



Canadian Securities
Administrators

Autorités canadiennes
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CSA Notice and Request for Comment

Draft Regulation to amend Regulation 62-104 respecting Take-Over Bids and Issuer Bids

Draft Amendments to Policy Statement 62-203 respecting Take-Over Bids and Issuer Bids

and

Draft Consequential Amendments

March 31, 2015

INTRODUCTION

The Canadian Securities Administrators (the **CSA** or **we**) are publishing, for a 90 day comment period, a draft *Regulation to amend Regulation 62-104 respecting Take-Over Bids and Issuer Bids* (**Regulation 62-104**) and amendments to *Policy Statement 62-203 respecting Take-Over Bids and Issuer Bids* (**Policy Statement 62-203**) (collectively, the **Proposed Bid Amendments**).

Currently, Regulation 62-104 governs take-over bids and issuer bids in all jurisdictions of Canada, except Ontario. In Ontario, substantively harmonized requirements for take-over bids and issuer bids are set out in Part XX of the *Securities Act* (Ontario) (the **Ontario Act**) and Ontario Securities Commission Rule 62-504 *Take-Over Bids and Issuer Bids* (the **Ontario Rule**). Policy Statement 62-203 applies in all jurisdictions of Canada. In this Notice, Regulation 62-104, the Ontario Act, the Ontario Rule and Policy Statement 62-203 are collectively referred to as the **take-over bid regime** or **bid regime**.

The Ontario Securities Commission intends to seek legislative amendments to the Ontario Act to accommodate the adoption of Regulation 62-104 in Ontario, as amended by the Proposed Bid Amendments and the Proposed Market Price Amendment (as described below) (such amended regulation, **Proposed Regulation 62-104**). The proposed repeal of the Ontario Rule and the related consequential amendments necessary to facilitate the adoption of Proposed Regulation 62-104 in Ontario (the **Proposed Harmonization**) are set out in an annex to the version of this Notice published in Ontario.

As a result of the Proposed Bid Amendments and the Proposed Harmonization, we are proposing to make related consequential amendments to each of the following, in the

applicable jurisdictions in which such regulations and/or policy statements have been adopted (collectively, the **Consequential Amendments**):

- *Regulation 11-102 respecting Passport System (Regulation 11-102);*
- *Regulation 13-102 respecting System Fees for SEDAR and NRD (Regulation 13-102);*
- *Regulation 43-101 respecting Standards of Disclosure for Mineral Projects (Regulation 43-101);*
- *Regulation 51-105 respecting Issuers Quoted in the U.S. Over-the-Counter Markets (Regulation 51-105);*
- *Policy Statement to Regulation 55-104 respecting Insider Reporting Requirements and Exemptions (Policy Statement 55-104);*
- *Regulation 61-101 respecting Protection of Minority Security Holders in Special Transactions (Regulation 61-101);*
- *Policy Statement to Regulation 61-101 respecting Protection of Minority Security Holders in Special Transactions (Policy Statement 61-101); and*
- *Regulation 62-103 respecting the Early Warning System and Related Take-Over Bid and Insider Reporting Issues (Regulation 62-103).*

Additionally, we are proposing a technical amendment to the meaning of “market price” in Regulation 62-104 (the **Proposed Market Price Amendment**) as it relates to securities acquired pursuant to an issuer bid that is made in the normal course on a published market other than a designated exchange in reliance on the normal course issuer bid exemption set out in paragraph 4.8(3)(c) of Regulation 62-104.

The texts of the Proposed Bid Amendments, Proposed Market Price Amendment and Consequential Amendments are published with this Notice and will also be available on the websites of CSA jurisdictions, including:

www.lautorite.qc.ca
www.albertasecurities.com
www.bcsc.bc.ca
www.msc.gov.mb.ca
www.gov.ns.ca/nssc
www.nbsc-cvmnb.ca
www.osc.gov.on.ca
www.fcaa.gov.sk.ca

SUBSTANCE AND PURPOSE OF THE PROPOSED BID AMENDMENTS

1. Overview of the Proposed Bid Amendments

In general, we intend the Proposed Bid Amendments to enhance the quality and integrity of the take-over bid regime and rebalance the current dynamics among offerors, offeree issuer boards of directors (**offeree boards**), and offeree issuer security holders by (i) facilitating the ability of offeree issuer security holders to make voluntary, informed and co-ordinated tender decisions, and (ii) providing the offeree board with additional time and discretion when responding to a take-over bid.

