CSA is an improvement over the inadequate provisions of the current regime. The amendments would provide boards with some additional latitude to exercise their judgment and take action to seek alternative arrangements in the event they deem a bid to not be in the best interests of the

corporation. The amendments would also lead to more informed and less pressurized tendering decisions by shareholders.

50% Minimum tender requirement and 10-day extension

The 50% minimum tender requirement gives shareholders the information and knowledge that a bid will only succeed with the support of a majority of shareholders independent of the bidder, eliminating the concern that they may be coerced into tendering their shares. The 10-day extension provides undecided shareholders more time to decide whether to accept the bid without the fear they may "miss their opportunity" to tender. These two provisions significantly improve the ability of target shareholders to make voluntary and informed tender decisions.

120-day bid period

We recognize that the 120-day bid period provides directors of target issuers more time to respond to a take-over bid. However, it is important to note that simply providing additional time falls far short of the AMF model (as well as models in other jurisdictions, notably in the United States), which would have allowed primary decision-making on change of control transactions to reside with company directors, who are the only individuals in the take-over process legally mandated to act in the best interests of the corporation.

Given the requirements of directors to act in the best interest of the corporation and given that competing jurisdictions allow boards to "just say no", we propose that 120 days is the minimum amount of time that should be provided to a target board to consider an unsolicited bid and, if necessary, find an alternative arrangement. It is important to recognize that, simply because an unsolicited bid for an issuer is made, it does not necessarily follow that the issuer is considered an obvious acquisition by other potential bidders. Put plainly, "White Knights" are not always queued up waiting for their opportunity. Target boards need as much latitude as possible to fulfill their responsibilities – including, should they decide to explore prospects that may be even more beneficial to shareholders than the unsolicited bid.

It is, in fact, not unreasonable to imagine that 120 days is an insufficient amount of time to, for instance, negotiate with a bidder or secure an alternative arrangement. For this reason, it will be vital that the CSA closely monitor the impact of the amendments to ensure that boards are, in fact, being provided with the time to act in the best interests of the corporation.

Defensive Tactics

The Proposed Bid Amendments do not explicitly address defensive tactics. Whereas in situations in which the proposed bid requirements are met, the need for a shareholder rights plan may be reduced, in exempt bid situations, we believe that plans will continue to be relevant to issuers concerned about shareholders accumulating large positions through normal course purchases and private agreement exemptions.

Conclusion

The ICD recognizes that reaching a unified position on take-over bid reform has been a challenge for regulators and the CSA deserves a great deal of credit for arriving at a consensus.

Canada's current take-over bid framework is in need of reform and the ICD supports the CSA's efforts to improve the regime. Directors must be given every opportunity to fulfill their legal obligation to act in the best interests of the corporation, including in the context of take-over bids. The Proposed Bid Amendments, therefore, should be re-assessed in the future, after their adoption to ensure that boards have sufficient latitude to deal with bids in the best interests of the corporation, its shareholders and other stakeholders.

Yours truly,

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

Institute of Corporate Directors
Institut des administrateurs de sociétés

29 juin 2015

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 (New Brunswick)
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Nunavut

Attention :

Le Secrétaire
Commission des valeurs mobilières de l'Ontario
20 rue Queen Ouest
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Me Anne-Marie Beaudoin
Secrétaire
Autorité des marchés financiers
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AVIS DE CONSULTATION DES ACVM : PROJET DE RÈGLEMENT MODIFIANT LE RÈGLEMENT 62-104 SUR LES OFFRES PUBLIQUES D'ACHAT ET DE RACHAT, PROJET DE MODIFICATION DE L'INSTRUCTION GÉNÉRALE 62-203 RELATIVE AUX OFFRES PUBLIQUES D'ACHAT ET DE RACHAT ET PROJET DE MODIFICATIONS CORRÉLATIVES

Cette lettre est soumise au nom de l'Institut des administrateurs de sociétés (« IAS ») en réponse à l'invitation à commenter le Projet de règlement des ACVM modifiant le

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Règlement 62-104 sur les offres publiques d'achat et de rachat (MI 62-104) et le Projet de modification de l'Instruction générale 62-103 relative aux offres publiques d'achat et de rachat (NP 62-103) (collectivement, le Projet de modification du régime des OPA).

