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BY E-MAIL

June 30, 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
Financial and Consumer Services Commission of New Brunswick
Superintendent of Securities, Prince Edward Island
Nova Scotia Securities Commission
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Nunavut

Me Anne-Marie Beaudoin
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The Secretary
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Dear Sirs / Mesdames,

Re: Comments on Proposed Amendments to National Instrument 62-104 *Take-over Bids and Issuer Bids* and National Policy 62-203 *Take-over Bids and Issuer Bids*

The following comments are submitted in response to the Notice and Request for Comments (the "**Request for Comments**") published by the Canadian Securities Administrators (the "**CSA**") on March 31, 2015 with respect to proposed amendments (the "**Proposed Bid Amendments**") to National Instrument 62-104 *Take-over Bids and Issuer Bids*

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("NI 62-104" and the "NI 62-104 Amendments") and National Policy 62-203 *Take-over Bids and Issuer Bids* ("NP 62-203").

Thank you for the opportunity to comment on the Proposed Bid Amendments. This letter represents our own personal comments (and not those of the firm generally or any client of the firm) and are submitted without prejudice to any position taken or that may be taken by our firm on its own behalf or on behalf of any client.

We are submitting these comments with respect to specific aspects of the Proposed Bid Amendments, primarily in respect of the application of the NI 62-104 Amendments that we believe could benefit from greater clarity and consistency.

Comments on NI 62-104 Amendments

Definitions

In respect of the proposed definition of "alternative transaction," we suggest the CSA consider the following:

- clarifying that the definition is not intended to include a conventional redemption feature;
- including in subsection (iii) "a transaction solely between the issuer and ~~a subsidiary~~ one or more subsidiaries of the issuer or any such subsidiaries..." or words having a similar effect; and
- excluding in subparagraph (c) any such sale, lease, etc. to a subsidiary.

"business day" – Consider the implications of the fact that what is a business day will vary among the Canadian jurisdictions and how to address the complications that may arise with respect to the date and timing calculations that are to be made throughout NI 62-104.

"deposit period news release" – Consider revising the term "issued by an offeree issuer" given that the offeree issuer could refuse or fail to issue the news release and clarifying that the date should be not less than 35 days "from the date of the bid or date of announcement of the bid" (in both instances)." In our view, NP 62-203 should clarify that clarify that the board's decision in this respect is not required to be unanimous.

"issuer bid" – Consider whether the exceptions should include the acquisition, redemption, etc. of securities in accordance with their terms, as well a dissolution or winding up. Paragraph (b) should perhaps also specify that the vote should be of the particular class of securityholders.

"partial take-over bid" – The definition should exclude securities subject to the bid, "other than, if applicable, the offeror's securities."

"published market" – This definition should be clarified and modernized, including, for example, to clarify whether markets such as U.S. pink sheets, TSX Private Markets and other

such sources are intended to be included and by specifying that the prices should be disseminated electronically on a regular basis. The CSA should also consider whether reference is still required to paid circulation.

“standard trading unit” – Consider whether this definition is required.

“take-over bid” – The reference to “last address as shown on the books” should be clarified and modernized given the prevalence of beneficial holdings of shares and of registered ownership being with depositories such as CDS. Reference to “vote of security holders” at the end of the definition should perhaps also be limited to “of that class.”

Section 1.4 - definition of “control” – The reference to “interests” of the partnership should be to “equity securities.”

Section 1.5 - Computation of time – See the comment made with respect to the definition of “business day” above. Given the definition of business day will differ among Canadian jurisdictions it should be clarified which jurisdiction applies for the purposes of the computation.

Section 1.6 - Expiry of Bid – Paragraph (b) of the interpretation should take into account any extension to the time that the offeror becomes obligated to take up or reject the securities deposited.

Section 1.8 - Deemed beneficial ownership – The calculation to determine ownership with respect to convertible, exchangeable securities, etc., should be made on a fully diluted basis as calculation on a partially diluted basis frequently results in over-statement of the offeror’s proportionate interest. Consider whether the exception in paragraph (4) for agreements, commitments, etc. should be limited only to non-exempt take-over or issuer bids or might also apply to exempt bids. Consider whether the specific clarification in (5) should apply outside Quebec also.

Section 1.9 - Acting jointly or in concert - Subparagraph (b)(ii) should not apply in the circumstances of an ordinary proxy solicitation where a person is appointed as proxy for a securityholder. In subparagraph (3) consider whether the exception for agreements, commitments, etc. should be limited only to non-exempt take-over or issuer bids or might also apply to exempt bids.

Section 1.0 - Application to indirect bids - We suggest that anti-avoidance purpose language should be added to this section. It should also be clarified whether this is limited only to the acquisition indirectly of a controlled entity via the acquisition of securities of the controlling entity or whether it is also intended to apply to the acquisition of voting or equity securities underlying convertible, exchangeable or exercisable securities.

Section 1.11 - Determination of market price - See our comments above with respect to the definition of “business day” where business day is defined with reference to each jurisdiction. All references to “average” in this section should also be to “simple average”.

Part 2 – BIDS

Subsection 2.2(2) – As per our comments above, consider whether this exception should also apply to exempt bids.