Specifically, the Proposed Bid Amendments require that all non-exempt take-over bids

(1) receive tenders of more than 50% of the outstanding securities of the class that are subject to the bid, excluding securities beneficially owned, or over which control or direction is exercised, by the offeror or by any person acting jointly or in concert with the offeror (the **Minimum Tender Requirement**);

(2) be extended by the offeror for an additional 10 days after the Minimum Tender Requirement has been achieved and all other terms and conditions of the bid have been complied with or waived (the **10 Day Extension Requirement**); and

(3) remain open for a minimum deposit period of 120 days unless

(a) the offeree board states in a news release a shorter deposit period for the bid of not less than 35 days that is acceptable to the offeree board, in which case all contemporaneous take-over bids must remain open for at least the stated shorter deposit period, or

(b) the issuer issues a news release that it has agreed to enter into, or determined to effect, a specified alternative transaction, in which case all contemporaneous take-over bids must remain open for a deposit period of at least 35 days

(the **120 Day Requirement**).

We are also proposing amendments to other aspects of the take-over bid regime relating to these key amendments.

2. Objectives of the Proposed Bid Amendments

(1) Minimum Tender Requirement

The Minimum Tender Requirement establishes a mandatory majority acceptance standard for all take-over bids, whether a bid is made for all or only a portion of the outstanding securities. The purpose of the majority standard is to address the current possibility that control of, or a controlling interest in, an offeree issuer can be acquired through a take-over bid without a majority of the independent security holders of the offeree issuer supporting the transaction if the offeror elects, at any time, to waive its minimum tender condition (if any) and end its bid by taking up a smaller number of securities.

The Minimum Tender Requirement allows for collective action by security holders in response to a take-over bid in a manner that is comparable to a vote on the bid. Collective action for security holders in response to a take-over bid is difficult under the current bid regime, where an unsolicited offeror's ability to reduce or waive its minimum tender condition may impel security holders to tender out of concern that they will miss their opportunity to tender and be left holding securities of a controlled company. Coupled with the 10 Day Extension Requirement, the Minimum Tender Requirement is intended to mitigate this "pressure to tender".

(2) *10 Day Extension Requirement*

The 10 Day Extension Requirement is intended to provide offeree issuer security holders who have not tendered their securities to a take-over bid with an opportunity to participate in the bid after a majority of independent security holders have tendered to the bid and it is known that the bid will succeed.

Currently, offerors are not required to extend their bids after they have taken up offeree issuer securities and there is no formal mechanism for offeree issuer security holders to coordinate their actions in the bid context. As a result, offeree issuer security holders make tender decisions without knowing what other security holders will do and with the awareness that the offeror can always elect to waive its minimum tender condition (if any) and end its bid by taking up a smaller number of securities, thereby altering the future control of the offeree issuer. This situation creates "pressure to tender" or coercion concerns since security holders may tender to the take-over bid or sell in the market not because they support the bid but because they are afraid of being "left behind" if the offeror obtains sufficient tenders from other security holders.

The 10 Day Extension Requirement addresses the "pressure to tender" concern by protecting the security holder's ability to tender whether or not it supports the bid in the first instance. As well, by mitigating coercive dynamics in the tender process, the 10 Day Extension Requirement enhances the quality and integrity of the collective majority security holder decision on whether or not to approve the bid.

(3) *120 Day Requirement*

The 120 Day Requirement is intended to provide offeree boards with a longer, fixed period of time to consider and respond to a take-over bid. The current take-over bid regime mandates a minimum 35 day deposit period. Where a board has adopted a security holder rights plan (a **Rights Plan**) to prevent a bid from being completed after 35 days, securities regulators have typically cease-traded the Rights Plan approximately 45-60 days after the commencement of the bid.

The 120 Day Requirement responds to the concern, as expressed by some commenters on the CSA Proposal and AMF Proposal (each as defined below), that offeree boards do not have enough time to respond to unsolicited take-over bids with appropriate action, such as seeking value-maximizing alternatives or developing and articulating their views on the merits of the bid.

We are, however, proposing two important exceptions as part of the 120 Day Requirement.

The first exception we are proposing is if an offeree board issues a news release in respect of a proposed or commenced take-over bid stating a deposit period for the bid of not less than 35 days that is acceptable to the offeree board. In this circumstance, the bid regime would provide that the minimum deposit period for the subject bid must be at least the number of days from the date of the bid as stated in the news release, instead of 120 days from the date of the bid. The purpose of this exception is to accommodate a shorter deposit period in cases where a longer bid period is not necessary for the offeree board to respond to the bid.

