

June 26, 2015

British Columbia Securities Commission
Alberta Securities Commission
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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To the attention of:

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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 marchés financiers, the Working Group believes that the CSA should allow boards of directors to respond to take-over overtures, in accordance with

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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)

Norton Rose Fulbright Canada LLP