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

c/o
The Secretary
Ontario Securities Commission
20 Queen Street West
19th Floor, Box 55
Toronto, ON M5H3S8
comments@osc.gov.on.ca

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
consultation-en-cours@lautorite.qc.ca

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.