However, in order to prevent discriminatory and unequal treatment of competing bids under the bid regime, if an offeree board issues a news release stating an acceptable shorter deposit period for one bid, then all other outstanding or subsequent take-over bids, including any unsolicited bids, would also become subject to the stated shorter minimum deposit period rather than the minimum 120 day deposit period. In any event, no bid could be open for less than 35 days.

The second exception we are proposing is if an issuer issues a news release announcing that it has agreed to enter into, or determined to effect, an “alternative transaction” (being, generally, a plan of arrangement or similar change of control transaction to be approved by security holders of the issuer). In such case, the minimum deposit period for any then-outstanding take-over bid or subsequent take-over bid commenced before the completion of the alternative transaction must be at least 35 days, rather than 120 days, from the date of the bid. 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 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.

Where an offeror reduces the initial deposit period in connection with a deposit period news release or an alternative transaction, the bid would have to remain open for at least 10 days after the date of any notice of variation concerning the reduction of the deposit period.

The 120 Day Requirement does not apply to issuer bids; the minimum deposit period for issuer bids remains 35 days.

BACKGROUND

Prior proposals

On March 14, 2013, the CSA published for comment draft *Regulation 62-105 respecting Security Holder Rights Plans* and draft *Policy Statement to Regulation 62-105 respecting Security Holder Rights Plans* (together, the **CSA Proposal**). The Autorité des marchés

financiers (the **AMF**), while participating in the publication for comment of the CSA Proposal, concurrently published a consultation paper entitled *An Alternative Approach to Securities Regulators' Intervention in Defensive Tactics* (the **AMF Proposal**).

The CSA Proposal and the AMF Proposal sought to address, in different ways, concerns raised with respect to the CSA's current approach to reviewing defensive tactics adopted by offeree boards in response to, or in anticipation of, unsolicited or "hostile" take-over bids.

CSA Proposal

The purpose of the CSA Proposal was to create a framework for the regulation of Rights Plans adopted by offeree boards in response to, or in anticipation of, unsolicited bids. The CSA Proposal would have allowed an offeree board to maintain a Rights Plan in the face of an unsolicited bid if a majority of the equity or voting securities of the offeree issuer (excluding the securities of the unsolicited offeror and its joint actors) were voted in favour of the Rights Plan, either in the face of the unsolicited bid or at the offeree issuer's previous annual meeting.

AMF Proposal

While the CSA Proposal addressed the use of Rights Plans by offeree boards, the AMF Proposal raised more fundamental issues regarding the regulation of defensive tactics in Canada, including the role of offeree boards when faced with unsolicited take-over bids. The AMF Proposal, as described, sought to remedy the structural imbalance between offerors and offeree boards and update the policy framework of the take-over bid regime to reflect the current legal and economic environment and market practices regarding unsolicited take-over bids.

The AMF Proposal put forward two changes to address concerns with the existing regulatory approach to defensive tactics. First, it suggested replacing *Notice 62-202 relating to Take-Over Bids – Defensive Tactics* (**Notice 62-202**) with a new policy statement that would recognize the fiduciary duty of the offeree board to the offeree issuer when responding to an unsolicited bid. The new policy statement would have limited the intervention of securities regulators to circumstances where security holders were deprived of the opportunity to consider a *bona fide* offer because the offeree board failed to adequately manage its conflicts of interest, and to circumstances that demonstrated an abuse of security holders' rights or that negatively impacted the efficiency of the capital markets.

Second, the AMF Proposal proposed to amend the take-over bid regime to require a minimum tender condition of more than 50% of all outstanding offeree issuer securities owned or held by persons other than the offeror and its joint actors, along with a mandatory 10 day extension of the bid following an announcement that the minimum tender condition had been met to give the remaining security holders the opportunity to tender to the bid.

Public comments on proposals

The comment periods for the CSA Proposal and the AMF Proposal ended on July 12, 2013. We received 72 comment letters from various market participants, including issuers, institutional investors, industry associations and law firms that reflected a broad diversity of opinions on the two proposals. Many commenters provided helpful substantive submissions, information and alternative considerations. We wish to thank all of the commenters for their contributions.

General summaries of comments received in respect of the CSA Proposal and AMF Proposal are set out, respectively, at Annex A.1 and Annex A.2 of this Notice.

Proposed Bid Amendments

On September 11, 2014, we published CSA Notice 62-306 *Update on Draft Regulation 62-105 respecting Security Holder Rights Plans* and AMF Consultation Paper *An Alternative Approach to Securities Regulators' Intervention in Defensive Tactics* (the **Update Notice**).