L'IAS est une association à but non lucratif comptant plus de 10 000 membres et onze sections régionales à travers le Canada. Nous sommes la principale organisation au Canada à représenter les administrateurs et administratrices œuvrant dans les secteurs à but lucratif, à but non lucratif et dans les sociétés d'État. Notre mission consiste à stimuler l'excellence au sein des conseils afin de renforcer la gouvernance et la performance des sociétés et organisations canadiennes. Cette mission est réalisée au moyen de la formation, de la certification et de la promotion des meilleures pratiques de gouvernance.

Sommaire de la position de l'IAS

Dans la lettre de commentaires de l'IAS datée du 12 juin 2013, en réponse au Projet de règlement des ACVM 62-105 et au document de consultation de l'AMF concernant les mesures de défense, nous soulignions qu'il y avait près de trente ans qu'avait été présentée l'Instruction générale C-38 sur les mesures défensives. Nous avions donc accueilli avec plaisir cette attention accordée par nos autorités réglementaires au régime d'offres publiques, ne serait-ce qu'en raison du fait que le Canada est devenu un pays hautement favorable aux offres publiques d'achat.

Dans cette lettre, l'IAS appuyait fermement la proposition de l'AMF. Nous continuons de croire qu'une telle approche accorderait aux conseils d'administration une meilleure capacité d'exercer leur jugement dans les meilleurs intérêts des sociétés et de l'ensemble de leurs parties prenantes, y compris leurs actionnaires. Nous reconnaissons toutefois que les ACVM ont le devoir de tenir compte des points de vue de chaque autorité réglementaire provinciale ainsi que des points de vue des divers participants aux marchés des capitaux.

Dans les circonstances, nous croyons que l'approche aujourd'hui proposée par les ACVM a beaucoup de mérite. Il est important, cependant, que cette approche soit réévaluée à l'avenir afin de nous assurer que les conseils ciblés disposent de suffisamment de latitude pour répondre à des offres non sollicitées dans les meilleurs intérêts de leurs sociétés.

Les principaux amendements proposés

L'approche dite « 50-10-120 » proposée par les ACVM représente une amélioration par rapport aux dispositions inadéquates du régime actuel. Les amendements offriraient aux conseils une latitude additionnelle pour exercer leur jugement et prendre des mesures

pour rechercher des arrangements alternatifs au cas où ils estiment qu'une offre n'est pas dans les meilleurs intérêts de leur société. Ces amendements mèneraient également à des prises de décision plus éclairées et moins dictées par la pression de la part des actionnaires.

Dépôt minimal de 50 % et prolongation de 10 jours

L'obligation de dépôt minimal de 50 % des titres donnerait aux actionnaires l'information et la certitude qu'une offre ne sera acceptée qu'avec l'appui d'une majorité d'actionnaires indépendants de l'initiateur, éliminant ainsi la crainte qu'ils puissent être poussés à déposer leurs titres. La prolongation de 10 jours fournit aux actionnaires indécis plus de temps pour décider s'ils acceptent l'offre sans crainte de « rater leur occasion » de déposer leurs titres. Ces deux dispositions améliorent la capacité des actionnaires ciblés de prendre des décisions volontaires et éclairées.

Délai obligatoire de 120 jours

Nous reconnaissons que le délai minimal de dépôt de 120 jours offre aux administrateurs de l'émetteur ciblé plus de temps pour réagir à une offre de prise de contrôle. Toutefois, il est important de souligner que le seul fait de fournir du temps additionnel n'offre pas autant que le modèle de l'AMF (ainsi que les modèles d'autres pays, notamment les États-Unis), qui aurait permis que la principale prise de décision lors de transactions de prise de contrôle demeure la prérogative des administrateurs de l'entreprise, lesquels sont les seules personnes, dans un processus de prise de contrôle, juridiquement mandatées pour agir dans les meilleurs intérêts de la société.

