Canadian Coalition for
GOOD GOVERNANCE

THE VOICE OF THE SHAREHOLDER

June 29, 2015

The Secretary
Ontario Securities Commission
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Me Anne-Marie Beaudoin
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Dear Sir/Madams:

Re: CSA Notice and Request for Comments on proposed amendments to Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids* and proposed changes to National Policy 62-203 *Take-Over Bids and Issuer Bids* (the "Proposed Amendments")

The Canadian Coalition for Good Governance ("CCGG") has reviewed the Proposed Amendments and we thank you for the opportunity to provide our comments. We are commenting only on those aspects of the Proposed Amendments which are of significant importance to our members.

CCGG's members are Canadian institutional investors that together manage approximately $3 trillion in assets on behalf of pension funds, mutual fund unit holders, and other institutional and individual investors. CCGG promotes good governance practices in Canadian public companies and the improvement of the regulatory environment in order to best align the interests of boards and management with those of their shareholders and to promote the efficiency and effectiveness of the Canadian capital markets. A list of our members is attached to this submission.

OVERVIEW

CCGG supports the CSA's endeavour to improve the take-over bid regime through the Proposed Amendments. While we support the majority of the Proposed Amendments because we believe they will help to address some important deficiencies in the existing regime, we do not support all of the components for the reasons discussed below.

The CSA articulates a two pronged goal it hopes to accomplish with the Proposed Amendments: (i) to enhance the quality and integrity of the take-over bid regime; and (ii) to rebalance the current dynamics among bidders, target boards, and target shareholders. CCGG supports the first of these goals but questions the assumptions underlying, and thus the need for, certain aspects of the second goal, in particular to the extent a rebalancing may permit boards to usurp shareholder decision-making power.

We provide our comments below on whether the Proposed Amendments are likely to achieve the CSA's stated goals and the extent to which we support those goals.

We also point out that once the CSA has decided on the new bid period (whether it be 120 days or, as we suggest in this letter, 90 days) it is essential that the CSA make it perfectly clear that a board will not be permitted to use a poison pill to extend the bid period any further.

COMMENTS ON PROPOSED AMENDMENTS

The Minimum Tender Requirement and the 10 Day Extension Requirement

CCGG supports the adoption of the Minimum Tender Requirement and the 10 Day Extension Requirement because together they address several problems with the existing system and will serve the laudable goal of enhancing the quality and integrity of the take-over bid regime.

In essence, the Minimum Tender Requirement mechanism allows for collective action on the part of shareholders responding to a bid that is comparable to a majority shareholder vote and prevents a change of control without the support of a majority of independent shareholders. Together with the 10 Day Extension Requirement it also mitigates the coercion to tender that can result, for example, when a shareholder does not support a bid but is afraid to be left in a minority position and miss out on a takeover bid premium if other shareholders tender to the bid and it goes ahead. They allow for a more informed tender than is guaranteed under the current regime in that shareholders can know the extent of shareholder support for a bid before tendering. Further they provide a mechanism to enable coordinated action on the part of shareholders and allow all shareholders to be treated equally in the context of a hostile bid. In short, they succeed at the CSA's expressed desire to facilitate "the ability of target shareholders to make voluntary, informed and co-ordinated tender decisions".

The second goal of the proposed amendments is to rebalance the current dynamics among bidders, target boards and target shareholders. As discussed in our earlier 2013 submission to the CSA and AMF[1] (the 2013 Submission), CCGG believes that the appropriate balance among the various players in a take-over bid regime is to place the decision about whether a bid is acceptable in the hands of the target shareholders and not the target board, although the board does have a role to play. To the extent that bidders are able to coerce shareholders to tender to a bid under the current system for fear of being left

[1] CCGG comments on CSA Proposals on Shareholder Rights Plans, July2013

behind, we agree that the power balance should shift and that this pressure to tender should be removed. For this reason as well we support the Minimum Tender Requirement and the 10 Day Extension Requirement because we believe they would achieve this rebalancing.