As indicated in the Update Notice, in light of the comments received on the CSA Proposal and AMF Proposal, and following further reflection and analysis, the CSA decided to propose specific amendments to the bid regime as an alternative harmonized policy approach for the regulation of take-over bids. At this time, the CSA are not contemplating any changes to the current take-over bid exemptions or Notice 62-202.

SUMMARY AND EXPLANATION OF THE PROPOSED BID AMENDMENTS

The Proposed Bid Amendments introduce important new requirements for take-over bids and alter the procedural framework for the conduct of take-over bids. The following is an explanation of the current bid regime and Proposed Bid Amendments as they relate to these topics:

1. Deposit Periods
2. Minimum Tender Requirement
3. 120 Day Requirement
4. Variations to a Bid
5. Changes in Information for a Bid
6. Take Up and Payment
7. Withdrawal Rights

In preparing the Proposed Bid Amendments, we have endeavored to preserve the existing structure of Part 2 of Regulation 62-104, which includes combined provisions for both issuer bids and take-over bids, to the greatest extent possible.

Unless otherwise specified, all references to sections in this part are to sections of Regulation 62-104 and the Proposed Bid Amendments.

1. Deposit Periods

(a) Current Bid Regime

Currently, the take-over bid regime mandates a deposit period of at least 35 days from the date of the bid and requires an extension of the deposit period in circumstances where there is a variation in the terms of the bid, subject to limited exceptions. Outside of these parameters, an offeror can elect to extend its bid as it deems necessary or desirable as long as it complies with the take up and payment provisions of the bid regime for any extension that occurs after all of the terms and conditions of the bid have been complied with or waived.

(b) Proposed Bid Amendments

As a consequence of the Proposed Bid Amendments, there will be three distinct deposit periods for a take-over bid: (i) an initial deposit period, (ii) a mandatory 10 day extension period if certain conditions are met, and (iii) any further deposit period(s) where the offeror voluntarily extends its bid after the expiry of the mandatory 10 day extension period.

(i) Initial deposit period

The initial deposit period is the period during which securities may be deposited under a take-over bid excluding the mandatory 10 day extension period or any extension period thereafter. This initial deposit period includes any extension by the offeror that may be necessary to permit satisfaction of the Minimum Tender Requirement or any other condition of the bid prior to the mandatory 10 day extension period. At a minimum, the initial deposit period must satisfy the 120 Day Requirement. The Proposed Bid Amendments provide that an offeror cannot take up securities deposited under its bid until the 120 Day Requirement is satisfied, all terms and conditions of the bid have been complied with or waived, and the Minimum Tender Requirement is satisfied. If a bid does not meet these three requirements at the expiry date of the bid fixed by the offeror, then the offeror would not be permitted to take up securities deposited under the bid and would have to determine whether it wishes to either (further) extend the initial deposit period or abandon its bid.

(ii) Mandatory 10 day extension period

The 10 Day Extension Requirement applies to a take-over bid if, at the expiry of the initial deposit period, the 120 Day Requirement is satisfied, all terms and conditions of the bid have been complied with or waived, and the Minimum Tender Requirement is satisfied. Once these requirements are met, an offeror must immediately take up all securities tendered to the bid (subject to a limited exception for partial take-over bids). The Proposed Bid Amendments require that the offeror issue and file a news release, with specified information, concurrent with the commencement of the mandatory 10 day extension period.

The 10 Day Extension Requirement is a standard feature of “permitted bid” Rights Plans¹ and a significant number of commenters supported the 10 Day Extension Requirement (as set out in the AMF Proposal).

(iii) Subsequent extension period and restrictions on extension

The Proposed Bid Amendments allow a take-over bid that is not a partial take-over bid to be further extended after the expiry of the mandatory 10 day extension period.

Under the Proposed Bid Amendments, a partial take-over bid must not be extended after the expiry of the mandatory 10 day extension period. As a partial take-over bid is for a fixed number of securities and a pro-ration requirement applies, the offeror will have effectively achieved its desired minimum number of tenders before the commencement of the mandatory 10 day extension period and the number of securities ultimately taken up by the offeror will not increase as a result of tenders during the mandatory 10 day extension period. Also, under the Proposed Bid Amendments, in order to accommodate the required 10 day extension, an offeror making a partial take-over bid is permitted to defer take up and payment in respect of a portion of the tendered securities until the end of the mandatory 10 day extension period when the pro-ration factor can be properly calculated. Any further extension to a partial take-over bid after the expiry of the mandatory 10 day extension period would be unnecessary.

