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Securities Commission of Newfoundland and Labrador
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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