The 120 Day Requirement

The benefits of the Minimum Tender Requirement and the 10 Day Extension Requirement would accrue with or without an extended bid period requirement. However other benefits accrue to boards and shareholders with a bid period greater than the current regulatory requirement of 35 days. CCGG supports the establishment of a longer bid period in order to provide boards more time to consider and respond to unsolicited take-over bids by seeking value-maximizing alternatives or developing and articulating their views on the merits of the bid.

There is no correct answer as to what number of days should constitute the bid period, but we believe 90 days (rather than the current 35 day period which typically is extended to 45-60 days when a target board adopts a poison pill) is a supportable compromise that will provide the benefits of more time without the disadvantages of an overly long bid period. Accordingly, CCGG supports the 90 day minimum bid requirement proposed earlier by the CSA in its request for comments on proposals to amend the takeover bid regime issued on March 14, 2013.[2] For the reasons provided below, we believe that 120 days is excessive and the negatives will outweigh the benefits that accrue from more time and will not contribute to enhancing the quality and integrity of the take-over bid regime or rebalance the current regime in a positive way.

To begin with, there are additional costs (such as financing, legal, and investment banking and possible opportunity costs) involved for a bidder in a 120 day bid period rather than a 90 day bid period.

Further, the 120 Day Requirement would appear to be based on the argument that the current balance of power lies with the bidder to the detriment of the target board and shareholders and that this balance needs to be shifted towards the target board in order to avoid the 'fire sale' of the company or the inevitability of the company being acquired.[3]

The CSA has not provided any empirical evidence, nor has it provided a cost/benefit analysis, to support the proposed 120 Day Requirement. To the extent there is empirical evidence in Canada, however, it does not support the foregoing interpretation of the existing power balance. According to a 2015 study by law firm Fasken Martineau[4] approximately 28% of the targets of first-mover bids remain independent, which means that a sale of the company is by no means inevitable. Further, as we pointed out in our 2013 Submission, the fact that targets tend to be sold once a bid has been made rather than remain independent has not been shown to be a bad thing. Many target companies are underperformers and the market for corporate control functions as one of the most effective disciplines on management. The Fasken Study provides evidence that it may be, in fact, better for shareholders

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[2] CSA Notice and Request for Comment Proposed National Instrument 62-105

[3] Various comment letters to the CSA Notice and Request for comment proposed a 120 day minimum bid requirement and relied on this argument. See for example, Submission by Ad Hoc Senior Securities Practitioners Group, July 11, 2013

[4] 2015 Canadian Hostile Take-over Bid Study, Fasken Martineau LLP (the "Fasken Study"). The Fasken Study is the most relevant empirical evidence of which we are aware in Canada that relates to the 120 Day Requirement and therefore we refer to it several times in this letter.

generally that targets tend to be sold: on the first anniversary of the date of the announcement of the bid where the target remained independent, more than 60% of the targets trade at a discount to the final bid price. Accordingly, CCGG does not accept the view that power needs to be shifted from bidders to the target board in order to address negative consequences of the existing system.

CCGG believes that 120 days would serve, as will be discussed in more detail below, to shift power to target boards in a way that could be detrimental to shareholders and bidders and does not rebalance the system in a desirable way.

Do directors need more leverage?

The requirement in the Proposed Amendments that a bid remain open for a 120 day period appears to be modeled on proposals found in comment letters[5] submitted to the CSA and AMF in response to their 2013 proposals to amend the takeover bid regime.[6] As such, it is relevant to review the strength of those arguments for adopting a 120 day time period.