Compte tenu des exigences faites aux administrateurs d'agir dans les meilleurs intérêts de la société et compte tenu de ce que les autorités concurrentes autorisent les conseils à « simplement dire non », nous proposons qu'une période de 120 jours soit le délai minimum qui devrait être offert au conseil pour étudier une offre non sollicitée et, si nécessaire, trouver un arrangement alternatif. Il est important de reconnaître que, simplement parce qu'une offre non sollicitée est faite pour l'acquisition d'un émetteur, il ne s'ensuit pas nécessairement que l'émetteur est considéré comme une acquisition évidente par d'autres soumissionnaires potentiels. Pour dire les choses clairement, les « Chevaliers blancs » ne font pas toujours la queue à attendre leur chance. Les conseils ciblés ont besoin d'autant de latitude que possible pour s'acquitter de leurs responsabilités – y compris celle de décider d'explorer d'autres avenues susceptibles d'être même plus avantageuses pour les actionnaires que l'offre non sollicitée.

En fait, il n'est pas déraisonnable d'imaginer qu'une période de 120 jours représente un délai insuffisant pour, par exemple, négocier avec un soumissionnaire ou obtenir un arrangement alternatif. Pour cette raison, il sera essentiel que les ACVM surveillent étroitement l'impact de ces amendements afin de s'assurer que les conseils disposent, en fait, du temps nécessaire pour agir dans les meilleurs intérêts de la société.

Mesures défensives

Les Projets de règlement n'abordent pas spécifiquement la question des mesures défensives. Alors que dans des situations où les exigences relatives à l'offre proposée sont satisfaites, la nécessité d'un régime de droits des actionnaires peut être réduite; mais dans des situations d'offre exemptée, nous croyons que de tels régimes continueront d'être pertinents pour les émetteurs préoccupés par l'accumulation par des actionnaires de positions importantes dans le cours normal d'achats et les exemptions d'accord privé.

Conclusion

L'IAS reconnaît qu'il est difficile pour les autorités réglementaires de dégager à une position unifiée sur la réforme des offres de prise de contrôle et nous saluons les ACVM pour en être arrivées à un consensus.

Le cadre actuel des offres de prise de contrôle doit faire l'objet d'une réforme et l'IAS appuie les efforts des ACVM afin d'améliorer le régime. Les administrateurs doivent avoir l'occasion de remplir leur obligation juridique d'agir dans les meilleurs intérêts de la société, y compris dans le contexte d'offres de prise de contrôle. Par conséquent, les modifications proposées devront être réévaluées à l'avenir, après leur adoption, afin de faire en sorte que les conseils aient suffisamment de latitude pour traiter de telles offres dans les meilleurs intérêts de la société, de ses actionnaires et des autres parties prenantes.

Cordialement,

Stan Magidson, LL.M., IAS.A
Président et chef de la direction

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June 16, 2015

Dear Sir/Madame:

Re: Proposed Amendments to Multilateral Instrument 62-104 *Take-Over Bids and Issuer bids,* and National Policy 62-203 *Take-Over and Issuer Bids* (the "Proposed Amendments ")

The Investment Industry Association of Canada ("IIAC" or "the Association") appreciates the ability to comment on the Proposed Amendments. The Association supports the CSA efforts to harmonize the Take-Over Bid regime, so that participants in the Canadian capital markets are subject to the same regulatory requirements, regardless of their geographic location.

The IIAC supports the intent of the Proposed Amendments. Although the introduction of the 50% Minimum Tender Requirement and the 10 Day Extension Requirement may,

in some cases create additional time and cost burdens for offerors, the additional protection provided to existing shareholders of the offeree offsets this concern. We do, however, have a few concerns with the 120 day minimum deposit period. Although the existing minimum deposit period is arguably too short to allow companies subject to an unsolicited bid to properly evaluate and entertain competing proposals, extending the period to 120 days may provide a deterrent to offerors, in that it introduces a significant element of risk and cost, particularly for fully funded bids. We believe that 90 days should be a sufficient period of time for offerees to evaluate and invite additional bids if appropriate, and would not provide a disincentive for potential transactions that may enhance shareholder value.

IIAC response to CSA Questions

1. The Proposed Bid Amendments contemplate the reduction of the minimum deposit period for take-over bids in the event that the offeree board issues a deposit period news release. Do you anticipate any difficulties with the application of the Proposed Bid Amendments as they relate to a deposit period news release and the ability of an offeror to reduce the initial deposit period for its bid as a result of the issuance of a deposit period news release?

