mcmillan

Date June 26, 2015

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
The 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 Territory
Superintendent of Securities, Nunavut

The Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor, Box 55
Toronto, Ontario M5H 2SB

Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
800, square Victoria, 22e étage
C.P. 246, tour de la Bourse
Montréal, Québec H4Z 1G3

Dear Sirs/Mesdames:

Re: Submissions and comments with respect to proposed amendments to Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids* (the "**Proposed Rule**"), proposed changes to National Policy 62-203 *Take-Over Bids and Issuer Bids* (NP 62-203) (the "**Proposed Policy**") and proposed consequential amendments

We are writing in response to the request for comments by the Canadian Securities Administrators (the "**CSA**") with respect to the Proposed Rule, the Proposed Policy and proposed consequential amendments (collectively, the "**CSA Proposal**"). In Part I of this submission, we outline recommended changes to the CSA Proposal which we believe address key policy objectives of the Proposed Rule or the take-over bid regime. In Part II of this submission, we provide specific drafting suggestions for changes to the language of the Proposal Rule. In Part III, we respond directly to the questions set out under "Request for Comments" in

the CSA Proposal. Finally, in Part IV we discuss certain specific concerns regarding the impact of the Proposed Rule on outstanding shareholder rights plans ("**Plans**").

PART I: RECOMMENDED CHANGES BASED ON POLICY OBJECTIVES

We recognize the considerable efforts the CSA has made for compromise in the CSA Proposal between the rights of security holders, offeree issuers and offerors. In light of the apparent difficulty in establishing the harmonized approach, we have not sought to suggest material changes to this proposed regime. However, we note below several aspects of the CSA Proposal that we believe warrant further consideration before the Proposed Rule is implemented, as certain aspects may depart from or appear to be inconsistent with the policy objectives underlying the Proposed Rule or the take-over bid regime. To the extent that we have suggested changes in Part I, we have not drafted amended language to the Proposed Rule. However, we would be prepared to provide amended language, if requested.

Section 1(1): Issues around the concept of an "alternative transaction"

We note that the definition of "alternative transaction" was based primarily on the definition of "business combination" found in Multilateral Instrument 61-01 – *Protection of Minority Security Holders in Special Transactions*. However, a business combination is a transaction that leads to the termination of an equity interest in an issuer without the consent of the holder of such equity interest. On the other hand, the purpose of the "alternative transaction" exception is as noted on page 3 of the CSA Proposal :

> The purpose of this exception is to avoid unequal treatment of offerors when a board supported change of control transaction is proposed to be effected through an "alternative transaction" rather than by way of a "friendly" take-over bid. As well, since the purpose of the 120 day minimum deposit period is to provide offeree boards with a longer period of time to respond to an unsolicited bid, there is no need for the 120 day minimum deposit period to apply where the offeree issuer has determined that an alternative transaction is appropriate.

Accordingly, we would suggest that using the definition of "business combination" as a starting point does not fully address the policy objectives underlying this exception. We believe a broader definition of "alternative transaction" is required which is focused on change of control transactions supported by the board of the offeree. We would therefore suggest that the Proposed Rule be modified to import the concept of a transaction agreed to by the offeree issuer's board that "affects materially the control" of the issuer. Without this change, an offeree issuer could undertake transactions that materially alter the control of the issuer without shareholder approval, such as a private placement of 24.99% of the voting securities of an issuer, and not trigger the application of the shortened deposit period under Section 2.28.3 of the Proposed Rule. We believe that this would run contrary to the rationale for the introduction of the alternative transaction exception. The term "affects materially the control", while not defined in securities legislation or the rules of stock exchanges, is well understood by market participants and securities practitioners, and therefore its adoption should not create difficulties with respect to its application.

We would also acknowledge that it could be suggested that this exception should be further broadened to include any transaction by the offeree issuer that may be subject to National Policy 62-202 – *Take-over Bids – Defensive Tactics* ("**NP 62-202**"): "will likely result in shareholders being deprived of the ability to respond to a take-over bid or to a competing bid". Provided that NP 62-202 remains in place, we would suggest that due to the imprecise nature of such language it should not be incorporated into the Proposed Rule. In any event, offerors will be able to pursue remedies under corporate law or NP 62-202 if a transaction would engage such language.