2. Minimum Tender Requirement

(a) Current Bid Regime

The current take-over bid regime does not impose a Minimum Tender Requirement for a take-over bid. An offeror may elect to make its bid conditional upon the receipt of a specified percentage of deposited securities; however any such condition can be waived at the discretion of the offeror. An offeree issuer may, independent of any take-over bid regime requirement, adopt a “permitted bid” Rights Plan that would require that a “permitted bid” have a minimum 50% tender condition.

(b) Proposed Bid Amendments

The Minimum Tender Requirement applies to all take-over bids and an offeror is prohibited from taking up any securities deposited under its bid unless, among other things, the Minimum Tender Requirement is satisfied.

The proposed Minimum Tender Requirement prohibits an offeror from taking up securities under a bid unless the bid receives tenders of more than 50% of the outstanding securities of the class that are subject to the bid, excluding securities beneficially owned,

¹ In general, a “permitted bid” Rights Plan includes conditions that allow a take-over bid to be made to offeree issuer security holders without triggering the Rights Plan if: (i) the offeror keeps the take-over bid open for a minimum period of time (usually 60 days), (ii) the offeror is not entitled to acquire securities under the take-over bid unless a majority of securities owned by persons other than the offeror are tendered, and (iii) the offeror is obligated to extend the bid for an additional 10 days following the offeror’s initial take up under the take-over bid.

or over which control or direction is exercised, by the offeror or by any person acting jointly or in concert with the offeror.

The following examples show how this requirement would apply in different scenarios. References to the “offeror” in the table below include the offeror and any joint actors.

Type of Take-Over Bid	Percentage of Issued and Outstanding Offeree Issuer Securities Owned by Offeror (as at Date of the Bid)	Tenders Required under the Minimum Tender Requirement
Take-over bid for all issued and outstanding offeree issuer securities (e.g. 1,000,000 securities)	0%	50% + 1 of all issued and outstanding offeree issuer securities (or 500,001 securities)
Take-over bid for all issued and outstanding offeree issuer securities (e.g. 1,000,000 securities)	40% (or 400,000 securities)	50% + 1 of the remaining 60% of issued and outstanding offeree issuer securities not owned by the offeror (or 300,001 securities)
Partial take-over bid for 25% of all issued and outstanding offeree issuer securities (e.g. 250,000 of outstanding 1,000,000 securities)	0%	50% + 1 of all issued and outstanding offeree issuer securities (or 500,001 securities) Offeror will take up the desired 25% issued and outstanding offeree issuer securities <i>pro rata</i> from all tendered securities (or 250,000 securities)
Partial take-over bid for 25% of all issued and outstanding offeree issuer securities (e.g. 250,000 of outstanding 1,000,000 securities)	10% (or 100,000 securities)	50% + 1 of the remaining 90% of issued and outstanding offeree issuer securities not owned by the offeror (or 450,001 securities) Offeror will take up the desired 25% issued and outstanding offeree issuer securities not owned by the offeror <i>pro rata</i> from all

		tendered securities (or 250,000 securities)
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The Minimum Tender Requirement does not preclude an offeror from establishing a higher minimum tender condition for its bid or waiving such higher minimum tender condition. However, an offeror is prohibited from taking up securities deposited under the bid until the Minimum Tender Requirement and 120 Day Requirement have been satisfied and all terms and conditions of the bid have been complied with or waived.

The Minimum Tender Requirement was put forward in the AMF Proposal and supported by many commenters. The effect of the Minimum Tender Requirement is comparable to the majority security holder approval requirement for Rights Plans that was proposed under the CSA Proposal. We also note that a Minimum Tender Requirement is a standard feature of a “permitted bid” under the terms of a “permitted bid” Rights Plan.

3. 120 Day Requirement

(a) Current Bid Regime

Under the current bid regime, an offeror must allow securities to be deposited under its bid for at least 35 days from the date of the bid (s. 2.28) and an offeror must not take up securities deposited under a bid until the expiration of that period (s. 2.29). An offeror complies with these requirements by having its bid expire not earlier than 35 days following the date of the bid.

The current bid regime’s minimum 35 day deposit period provides all offeree issuer security holders with that period of time in which to receive disclosure regarding, assess the merits of, and ultimately decide whether to tender to, a take-over bid. As long as an offeree issuer security holder deposits its securities within this 35 day period and all conditions to the bid are complied with or waived, then the offeror is obligated to acquire all of the security holder’s deposited securities (subject to pro-ration in the case of a partial take-over bid) (s. 2.32).