We believe the offeree board should have the discretion to reduce the initial deposit period where it deems appropriate, and where a news release is issued. This provision facilitates a more efficient process where the board has determined that a longer bid period is not necessary for the offeree board to respond to the bid, such as in the event of a "friendly" take-over bid. The 35 day minimum period ensures that any other offerors are not unduly prejudiced, and that shareholders have adequate time to consider and respond to the bid.

2. The Proposed Bid Amendments provide that the minimum deposit period for an outstanding or future take-over bid for an issuer must be at least 35 days if the issuer announces that it has agreed to enter into, or determined to effect, an "alternative transaction". The Proposed Bid Amendments include a definition of "alternative transaction" that is intended to encompass transactions generally involving the acquisition of an issuer or its business. Do you agree with the scope of the definition of "alternative transaction"? If not, please explain why you disagree with the scope and what changes to the definition you would propose.

The scope of the definition of "alternative transaction" appropriately captures the stated intent to encompass transactions generally involving the acquisition of an issuer or its business.

3. Do you anticipate any difficulties with the application of the Proposed Bid Amendments as they relate to alternative transactions? Does the proposed policy guidance in sections 2.13 and 2.14 of NP 62-203 assist with interpretation of the alternative transaction provisions?

The guidance provided in sections 2.13 and 2.14 of NP 62-203 provides additional clarity in respect of the interpretation of the alternative transaction provisions.

4. The Proposed Bid Amendments include a number of provisions that are specific to partial take-over bids. In particular, the Proposed Bid Amendments contemplate that an offeror making a partial take-over bid is only obligated to take up, at the expiry of the initial deposit period and assuming all pre-conditions to the bid are met, the maximum number of securities it can without contravening the pro rata take up requirement (s. 2.32.1(6)). Then, at the expiry of the mandatory 10 day extension period, the offeror must complete the pro rata take up obligation in respect of securities previously deposited (but not taken up) and securities deposited during the mandatory 10 day extension period (s.2.32.1(7)). Would policy guidance concerning the interpretation or application of the Proposed Bid Amendments as they relate to partial take-over bids be useful? If so, please explain.

The existing provisions appear to be clear, however, if it might be helpful to include a numerical example in the provisions to ensure they are interpreted in the manner that is intended.

5. The Proposed Bid Amendments include revisions to the take up and payment and withdrawal right provisions in the take-over bid regime. Do you agree with these proposed changes or foresee any unintended consequences as a result of these changes? In particular, do you agree that there should not be withdrawal rights for securities deposited to a partial take-over bid prior to the expiry of the initial deposit period for so long as they are not taken up until the end of the mandatory 10 day extension period?

The requirement that withdrawal rights on a partial take-over bid be suspended until the expiry of the 10 day extension mandatory is consistent with, and an acceptable consequence of, the intent to provide shareholders with information about the success of the bid, and to mitigate any pressure to tender.

6. Are the current time limits set out in subsections 2.17(1) and (3) sufficient to enable directors to properly evaluate an unsolicited take-over bid and formulate a meaningful recommendation to security holders with respect to such bid?

The proposed timeline of 15 days from the time of the bid to prepare and distribute a directors circular, and to communicate its recommendation or lack of ability to make a

recommendation is reasonable. Where the circular does not contain a recommendation, the requirement to communicate a recommendation to accept or reject the bid or the decision that it is unable to make, or is not making, a recommendation, together with the reasons for the recommendation or decision, at least 7 days before the scheduled expiry of the initial deposit period is also reasonable. Extension of such timelines may unnecessarily extend the process.

7. Do you anticipate any changes to market activity or the trading of offeree issuer securities during a take-over bid as a result of the Proposed Bid Amendments? If so, please explain.

We do not anticipate any significant changes to market activity or the trading of the offeree's securities as a result of the Proposed Amendments, however the extended timeframe to bid completion resulting from the proposed 120 day minimum period could result in a widening of the arbitrage discount on bids, particularly in situations where the market believes there is a relatively low probability of a competing bid.

Thank you for considering our comments. If you have any questions please do not hesitate to contact me.