One group of commentators[7] acknowledges that "there is a lack of consensus as to what period of time would be sufficient to overcome" concerns about the length of time needed for a board to attempt to surface and consider alternatives to an unsolicited bid and asserts that a "minimum bid period of at least 120 days is critical to our proposal and is based on our experience advising both targets and bidders". They then go on to argue:

> "this *is fundamentally not merely about allowing a target board adequate time to identify and solicit interest from other bidders. The adequacy of the time period is also driven by the need to create negotiating leverage opposite the unsolicited bidder.* ... To advance alternatives and create effective negotiating leverage, the target board needs a *period long enough to create real uncertainty as to whether an unsolicited offer will succeed and to make obtaining the target board's cooperation valuable* to the bidder, therefore encouraging an unsolicited bidder and potential competing bidders to the bargaining table. *Without that tension, a target board is effectively required to conduct a 'fire sale' process* in which it is unlikely to achieve the best results for its shareholders. We do not believe that the 90 day period in the CSA Proposal is sufficient to change the current dynamic".[8] (Italics added)

Several points are relevant here.

Fire sale not inevitable

The submission by the Ad Hoc Senior Securities Practitioners Group was made before the empirical evidence published in the Fasken Study. As noted above, empirical evidence in the Fasken Study belies the claim that without bidders being forced to negotiate with the target board, a sale is inevitable.

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[5] See for example, Submission by Ad Hoc Senior Securities Practitioners Group, July 11, 2013

[6] Ibid see footnote 1; AMF Consultation Paper An Alternative Approach to Securities Regulators' Intervention in Defensive Tactics

[7] Submission by Ad Hoc Senior Securities Practitioners Group, ibid

[8] Submission by Ad Hoc Senior Securities Practitioners Group, ibid

Purpose of the 120 day period

Under the above-quoted view, a 120 day bid period is not just about providing adequate time to identify and solicit interest from other bidders. It would appear that another major purpose, and perhaps even the primary purpose, is to put the bidder in a position of uncertainty that will provide leverage to the target board. CCGG continues to believe that under corporate law takeover bids are unique in that the offer to tender is made directly by a bidder to target shareholders without the need for board approval. In effect, the relationship is one between bidder and target shareholders and is not intended that it be mediated by the target board.[9] Directors are asked only to make a recommendation to shareholders (or explain why not) but the decision whether to tender is a right of shareholders. We believe that uncertainty as to whether a bid will succeed should come from whether the quality and terms of the bid are acceptable to shareholders, not because the target board has been able to create that uncertainty by keeping the bid open for excessive periods of time.

Directors are not without power in the face of a hostile takeover bid

It is important to note that directors' recommendations carry substantial weight and empirical evidence suggests that boards are not in fact without power in the face of a hostile bid. The Fasken Study found that board support is a "prized asset" and that hostile bidders had a near-perfect record when securing the board's support and fared poorly without it: "where a bidder ultimately won the support of the target board, the bid succeeded in all but one contest, or 98% of the time. In contrast, a hostile bid succeeded only 22% of the time in the absence of board support".

Contrary to what many claim, under the current regime boards already have influence and power. The Fasken Study states that the "relatively greater alignment between the board's recommended outcome and the outcome that prevails may suggest that the board has a relatively greater degree of influence, and therefore leverage, in directing that outcome." As we noted in our 2013 Submission[10], boards' recommendations carry weight because of boards' superior knowledge of the company. Boards may use company resources when communicating those recommendations to shareholders and boards also can engage with shareholders to explain their views. The fact that shareholders tend to vote with management recommendations generally should not be discounted when assessing a board's power. The point is that shareholders should be free to accept or reject a board's recommendation and that the recommendation should not be determinative.[11]

120 days is not needed to bring out competing bids

The Fasken Study found that the vast majority of competing bids emerged after the expiry of the statutory 35 day minimum bid period but before 95 days, with 63% emerging between 35 days and 94 days. The highest percentage of 21% emerged between 35 to 44 days after the first mover bid. In the

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[9] Unlike arrangements or amalgamations which require board approval before they go to shareholders for approval

[10] Ibid, footnote 1, page 3

[11] We noted in our earlier submission that boards did make the choice of whether or not to accept the board's recommendation in the high profile proxy fights at CP and Agrium: in one case shareholders did not accept the board's arguments and in the other they did.