If the concept of "affects materially the control" is not adopted, we would suggest additional changes. In our view, the current definition of "alternative transaction" is insufficiently broad to capture the range of potential re-organization or change of control transactions currently contemplated by the policy objectives of the definition. Specifically, we believe "merger" should be expressly included in the definition to acknowledge this common form of transaction for U.S. incorporated issuers. Secondly, the definition does not capture a three-corner amalgamation where the subsidiary of an offeree issuer amalgamates with a third party. By not capturing such transactions in the definition, an offeree issuer could become a very different company without a shareholder vote and without triggering the acceleration provisions for the minimum deposit period under Section 2.28.3 of the Proposed Rule, notwithstanding that the offeree issuer's shareholders continue to hold the same shares.

Section 1(1) and Section 2.28.2(2): Shortening the deposit period

The definition of "deposit news release" under the Proposed Rule limits a deposit period news release to news releases in response to a "proposed or commenced take-over bid". In our view, an issuer should be allowed to shorten the initial deposit period, whether or not a take-over bid has been proposed or commenced. For example, an issuer could announce that for the next two years the initial deposit period for all formal take-over bids will be 40 days. We believe this change would offer greater flexibility to issuers, allowing them to encourage more take-over bids in response to shareholder requests or demands, or for other specific purposes that the issuer believes would be helpful.

To effect this change, the definition for a "deposit period news release" in Section 1.1 will need to be further amended to contemplate an ongoing reduction to the minimum deposit period by the offeree issuer. Also, Section 2.28.2(2) would need to be revised to account for a continuing reduction to the initial deposit period.

Section 2.12(1) and Section 2.16(2): Offeror news releases

As currently worded, upon a deposit period news release or an alternative transaction, the Proposed Rule requires an offeror to issue a news release and prepare and send a notice of variation to every person to whom the bid was required to be sent. We recommend that the CSA Proposal be amended to allow an offeror to account for the possibility of a reduced deposit period, as a result of the issuance of a deposit period news release or an alternative transaction, in its original bid document, and, if the reduced period is activated, the offeror would then be required to issue a news release only, rather than also having to prepare and mail a notice of

variation. We acknowledge that if the bid would expire less than 10 days following the issuance of a deposit period news release or an alternative transaction, then the offeror would still be required to keep the bid open for a minimum period of 10 days thereafter.

If an offeree issuer can lessen the initial deposit period by a press release, an offeror should be able to adopt that shorter deposit period by press release, provided that it clearly states that it reserves this option in its circular and shareholders have a minimum of 10 days to respond.

Section 2.29.1(c): Minimum Tender Requirement

It is noted in the CSA Proposal that the Minimum Tender Requirement is "comparable to a vote on the bid" and serves to mitigate any pressure to tender to a bid. An alternative process to confirm that a majority of shareholders consent to a bid, is to have persons holding a majority of the outstanding shares (other than the offeror and its joint actors) acknowledge in writing their agreement ("**Minimum Consent Requirement**"). This could be achieved in much the same manner as a consent solicitation; in that the offeror could provide in a letter of transmittal or similar form for such consent to be documented and sent to the offeror or its agent. The Minimum Consent Requirement could be defined as instruments in writing executed in counterparts by persons holding more than 50% of the outstanding securities of the class that are subject to the bid (excluding shares held by the offeror and its joint actors) evidencing their consent to the terms of the bid. Shareholders would have at least 10 days from the date of a news release announcing that the Minimum Consent Requirement had been met to tender to and accept the bid.

We would suggest that the offeror should have the option of choosing between using the Minimum Tender Requirement and the Minimum Consent Requirement.

The Minimum Consent Requirement would be particularly helpful with respect to partial take-over bids. For partial take-over bids, the Minimum Tender Requirement combined with the lack of withdrawal rights during the mandatory 10 day extension period may reduce the likelihood of a successful partial take-over bid and thus strongly discourage offerors from making partial take-over bids. If shareholders of an offeree issuer were only required to evidence their consent to a partial take-over bid and not tender their shares until during the mandatory extension period, it may somewhat counterbalance the negative implication to partial take-over bids that would be brought about by the Proposed Rule.

The CSA could also consider limiting the Minimum Consent Requirement to partial take-over bids.