Yours sincerely,

Susan Copland

June 29, 2015

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Please forward to the other participating CSA jurisdictions as follows:

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Superintendent of Securities, Prince Edward Island
Nova Scotia Securities Commission
Financial and Consumer Services Commission (New Brunswick)
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Nunavut

Dear Secretary and Me Beaudoin,

Re: Proposed Amendments to Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids* (MI 62-104) and changes to National Policy 62-203 *Take-Over Bids and Issuer Bids* (NP 62-203) (collectively, the Proposed Bid Amendments)

The Canadian Investor Relations Institute (CIRI), a professional, not-for-profit association of executives responsible for communication between public corporations, investors and the financial community, is pleased to provide comments regarding the Proposed Bid Amendments. CIRI is

committed to educating its members and other stakeholders regarding the value of appropriate investor relations and capital markets best practices as an element of appropriate corporate governance best practices.

CIRI has over 500 members from across Canada, 70% of which are investor relations professionals employed by publicly listed reporting issuers. CIRI membership represents over 200 publicly listed issuers with a combined market capitalization of over $1.5 trillion. CIRI issuer members represent 85% of the S&P/TSX 60 Index companies and 54% of the S&P/TSX Composite Index companies. Please see Appendix A for more information about CIRI.

General Comments

We commend the CSA for proposing harmonized amendments to the take-over bid regime that put unsolicited or 'hostile' bidders and target companies on a more equal footing. We recognize the effort expended to arrive at this alternative co-ordinated proposal that responds to comments from a broad section of market participants following the publication of the initial CSA and AMF proposals in 2013. Different regulatory initiatives seeking to achieve similar outcomes can be confusing, costly and potential conflicting for issuers.

CIRI is of the firm belief that Canada needs to enhance the quality and integrity of the current take-over bid regime and that the proposed revisions to the regime are appropriate in order to balance the scales between hostile bidders and target companies. In a survey of CIRI members there was overwhelming support among commenters for updating and revising the current takeover bid regime.

CIRI recognizes that no matter what regulatory regime is established going forward, the ultimate decision regarding the outcome of an unsolicited take-over bid rightly rests with the shareholders of the target entity. CIRI also firmly believes that any take-over bid regime or process must be designed to provide an opportunity to enhance the value of the target for the benefit of all shareholders collectively. To that end, CIRI takes the position that target Boards of Directors are in the best position to influence value enhancement during a bid process and should be provided the appropriate tools and rights to ensure that they can achieve this outcome. To that end, CIRI generally supports the Proposed Bid Amendments.

CIRI also notes that the Proposed Bid Amendments, particularly the 120-Day Requirement and the 10-day Extension Requirement, have the benefit of potentially increasing clarity and consistency in transactions, while reducing the involvement and/or intervention of securities regulators (and the inherent uncertainty of hearings and cease-trade orders).

Specific Proposals

CIRI believes that the current regime does not allow the Board of Directors of target issuers sufficient time to fulfill their fiduciary duty to act in the best interests of the corporation.

1. **The 120 Day Requirement**
   CIRI supports the move from the current minimum 35-day deposit period to a minimum 120-day deposit period (subject to either a shorter period, of not less than 35 days, acceptable to the offeror Board of Directors or the acceptance by the offeror of a specified alternative

transaction) because it significantly improves the potential for increased valuation and better enables Directors to more effectively meet their fiduciary obligations to act in the best interests of the corporation. The longer deposit period provides additional opportunities for a more fulsome assessment of the offer and possible negotiation between the bidder and target board; for the surfacing of one or more potential competitive bidders; for the identification of value-maximizing alternative bidders (i.e. the 'white knight' scenario); or to convince shareholders that the current strategy provides the best long-term option. It should be noted that several months are often required to identify prospective 'white knights', to give them sufficient time to conduct due diligence and to negotiate the final transaction.

It is imperative that the Board be afforded sufficient time and leverage to pursue these various options to determine and/or negotiate that avenue which provides optimal benefit to both the target issuer and the existing majority and minority shareholders. In allowing this process to unfold in an appropriate manner and over an appropriate period, the board will have its best opportunity to deliver an option that generates maximum value and benefit to all shareholders.

From the perspective of investor relations professionals, the minimum 120-day deposit period provides the additional time that is necessary to increase the quality and integrity of the take-over bid regime, key policy objectives of the Proposed Bid Amendment. The extended time allows a target issuer to assess and develop its response to the unsolicited bid, to formulate its communication strategy, identify its current shareholder base (which may have radically altered upon the bid announcement) and to pursue fulsome engagement with current shareholders. Such engagement is key to ensuring that the target's business, often complex, and its position vis-à-vis the take-over bid is well understood and appreciated by those shareholders who are rightly being asked to make the ultimate decision regarding the outcome of the unsolicited take-over bid.