(b) Proposed Bid Amendments

Under the Proposed Bid Amendments, take-over bids will have a minimum 120 day deposit period (s. 2.28.1), subject to the exceptions described below.

We note that several commenters in connection with their consideration of the CSA Proposal, AMF Proposal, or both, supported a longer minimum deposit period of 90 or 120 days.

(i) Shortened minimum deposit period – deposit period news release

Under the Proposed Bid Amendments, the offeree board has an option to initiate a reduction of the minimum deposit period from a minimum of 120 days to a minimum of 35 days. This may be desirable for an offeree board because otherwise, for example, a

board-supported change of control transaction structured as a take-over bid would be less expeditious than an alternative structure such as a plan of arrangement effected under corporate law if a firm 120 day minimum deposit period applied.

Under the Proposed Bid Amendments, the minimum deposit period of a take-over bid can be shortened if an offeree issuer issues a deposit period news release in respect of the bid that states an initial deposit period of not more than 120 and not less than 35 days that is acceptable to the offeree board (s. 2.28.2(1)). The stated shorter deposit period in the news release would be expressed as a number of days from the date of the bid (e.g. 35 days, 60 days, 90 days, etc.) rather than with reference to an actual date (e.g. July 1, 2015). A deposit period news release is a news release in respect of a proposed or commenced take-over bid. Any purported deposit period news release in respect of a possible future bid would not have the effect of shortening the minimum deposit period for any take-over bid. We have proposed changes to Policy Statement 62-203 to provide guidance on deposit period news releases (sections 2.11 and 2.12).

The Proposed Bid Amendments expressly provide that, despite the application of a shorter deposit period for a bid as a result of the issuance of a deposit period news release, an offeror must not allow securities to be deposited under its bid for an initial deposit period of less than 35 days from the date of the bid (s. 2.28.2(3)). We think this limitation is appropriate because a period of 35 days provides all offeree issuer security holders with an equal and sufficient period of time in which to obtain disclosure regarding, assess the merits of, and ultimately decide whether to tender to, a take-over bid.

Where a deposit period news release is issued in respect of a bid, the offeror can avail itself of the shortened minimum deposit period permitted under the regime by reflecting the earlier expiry date in its bid documents (if the bid is announced at the same time as or after the deposit period news release is issued) or by way of a notice of variation (if the bid was commenced prior to the issuance of the deposit period news release) (s. 2.12(1)). We have proposed changes to Policy Statement 62-203 to provide guidance on shortened deposit periods, including in the additional circumstances described below (section 2.10).

(ii) Shortened minimum deposit period – application to other bids

While the Proposed Bid Amendments are intended to provide more time for offeree boards to respond to an unsolicited take-over bid and accommodate the expeditious completion of a “friendly” bid, they are not intended to result in discriminatory treatment among competing offerors. As such, the Proposed Bid Amendments provide that, if an offeree board issues a deposit period news release stating an acceptable shorter deposit period for one bid, then all other outstanding or subsequent take-over bids, including any unsolicited bids, would also be entitled to the stated shorter minimum deposit period rather than the minimum 120 day deposit period (s. 2.28.2(2)). The rationale for this mechanism is similar to the rationale that underlies the “waive for one, waive for all” provision present in the majority of “permitted bid” Rights Plans.

A competing offeror with an outstanding bid at the time the deposit period news release is issued in respect of another bid must vary its bid if it intends to avail itself of the shorter deposit period (s. 2.12(1)). An offeror that commences a take-over bid subsequent to the issuance of a deposit period news release in respect of another bid could adopt the stated shorter minimum deposit period, provided that the bid was commenced prior to the expiry of the bid that was the subject of the deposit period news release or any other take-over bid that had been commenced at the time the deposit period news release was issued (s. 2.28.2(2)(b)). The purpose of this limitation on the application of a shortened deposit period for future take-over bids is to make clear that the shortened deposit period applies only to contemporaneous bids.

The following examples demonstrate how the minimum deposit period provisions would apply in different scenarios.

