McCarthy Tétrault LLP
PO Box 48, Suite 5300
Toronto-Dominion Bank Tower
Toronto ON M5K 1E6
Canada
Tel: 416-362-1812
Fax: 416-868-0673

mccarthy tétrault

June 30, 2015

Via Email

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

c/o
The Secretary
Ontario Securities Commission
20 Queen Street West
19th Floor, Box 55
Toronto ON M5H 2S8
comments@osc.gov.on.ca

and

Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
800, square Victoria, 22 etage
Montreal QC H4Z 1G3
Consultation-en-cours@lautorite.qc.ca

Dear Sirs/Mesdames:

Re: CSA Notice and Request for Comment re: Proposed Amendments to Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids,* and National Policy 62-203 *Take-Over and Issuer Bids* (the "Proposed Amendments") and OSC Notice and Request for Comment re: Proposed Adoption of Proposed National Instrument 62-104 *Take-Over Bids and Issuer Bids*

Thank you for the opportunity to comment on the Proposed Amendments. Our letter addresses the specific questions that you have sought comment on.

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 Proposed Amendments will create a more dynamic situation from a legal perspective if the first offer for the securities of an offeree issuer is unsolicited. This dynamism will require more readiness with respect to things like final documentation for credit arrangements and depositary arrangements and any other corporate events that may have been planned around the original expiry date (if any acceleration of the original initial expiry date can be accommodated at all or in part). However, if the timing advantage is important to preserve, for an increased offer perhaps, presumably these planning matters can be overcome in the normal course.

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 have a few comments on the proposed definition of "alternative transaction":

(a) We wonder why clause (a) of the definition is not restricted to such transactions where there is a termination of equity interests that also results in a change of control of the offeree issuer. Also with respect to clause (a), we suggest the phrase "or any other transaction" be replaced with "or any other transaction or series of related transactions".

(b) If clause (a) were maintained in its proposed form, we question whether clause (a)(i) is needed given how rarely such a circumstance would arise.

(c) In clause (b) the phrase "acquire the issuer" seems in the context of the proposed definition both duplicative and somewhat unclear. If clause (a) addresses the termination of equity interests and clause (c) addresses asset sale transactions, it is not clear what is intended to be covered by clause (b). In light of our comment above, perhaps clause (b) should in concept be combined with clause (a).

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?*

An existing offeror may face difficulties when attempting to make a fast decision as to whether its pre-existing offer with a long expiry date can be immediately varied to accelerate the expiry date based only on a news release by the offeree issuer announcing that it has agreed to enter

into an alternative transaction. As recognized by the proposed changes to National Policy 62-203, in some cases the interpretation of what constitutes an "alternative transaction" may not be straightforward and the offeror will likely only have the press release of the offeror to rely upon (as it may take up to 10 days for the related material agreements to be available publicly) to make that decision in a timely fashion. Query whether the news release contemplated by s.2.28.3 of proposed National Instrument 62-104 should contain the same specificity as that contemplated by a "deposit period news release". Consideration should be given to requiring the offeror to make a positive statement in its news release or other timely disclosure document about the treatment of its announcement for the purposes of s.2.28.3 to avoid any uncertainty in the market and for pre-existing bidders.

The proposed policy guidance is of some assistance but the introduction in the policy guidance at s.2.14 of the concepts of reasonable interpretation and issuer disclosure statements only to protect against erroneous interpretation seem as likely to create controversy at they are to avoid it. We think it is preferable that the objective standard set out in the Instrument be maintained and not softened by the policy guidance - either an announced transaction by the issuer is an "alternative transaction" for the purposes of the legislation or it is not and perhaps, as noted above, the offeree issuer should be required to make a positive statement in that regard.

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.*

Policy guidance providing numerical examples as to the application of the Proposed Amendments to partial bids and the pro ration considerations that arise in combination with the 10 day mandatory extension would be of assistance. Policy guidance on the treatment of partial bids generally will likely also be of assistance as we have continuing concerns that in the interests of finding a suitable compromise to provide boards with more time to deal with unsolicited take-over bids, some desirable transactions, although perhaps rare, have been effectively precluded by the requirement to obtain majority approval, including partial bids in certain circumstances where they effectively amount to block trades at a premium of more than 15% to market price.

Currently, if a purchaser wishes to acquire a block of shares at more than a 15% premium to market it may do so provided it makes the same offer open to all shareholders pursuant to a formal take-over bid offer. In order to ensure that the targeted block is acquired in its entirety and that no pro-ration is applied such offer must be made on an "any and all" basis and presumably the seller of the block agrees to irrevocably lock-up to the "any and all" offer. In such specific circumstances, the endorsement of a majority of shareholders should not be required as it may deny other shareholders the ability to participate in a premium offer and it may prevent block-holders from disposing of their block to a purchaser at a significant premium - a value it is possible for such block-holder to obtain in the right circumstances currently.

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 lack of withdrawal rights following the initial expiry date for securities deposited is an essential feature of a bid regime that contemplates a mandatory 10 day extension period. An offeror should not have its bid forcibly extended for an additional 10 days if it cannot at least rely on the fact that the securities tendered at the initial expiry date will not have been withdrawn. The same logic should apply to partial bids unless it were possible to limit the number of securities withdrawn to not exceed the number after which pro-ration of the take-up of the offer would not be required. The other possible exceptional circumstance for permitting securities to be withdrawn during the 10 day mandatory extension period is where an offer would traditionally have been regarded as "any and all" offer.

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 that the current time limits set out in subsections 2.17(1) and (3) together with the related procedures set out in s.2.17(2) and (3) continue to be sufficient to enable directors to properly evaluate an unsolicited take-over bid and formulate a meaningful recommendation to security holders with respect to a bid. While the time required for an offeree issuer's board to issue a directors' circular is not exactly the same as the corresponding deadline under United States' law, it's close proximity has proven convenient and useful for inter-listed issuers and any consideration of a change in these time limits should take this cross-border coordination exercise into consideration.

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 do not anticipate any material changes.

In addition to the questions raised in the CSA Notice and Request for Comment for specific comment, we also wanted to take the opportunity to note our strong support for the complete national harmonization of take-over bid rules in Canada as Ontario proposes to adopt the National Instrument 62-104 being proposed by the CSA.

We note that in order to adopt the proposed National Instrument 62-104 in Ontario, the Ontario Securities Commission intends to seek legislative amendments to remove the detailed take-over bid provisions from Part XX of the *Securities Act (Ontario)* and include general "platform provisions" in their place. We wish to indicate our strong support for the necessary changes that must be enacted by the Legislative Assembly of Ontario in order for this important step toward uniform take-over bid regulation in Canada to be completed.

If we can be of further assistance, please do not hesitate to contact Ian Michael (imichael@mccarthy.ca 416-601-8023) or Graham Gow (ggow@mccarthy.ca 416-601-7677) of our office.

Yours truly,

McCarthy Tétrault LLP

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