Subsection 2.2(2)) – It should be clarified whether these purchases may themselves constitute a take-over bid (i.e. that result in ownership of greater than 20% by the offeror) to address the type of situation, which was not addressed, that arose *In the Matter of Falconbridge Limited* (Reasons of the OSC dated August 17, 2006).

Subsection 2.2(3)

- Subsection 2.2(3)(d)(ii) – The wording appears a bit awkward since all persons referred to are offerors.
- Subsection 2.2(3)(d)(iii), (iv), (v) and (vi) should specifically refer to “securities purchased” or “price paid” by the offeror. Subsection 2.2(3)(d)(vii) should refer to the securities “owned by the purchaser or the offeror”.
- Subsection 2.2(4) should refer to the acquisition of the “convertible” securities as opposed to “as converted” as they will not, at that time, be converted.

Subsection 2.4(1)

- It should be clarified in subparagraph 2.4(1)(a)(i) that reference is to the highest consideration paid “by the offeror” and in subparagraph 2.4(1)(a)(ii) at what time the cash equivalent is to be determined.

Subsection 2.7(2)

- Given prior decisions, this subsection should refer to the intention or “potential” intention of the offeror (as the intention may not have been crystalized at that time) and should permit for disclosure in a news release in addition to the bid circular.

Section 2.8 – Consider whether the wording can be interpreted to imply that a non-exempt take-over bid can be made only in one jurisdiction.

Section 2.9 – Publication should be permitted to be made in an acceptable electronic format and as per our comments above, consider whether reference is still required to “paid circulation”.

Subsection 2.10(2)(b) should allow for delivery of the bid circular as soon as practicable after receipt of the list of security holders as it is often quite difficult to prepare and deliver the bid circular in the proper form within the 2 business day period.

Subsection 2.11(1)(b) and subsection 2.12(1)(b) should allow for sending to current security holders at the option of the offeror since the security holders may have changed from the time of sending of the original bid.

Subsection 2.12(5) – Consider the application of this provision to a share exchange issuer bid.

Subsection 2.16(1) – An acceptable method of electronic delivery should be specifically contemplated.

Subsection 2.17(3) – This should refer to the “scheduled expiry as it may be extended....”

Subsection 2.18(1) – See the comment in respect of 2.11(1)(b) above in respect of the security holders changing since the bid being commenced.

Subsection 2.23(1) – This should refer to all holders of the same class “in Canada” being offered identical consideration since the bid is otherwise determined on a jurisdiction by jurisdiction basis, and tax and securities law in other countries may require adjustments and should not constitutionally be regulated by Canadian provincial law.

Subsection 2.23(3) – This section should refer to an increase in the consideration only, and not value, as the consideration could increase due to a change in share value of the securities subject to the bid.

Subsection 2.26(1) and Subsection 2.26.1(1) – It should be clarified how the proportionate take-up and payment applies in the local jurisdiction, nationally or otherwise.

Subsection 2.26(1) and Subsection 2.26.1(1) – It should be clarified whether the offeror’s securities are excluded for the purposes of this determination and whether the proportionate take-up applies across each local jurisdiction.

Subsection 2.26.1(2) – We question how this would work in practice; in particular, whether it could preclude a partial bid subsequently.

Subsection 2.27 – Consider whether reference should be expressly made to the requirements where a condition is subsequently added.

Subsection 2.28.1 – Consider whether the offeror should be permitted to shorten the period if later and whether it could allow for two alternatives.

Subsection 2.28.2(i) and (ii) – Consider the implications in (i) given that the bid may be shortened to 35 days and in (ii) where there is a second bid.

Subsection 2.28.3 – Consider whether the offeror should be permitted to shorten the period if later, whether it could allow for two alternatives and whether an alternative transaction could include a substantial issuer bid. In this respect, we would also urge the CSA to ensure the regulators have the powers (for example, under section 104 of the *Securities Act* (Ontario) or the equivalent in other jurisdictions) to address any potential defensive measures that may frustrate the policy rationale underlying NI 62-104. This would include, for example, the ability to prescribe a shorter period bid period in respect of a particular issuer. Guidelines setting out the circumstances in which such powers could be exercised should similarly be set out NP 62-203.

Subsection 2.29.1 (c) – This condition will be very difficult for small partial bids. Consider whether the board of the target should be able to exempt the offeror from this condition.

Subsection 2.30(2)(b)(i) – The value of the consideration could be reduced in the case of a share-exchange. Subsection 2.30(2)(b)(i) and (iii) – Consider whether the security holder should not be able to withdraw as it may no longer wish to sell. Subsection 2.30(2)(b)(iii) should refer to an increase in the “value” of the consideration.

Section 2.31 - In our view, the words proposed to be deleted from this provision are still required.

Section 2.31.1 (b)(iv), 2.32(3) and 2.32.1(7) – The requirement to take-up the securities within the prescribed period should take into consideration the circumstances where a subsequent material adverse change occurs and whether the implication is that the offeror must nonetheless acquire the securities.

Section 2.31.1 (b)(iv)(B) – This should also allow for a period of 3 business days to take-up and pay for the securities, given the possibility of holidays or weekends.

Thank you for the opportunity to comment on these proposals.

Regards,

« *Simon A. Romano* »

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