Issuance of Deposit Period News Release	Bid Scenario / Shorter Deposit Period	Result
Deposit period news release issued in respect of proposed Bid A	Deposit period news release states a minimum deposit period of 35 days in respect of Bid A	Bid A subject to minimum deposit period of 35 days from the date of the bid
Deposit period news release issued in respect of previously commenced Bid A	<p>Deposit period news release states a minimum deposit period of 35 days in respect of Bid A</p> <p>Bid B also commenced prior to issuance of deposit period news release in respect of Bid A</p>	<p>Bid A and Bid B both subject to minimum deposit period of 35 days from the date of each respective bid</p> <p>Offerors A and B may vary bids to expire at least 35 days from date of their respective bid (provided that the bid must not expire before 10 days from the date of variation)</p>
Deposit period news release issued in respect of previously commenced Bid A	<p>Deposit period news release states a minimum deposit period of 35 days in respect of Bid A</p> <p>Bid C commenced subsequent to issuance of deposit period news release in respect of Bid A, but</p>	<p>Bid A and Bid C both subject to minimum deposit period of 35 days from the date of each respective bid</p> <p>Offeror A may vary its bid to expire at least 35 days from date of its bid (provided that the bid must</p>

	before expiry of Bid A	not expire before 10 days from the date of variation) Bid C subject to minimum deposit period of 35 days from the date of its bid
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(iii) *Shortened minimum deposit period – alternative transaction*

In addition to deposit period provisions that afford equal treatment of competing offerors, we believe that an offeror should not be disadvantaged vis-à-vis another potential acquiror solely on the basis of the structure of the change of control transaction (e.g. take-over bid as opposed to a plan of arrangement). Accordingly, the Proposed Bid Amendments provide that, if an issuer issues a news release announcing that it has agreed to enter into, or determined to effect, an “alternative transaction”, then the minimum deposit period for any then-outstanding take-over bid or subsequent take-over bid (commenced before the completion or the abandonment of the alternative transaction or expiry of any other outstanding take-over bid) must be at least 35 days, rather than 120 days, from the date of the bid (s. 2.28.3). We do not think that an offeree board that has already agreed to an alternative transaction needs the additional time between 35 to 120 days to consider and respond to a competing take-over bid. The effect of maintaining the 120 day deposit period would be to unduly prejudice existing offerors or those contemplating a bid after the alternative transaction is announced.

We propose a concept of “alternative transaction” principally based on the definition of “business combination” currently found in Regulation 61-101. The definition of “alternative transaction” has been drafted with a view to capturing other types of change of control transactions that could be agreed to or initiated by the issuer. As well, we propose that the definition encompass, based upon language found in business corporation legislation, a sale, lease or exchange of property by an issuer that requires approval by way of a special resolution. We have proposed changes to Policy Statement 62-203 to provide guidance on alternative transactions (sections 2.13 and 2.14).

The following examples demonstrate how the minimum deposit period provisions would apply in different scenarios involving an “alternative transaction”.

Timing of Announcement of Alternative Transaction	Result
Announcement of alternative transaction in respect of offeree issuer subsequent to commencement of Bid A	Bid A subject to minimum deposit period of 35 days from the date of its bid Offeror A may vary bid to expire at least 35 days from date of its bid (provided that the bid must not expire before 10 days from the

	date of variation)
Announcement of alternative transaction in respect of offeree issuer prior to commencement of Bid B Bid B commenced before completion or abandonment of alternative transaction	Bid B subject to minimum deposit period of 35 days from the date of its bid

(iv) Scope and duration of shortened minimum deposit period

The 120 Day Requirement is, effectively, restored for any new bids commenced after all of the bids to which sections 2.28.2 and 2.28.3 apply have expired and any applicable alternative transaction has been completed or abandoned.

4. Variations to a Bid

(a) Current Bid Regime

Currently, if an offeror varies its take-over bid it must issue and file a news release and send a notice of variation to all security holders subject to the bid whose securities were not taken up before the date of variation (s. 2.12(1)). If there is a variation, the period during which securities may be deposited under the bid must not expire before 10 days after the date of the notice of variation (s. 2.12(3)). An exception to these requirements exists for a variation consisting solely of a waiver of a condition in the bid where the consideration offered for the securities consists solely of cash (s. 2.12(4)).

The current bid regime also prohibits variations to a bid after expiry of the period during which securities can be deposited under a bid, except for a waiver of a condition that is specifically stated in the bid as being waivable at the sole option of the offeror (s. 2.12(5)).

(b) Proposed Bid Amendments

We are proposing two changes to the variation provisions in the bid regime as a result of the Proposed Bid Amendments.

