

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
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22nd Floor, Box 55
Toronto, Ontario M5H 2S8

Me Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
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**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**

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,

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President and CEO