PART II: SPECIFIC SUGGESTIONS FOR CHANGES TO THE LANGUAGE OF THE PROPOSED RULE

In addition to the changes noted in Part I, we believe the Proposed Rule may benefit from certain drafting changes, as outlined below. For each suggested change, we have included a reference to the section, a blackline of our changes, and a brief description of our rationale in proposing such change. Please note that the revisions set out below do not incorporate proposed language for

changes recommended under Parts I, III and IV of our submission, and only relate to changes that we believe affect either the internal consistency of the language of the Proposed Rule or would provide greater clarity.

Section 1(1): Definition of "deposit period news release"

We suggest the following changes to the definition of a "deposit period news release" under Section 1(1):

> *"**deposit period news release**" means a news release issued by an offeree issuer ~~in respect of a proposed or commenced take-over bid for the securities of the offeree issuer and~~ stating that an initial deposit period ~~for the bid of~~, in respect of a proposed or commenced take-over bid for securities of the offeree issuer, is for a period of not more than 120 days and not less than 35 days ~~that is acceptable to the board of directors of the offeree issuer~~, expressed as a number of days from the date of the bid.*

We believe the proposed changes provide greater clarity respecting the purpose of the deposit period news release. We removed the phrase "acceptable to the board of directors of the offeree issuer" because we did not see a reason why it should be included.

Section 1(1): Definition of "partial take-over bid"

We suggest the following change to the definition of a "partial take-over bid" under Section 1(1):

> ***"partial take-over bid"** means a take-over bid for less than all of the outstanding securities of the class of securities subject to the bid;*

We believe this change is necessary, as take-over bid legislation relate to bids for outstanding securities, not the entire class of securities.

Section 2.28.1(2)

We suggest the following changes to subsection 2.28.1(2):

> *2.28.1(2) Despite section 2.28.1, an offeror, other than an offeror under subsection (1), must allow securities to be deposited under its take-over bid for an initial deposit period of at least the number of days from the date of the bid as stated in the deposit period news release if either of the following applies:*
>
> > *(a) the offeror, prior to the issuance of the deposit period news release referred to in subsection (1), has commenced a take-over bid in respect of ~~the~~ securities of the offeree issuer that has yet to expire;*
> >
> > *(b) the offeror, subsequent to the issuance of the deposit period news release referred to in subsection (1), commences a take-over bid in respect*

> *of ~~the~~ securities of the offeree issuer and the bid is made prior to one of the following:*
>
> > *(i) the date of expiry of the take-over bid referred to in subsection (1),*
> >
> > *(ii) the date of expiry of a take-over bid referred to in paragraph (a).*

We believe these changes make it clearer that the bid can be in respect of a certain class of securities. We also were unsure whether the CSA was trying to imply that the deposit period news release should be limited to a specific class of securities – if so we believe that this would be unnecessary.

Section 2.28.3

We suggest the following change to Section 2.28.3:

> *2.28.3 Despite section 2.28.1, if an issuer issues a news release announcing that it has agreed to enter into, or determined to effect, or has entered into, an alternative transaction, an offeror must allow securities to be deposited under its take-over bid for an initial deposit period of at least 35 days from the date of the bid if either of the following applies:*
>
> > *(a) the offeror, prior to the issuance of the news release, has commenced a take-over bid in respect of the securities of the offeree issuer that has yet to expire;*
> >
> > *(b) the offeror, subsequent to the issuance of the news release, commences a take-over bid in respect of the securities of the offeree issuer and the bid is made prior to one of the following:*
> >
> > > *(i) the date of completion or abandonment of the alternative transaction,*
> > >
> > > *(ii) the date of expiry of a take-over bid referred to in paragraph (a).*

We believe this change precludes uncertainty regarding the application of the reduced minimum deposit period under Section 2.28.3.

Section 2.30 (1.1)

We suggest the following change to the language of Section 2.30(1.1):

> *2.30(1.1) Despite paragraph (1)(a), if an offeror that has made a partial take-over bid becomes obligated to take up securities under subsection 2.32.1(1), a*

security holder may not withdraw securities that have been deposited under the bid before the expiry of the initial deposit period but not taken up by the offeror in reliance on subsection 2.32.1(6) during the period

(a) commencing at the time the offeror became obligated to take up securities under subsection 2.32.1(1), and

(b) ending at the time the offeror becomes obligated to take up securities, under subsection 2.32.1(7) or (8), which were not taken up by the offeror in reliance on subsection 2.32.1(6) ~~under subsection 2.32.1(7) or (8), as applicable.~~

We believe this change provides greater clarity with respect to obligations of an offeror under Sections 2.32.1(7) and (8).

