

Submission by Ad Hoc Senior Securities Practitioners Group

June 26, 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
Superintendent of Securities, Prince Edward Island
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

c/o The Secretary
Ontario Securities Commission
20 Queen Street West
19th Floor, Box 55
Toronto, Ontario M5H 2S8

- and -

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 and Mesdames:

We are writing in response to the notice and request for comment issued by the Canadian Securities Administrators (CSA) on March 31, 2015 (the **Request for Comment**) proposing amendments to Multilateral Instrument 62-104 — *Take-over Bids and Issuer Bids* and changes to National Policy 62-203 — *Take-over Bids and Issuer Bids*, and Proposed Consequential Amendments (the **Proposed Bid Amendments**).

We are providing these comments in our personal capacities. They reflect our individual views and not those of our respective firms. Some of our respective firms (or other practitioners in our respective firms) may be making separate submissions to you in response to the Request for Comments, and the views of other practitioners within our respective firms may differ from ours on the issues discussed below.

We are writing regarding the proposed majority tender requirement in the Proposed Bid Amendments, which would require a formal bid to be accepted by holders of more than 50% of the affected securities. We wish to draw a potential issue with the requirement to your attention and to suggest a possible approach for addressing the point.

Background

By way of background, we wrote on July 11, 2013, advocating changes to the take-over bid rules in response to the CSA's proposals of March 14, 2013 regarding security holder rights plans and the consultation launched concurrently by the Autorité des marchés financiers into securities regulators' response to defensive tactics. We believe that the CSA has, through the Proposed Bid Amendments,

made significant progress in developing a more balanced approach to the regulation of take-over bids, and we support the Proposed Bid Amendments for the reasons outlined in our July 11, 2013 letter. In our view, the amendments would provide boards of directors with a larger role in overseeing the target shareholder response to a proposed change of control transaction and would reduce potential structural coercion.

As noted in our July 11, 2013 letter, we agree with the proposed majority tender requirement, which is designed to address structural coercion. Shareholders faced with a take-over bid may feel forced to tender their shares even if they do not want the bid to succeed. Failing to tender may result in the shareholder either being left with an illiquid security and not participating in the benefit of any control premium implicit in the bid, or being subject to a forced “squeeze-out” transaction in which it would receive the same consideration but on a delayed basis. The new rule would, instead, allow shareholders to act collectively in making decisions regarding change of control transactions that are initiated by way of a take-over bid rather than a voting transaction.

Issue for Consideration

There may, however, be circumstances where the majority tender requirement would prevent a non-coercive bid from proceeding. For example, a control block holder or other insiders may not support the transaction because they have a stake in the outcome that is different from that of the minority shareholders. This could arise if they have a role in management or if there are related party arrangements that make the status quo important to those shareholders. Depending on the size of their investments taken together, it may not be practically possible for a bidder to achieve the 50% mandatory minimum tender condition. The question is whether, in those circumstances, the other shareholders should be able to accept the offer if the bidder is willing to proceed without acquiring the “insider” block and whether allowing that to occur would have a coercive impact on the holders of that block.

One approach to dealing with this scenario would be to exclude shares held in a control block or by insiders from being counted as part of the 50% condition. That would, in theory, allow a “disinterested” group of shareholders to determine collectively the outcome of the take-over bid. The risk of this being coercive to the holders of the control block and insiders would be mitigated by the Proposed Bid Amendment requiring the bidder to extend the bid for a minimum of 10 days when all of the conditions have been satisfied or waived. If 50% of the shares (other than shares held by a control block and insiders) are tendered, the holders of the excluded shares would still have the opportunity to tender during the mandatory extension period. As well, the insiders would in the contemplated fact situation hold sufficient shares to resist being forced out in a subsequent “squeeze out” transaction.

We recognize that these facts would be unusual¹. In our view, the right approach will also ultimately turn on the facts of the particular case and there may be circumstances where control block or insider shares ought not to be excluded. It is difficult, if not impossible, to anticipate each potential future fact situation and to develop a rule that would fairly address each of those cases.

For that reason, we believe that it would be preferable to deal with potential unintended consequences by relying on the general exemption power under section 6.1 of the proposed amended National Instrument 62-104. This power would allow securities regulators to provide tailored relief from the new majority tender requirement where they determine it is appropriate to do so. We would also support the CSA including in National Policy 62-203 guidelines outlining the circumstances in which securities regulators

¹This type of situation arose in the take-over bid by Hudbay Minerals Inc. for the shares of Augusta Resource Corporation. In that case, management of Augusta and certain other shareholders who together held approximately 33 percent of the shares of Augusta indicated they did not intend to tender to Hudbay's offer.

would be likely to grant exemptive relief from the majority tender requirement. Those guidelines could include a statement to the effect that it is not expected that exemptive relief would be granted in respect of *de minimis* insider holdings absent special circumstances. This would avoid exemptive relief being sought on a routine basis for small director and officer shareholdings, given these will regularly arise but will generally be unlikely to affect the outcome of the bid.

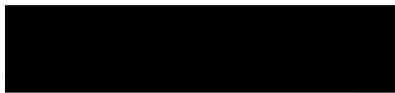
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