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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**") 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)

Osler, Hoskin & Harcourt LLP