PART III: RESPONSE TO CSA REQUEST FOR COMMENTS

Our responses to the specific questions posed by the CSA in its request for comments are set out below. For ease of reference, we have set out below each question.

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?

Section 2.12(1) of the Proposed Rule mandates that offerors must "promptly" issue and file a news release and send a notice of variation to the security holders entitled to receive such notice. Under Section 2.12(3), the new deposit period must not expire before 10 days after the date of the notice of variation. Under Section 2.16(2), the date of the notice of variation is deemed to be the date it was sent to all or substantially all of those security holders entitled to receive it. Accordingly, if an offeree issuer reduces the deposit period to 35 days on day 30 of the offeror's bid, the offeror's bid would still be open for at least 10 days after it issues a news release and prepares and mails the notice of variation. Subject to requiring that a bid be open for at least 10 days following a deposit period news release or an alternative transaction, we suggest that the CSA consider allowing for the possibility of a reduced deposit period to be built into the original bid document of an offeror such that if the reduced deposit period is activated, the offeror will be required to issue a news release only to accept such shortened period, rather than also having to prepare and mail a notice of variation. Please see our comments under "Part I: Recommended Changes Based on Policy Objectives - Section 2.12(1) and Section 2.16(2): Offeror news releases".

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 refer to our comments under "Part I: Recommended Changes Based on Policy Objectives – Section 1(1): Issues around the concept of an 'alternative transaction' ".

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?

We refer to our comments above under "Part I: Recommended Changes Based on Policy Objectives – Section 1(1): Issues around the concept of an 'alternative transaction' ".

Although we are generally in favour of providing guidance, we have two concerns regarding the guidance set out in Section 2.14 of the Proposed Policy. We would suggest that a transaction is either an "alternative transaction" or it is not. If the Proposed Rule is meant to apply to a transaction that "may reasonably be interpreted to be an alternative transaction", then it should be so worded. Also, the guidance to offeree issuers that if they do not consider a transaction to be an alternative transaction for the purposes of Section 2.28.3 to so state that fact in a news release in respect of the transaction only if it believes that the transaction could be erroneously interpreted as an "alternative transaction", appears unhelpful to both offerors and offeree issuers. Regardless of the views of the offeree issuer, the Proposed Rule will be interpreted by the offeror and ultimately by a securities regulator if there is a difference of opinion. There should be no guidance that insinuates that the interpretation of the offeree issuer has any bearing on the meaning to be given to the term "alternative transaction".

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.

While any explanation would likely be helpful, we are of the view that the provisions with respect to partial take-over bids are clear. If the CSA is contemplating additional guidance, we would suggest providing an example using actual numbers in such guidance.

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?

At the outset we would note that partial take-over bids are rare. Nevertheless, we believe that this option should remain a viable one to offerors. We expect that the Minimum Tender Requirement, combined with the lack of withdrawal rights during the mandatory 10 day extension period which may have the effect of discouraging security holders from depositing prior to the expiry of the initial deposit period, may reduce the likelihood of a successful partial take-over bid and thus discourage offerors from making partial take-over bids. Please see "Part I: Recommended Changes Based on Policy Objectives – Section 2.29.1(c): Minimum Tender Requirement" for our comments regarding adopting a Minimum Consent Requirement, particularly for partial take-over bids. We expect that the adoption of the Minimum Consent Requirement would assist in increasing the likelihood of a successful partial take-over bid.

We believe that the proposed mechanism described in the question above seems to be the most reasonable way to proceed and most fair to offerors, and agree with the proposed changes to the take up and payment and withdrawal rights. While the lack of withdrawal rights in respect of securities deposited before the expiry of the initial deposit period and not taken-up by the offeror may put such securities at risk for intervening events affecting the offeree and restrict a security holder's ability to deal with such securities during the mandatory 10 day extension period, we are of the view that the risk is reasonable and should lie with the security holders rather than the offeror.