Fasken Study, no competitive bids emerged between 95 and 149 days after the first bid, although one did emerge 150 days after. This evidence does not support the argument that 120 days is needed to find and elicit more bids. The suggested 120 days is based on anecdotal experience rather than empirical evidence. According to the submission by the Ad Hoc Senior Securities Practitioners Group, 120 days also serves to provide board leverage by creating uncertainty for the bidder, but as stated above CCGG believes the appropriate uncertainty is whether shareholders will see the bid as desirable.

It is difficult to see the benefits for investors or the capital markets of a 120 day bid period. CCGG does not agree that a goal of our takeover bid regime is to provide directors with leverage above and beyond what is needed to enhance shareholder options, decision-making and value.

Board's ability to waive 120 Day Requirement

For the same reasons stated above where we argue that 120 days is too long, we also believe that providing the target board with the ability to waive the 120 day minimum bid period (which, as stated above, we believe should be a 90 day bid period) is not necessarily beneficial to shareholders. The uncertainty it creates would indeed provide more leverage to boards and would pressure a bidder to negotiate with a board in the hope that the board will shorten the bid period but the board's ability to waive will not necessarily provide shareholders with more options.

For example, boards that shorten the bid period for a particular bid or alternative transaction they favour to 35 days could preclude other bidders from coming forward that may need a longer time period to undertake the necessary analysis to present an alternative bid. The certainty of knowing that a bid must be open 90 days provides a more stable context for counter bidders to assess the factors involved, carry out due diligence and put financing in place. Shareholders do not gain from a compressed time period if alternatives are discouraged by boards having the ability to act unilaterally.

In addition, to the extent that directors, or a CEO supported by the board, can gain personal advantage through favouring a particular bid before others have time to emerge, such as by obtaining an agreement with the bidder that they will continue on in their respective roles, shareholders are not served.

On principle, we also question whether the ability to decide the length of the bid period should fall to the board without the need for shareholder approval. In our view, it places too much power in the hands of the board rather than shareholders. The effect will be to give the board the sole power to determine how long a bid must remain outstanding within the statutorily mandated 35 and the proposed 120 days, one arguably too short and the other arguably too long. We believe that if the board is to be given the ability to waive the statutory bid period, then that decision should be subject to shareholder approval.

SUMMARY

CCGG supports the Minimum Tender Requirement and the 10 Day Extension Requirement on the basis that they help to ensure the equal treatment of shareholders, a collective approval of take-over bids by an independent majority of shareholders and the removal of bidder coercion to tender. They achieve both goals of the Proposed Amendments: they serve to enhance the quality and integrity of the take-over bid regime and they rebalance the current dynamics among bidders, target boards, and target shareholders in a desirable way.

CCGG does not support the 120 Day Requirement but instead we support a 90 day bid period. CCGG also does not support the ability of boards to waive the 120 Day Requirement (or, as we support, a 90 day bid requirement). The supposed benefits of such a lengthy time period are not based on empirical evidence and will provide more leverage to the board, as will board discretion to waive the bid period, which may not be beneficial to shareholders, thus moving the balance of power in a take-over bid situation away from shareholders where it should be and rather towards the target board. As such these proposals meet neither of the goals of the Proposed Amendments.

Regardless of the bid period selected by the CSA, the CSA must make it clear that poison pills cannot be used by a board to extend the bid period any further.

Thank you for the opportunity to provide you with our comments. If you have any questions regarding the above, please feel free to contact our Executive Director, Stephen Erlichman, at 416.847.0524 or serlichman@ccgg.ca or our Director of Policy Development, Catherine McCall, at 416.868.3582 or cmccall@ccgg.ca.

Yours very truly,

[redacted]

Daniel E. Chornous, CFA
Chair of the Board
Canadian Coalition for Good Governance

CCGG MEMBERS - 2015

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