The importance of 120 days as a minimum deposit period has been fully explained and supported by a group of experienced senior legal practitioners from a number of major Canadian law firms that provided commentary in their submission to the CSA and AMF in response to the initial 2013 CSA and AMF Proposals.[1] This group has stated explicitly that a bid period of 120 days is critical - based on their experience advising both targets and bidders.

CIRI takes the position that if regulators seek to establish balance between target Boards and hostile bidders, the Boards must be given sufficient time, a **minimum** of 120 days, to achieve that policy objective.

[1] "Submission by Ad Hoc Senior Securities Practitioners Group", July 11, 2013

2. **The 10-Day Extension**
   CIRI further views the proposed extension as a “relief valve for undecided shareholders” and supports this aspect of the Proposed Bid Amendments. It is generally agreed by our members that this aspect of the proposal serves to effectively remove the pressure on ‘undecided’ shareholders to tender into a bid simply to avoid being left in the minority or being left with an illiquid security if the bid is successful.

   The 10-day extension is seen as an appropriate means to level the playing field for such shareholders and as such also contributes to the CSA policy objectives to improve the overall quality and integrity of the current take-over bid regime.

3. **The Minimum Tender Requirement**
   CIRI believes that the requirement for tenders to a bid to exceed 50% of the outstanding securities owned by shareholders other than the bidder and its joint actors (“Independent Shareholders”) is appropriate, reasonable and fair. Given that any unsolicited bid will constitute a material event for the target issuer, it is appropriate that the outcome should be subject to a mandatory majority acceptance by Independent Shareholders.

   The Minimum Tender Requirement will potentially also contribute to a lessening of the uncertainty that often accompanies unsolicited take-over bids. CIRI agrees that the 50% level for tendering represents a clear ‘goal-line’ that is well understood by capital market participants, including those party to the transaction as well as interested observers. This, again, speaks to improved transparency and integrity of the take-over bid regime.

   CIRI appreciates the opportunity to comment on the Proposed Bid Amendments and is always available if there are questions regarding our submission.

   Yours truly,

   Yvette Lokker
   President & CEO

Canadian Investor Relations Institute
Institut canadien des relations avec les investisseurs

APPENDIX A

The Canadian Investor Relations Institute

The Canadian Investor Relations Institute (CIRI) is a professional, not-for-profit association of executives responsible for communication between public corporations, investors and the financial community. CIRI contributes to the transparency and integrity of the Canadian capital market by advancing the practice of investor relations, the professional competency of its members and the stature of the profession.

Investor Relations Defined

Investor relations is the strategic management responsibility that integrates the disciplines of finance, communications and marketing to achieve an effective two-way flow of information between a public company and the investment community, in order to enable fair and efficient capital markets.

The practice of investor relations involves identifying, as accurately and completely as possible, current shareholders as well as potential investors and key stakeholders and providing them with publicly available information that facilitates knowledgeable investment decisions. The foundation of effective investor relations is built on the highest degree of transparency in order to enable reporting issuers to achieve prices in the marketplace that accurately and fully reflect the fundamental value of their securities.

CIRI is led by an elected Board of Directors of senior IR practitioners, supported by a staff of experienced professionals. The senior staff person, the President and CEO, serves as a continuing member of the Board. Committees reporting directly to the Board include Nominating; Audit; Membership; Issues; Editorial Board; Resource and Education; and Certification.

CIRI Chapters are located across Canada in Ontario, Quebec, Alberta and British Columbia. Membership is approximately 550 professionals serving as corporate investor relations officers in approximately 300 reporting issuer companies, consultants to issuers or service providers to the investor relations profession.

CIRI is a founding member of the Global Investor Relations Network (GIRN), which provides an international perspective on the issues and concerns of investors and shareholders in capital markets outside of North America. The President and CEO of CIRI also sits as a member of the Continuous Disclosure Advisory Committee (CDAC) of the Ontario Securities Commission. In addition, several members, including the President and CEO of CIRI, are members of the National Investor Relations Institute (NIRI), the corresponding professional organization in the United States.