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 the 7-day time limit in Section 2.17(3) is sufficient since the offeree itself is able to control the length of the initial deposit period.

The 15-day time limit in Section 2.17(1) to prepare and send a directors' circular, however, appears unnecessarily short under the CSA Proposal given the minimum deposit period of up to 120 days. We would suggest that offerees be given a minimum period of the lesser of (i) 30 days following the commencement of the bid and (ii) 20 days prior to the end of the initial deposit period.

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 are not qualified to comment.

PART IV: POSSIBLE IMPACT ON SHAREHOLDER RIGHTS PLANS

We expect that enactment of the Proposed Rule will have ramifications for existing Plans. A number of practical issues will arise upon enactment of the Proposed Rule, particularly in respect of the concept of a "permitted bid" under Plans. For example:

- Where an offeree issuer enters into an "alternative transaction", the Proposed Rule could reduce the deposit period to less than the minimum 60-day period required under a Plan's permitted bid provisions.

- The Proposed Rule's Minimum Tender Requirement may not coincide with the definition of "independent shareholders" used in many Plans for purposes of determining the group from which a majority tender is required so as to qualify as a 'permitted bid'. Plans typically exclude all acquiring persons and associates of offerors and acquiring persons.

- The Minimum Consent Requirement is not addressed in Plans and therefore if this concept is adopted, bids approved in such a manner would not constitute a 'permitted bid'.

It may be suggested that the Proposed Rule will largely deal with the primary purposes of Plans - in providing adequate time to the offeree issuer's Board to consider alternatives to unsolicited proposals and providing for equal treatment of shareholders – and therefore Plans should serve no purpose in the Canadian capital markets and, as a result, the CSA need not be concerned with this conflict. We would suggest, however, that there are a few reasons why this may not be the case.

Elements of Plans may continue to be relevant for certain issuers while not being contrary to the policy objectives of the proposed Rule. For example, Plans will continue to be relevant for offerees who are wary of 'creeping' acquisitions made by way of the 'private agreement' exemption and other exemptions from the formal takeover bid requirements.

The 'new generation' Plans supported by shareholder advisory groups such as Institutional Shareholder Services, require that shareholder approval be obtained to any waiver of a Plan's provisions or redemption of rights under a Plan. Boards of issuers with Plans in place who wish to fully comply with the Proposed Rule will effectively have their hands tied at least until the first meeting of shareholders to occur following the effective date of the Proposed Rule or a shareholders' meeting to terminate or amend a Plan is called.

Accordingly, we believe that it would be prudent for the CSA to address this issue. While we would expect that a securities regulator would move quickly to cease trade a Plan where the requirements of the Proposed Rule had been satisfied by a specific bid, it would still require that an application for relief be made by the offeror which would result in unnecessary time and expense being incurred and defeat one of the principal reasons for the CSA putting forward the Proposed Rule (i.e. putting an end to hearings regarding the cease trading of Plans).

There are several ways to deal with this matter, including a transition period to allow for issuers to amend Plans to comply with the Proposed Rule. It may be simpler to have the Proposed Rule, or regulations or securities legislation include express language that provisions in indentures, agreements or constating documents of issuers will not be binding on any person to the extent that such are contrary to the provisions of the Proposed Rule.

Finally, it may be helpful if the Proposed Policy (or NP 62-202) provides guidance on the CSA's view as to when the public interest power would be exercised if a Plan remains operational to impede a bid beyond the deposit period of such bid.

If you wish to discuss any aspect of this letter, we would encourage you to contact any one of the following lawyers who would be pleased to speak to you at your convenience:

Paul Collins (paul.collins@mcmillan.ca; 416-307-4050)
Paul Davis (paul.davis@mcmillan.ca; 416-307-4137)
Adam Kline (adam.kline@mcmillan.ca; 416-865-7874)
Scott Kuehn (scott.kuehn@mcmillan.ca; 604-235-3026)
Amandeep Sandhu (amandeep.sandhu@mcmillan.ca; 604-691-7448)
Stephen Wortley (stephen.wortley@mcmillan.ca; 604-691-7457)
Sandra Zhao (sandra.zhao@mcmillan.ca; 416-865-7808)

Yours truly,

"*McMillan LLP*"