(i) Reduction or extension of deposit period is a variation to the bid

First, we are adding language confirming that any reduction to the period during which securities may be deposited to a bid pursuant to section 2.28.2 or section 2.28.3 constitutes a variation requiring the offeror to issue and file a news release and send a notice of variation (s. 2.12(1)). This would apply where an offeror shortens its initial deposit period following the issuance of a deposit period news release or as a result of the offeree issuer announcing an “alternative transaction”. If an offeror varies its bid to

shorten the deposit period, subsection 2.12(3) requires that the bid must not expire before 10 days after the date of the offeror's corresponding notice of variation, which means that the period during which securities may be deposited under the bid may have to be extended.

We note that currently subsection 2.12(1) expressly states that a variation to a bid includes an extension of the period during which securities may be deposited to the bid. As a result, that provision would apply to the mandatory 10 day extension period required under paragraph 2.31.1(a), or any other permissible extension, such that the offeror would be required to issue and file a news release and send a notice of variation in connection with any such extension.

(ii) Prohibition on Certain Variations after Bid Pre-Conditions Achieved

The second change we are proposing to the variation provisions of the bid regime is an express restriction on variations in the terms of a take-over bid after the offeror becomes obligated to take up securities (s. 2.12(6)). Under the Proposed Bid Amendments, an offeror must immediately take up securities deposited under its bid if, at the expiry of the initial deposit period, the 120 Day Requirement and Minimum Tender Requirement are satisfied and all terms and conditions of the bid have been complied with or waived (s. 2.32.1(1)).

The purpose of the general restriction on variations after these requirements are satisfied is to preclude possible prejudice to security holders whose deposited securities were taken up prior to the variation. We are, however, proposing exceptions to this restriction for (i) a variation to extend the time during which securities may be deposited under the bid, or (ii) a variation to increase the consideration offered for securities subject to the bid.

5. Changes in Information for a Bid

(a) Current Bid Regime

The bid regime sets out requirements where there is a change in the information contained in a bid circular, a notice of change or a notice of variation that would reasonably be expected to affect the decision of the security holders of the offeree issuer to accept or reject the bid (s. 2.11). In that circumstance, an offeror must promptly issue and file a news release and send a notice of change to every security holder to whom the bid was required to be sent and whose securities were not taken up before the date of the change. The purpose of this requirement is to ensure that security holders who have yet to deposit securities to the bid, or those whose deposited securities have not yet been taken up, can consider whether the new information impacts their tender decision. As well, a security holder is entitled to withdraw securities deposited to a bid during the 10 day period after the date of a notice of change provided that the securities were not already taken up by the offeror before the date of the notice of change (s. 2.30).

(b) Proposed Bid Amendments

We are proposing to introduce a new provision concerning changes in information whereby, if an offeror is required to send a notice of change prior to the expiry of the initial deposit period, the initial deposit period must not expire before 10 days after the date of the notice of change, which means that the initial deposit period may have to be extended (s. 2.11(5)). The purpose of this restriction is to ensure that all withdrawal rights associated with a notice of change have lapsed before an offeror can take up deposited securities at the expiry of the initial deposit period (assuming that, otherwise, the 120 Day Requirement has been satisfied, all terms and conditions of the bid have been complied with or waived, and the Minimum Tender Requirement has been satisfied). We have also proposed changes to Policy Statement 62-203 to provide further guidance on changes in information (section 2.15).

We believe this extension requirement is appropriate because it ensures that the Minimum Tender Requirement is achieved in circumstances where offeree issuer security holders have had adequate time to consider the information in a notice of change. We also think that security holders who have an opportunity to deposit securities to a bid during the mandatory 10 day extension period, after a bid has already succeeded in meeting the Minimum Tender Requirement and all other conditions to the bid, should make their tender decisions with assurance that the bid cannot fail as a result of withdrawal rights being exercised and the Minimum Tender Requirement no longer being met.

6. Take Up and Payment

(a) *Current Bid Regime*

The purpose of the take up and payment provisions of the bid regime is to provide an equitable framework for the timely take up and payment of securities deposited to a bid.

The current bid regime provides that if all terms and conditions of a take-over bid have been complied with or waived, the offeror must take up and pay for securities deposited under the bid not later than 10 days after the expiry of the bid (or possibly earlier in certain cases) (s. 2.32(1)). The offeror cannot take up deposited securities until the expiration of 35 days from the date of the bid. An offeror is specifically required to pay for any securities taken up as soon as possible, and in any event, not later than 3 business days after take up (s. 2.32(2)). An offeror is further obligated to take up and pay for securities deposited subsequent to the date on which it first took up securities deposited under the bid no later than 10 days after the deposit of those securities (s. 2.32(3)). In addition, an offeror is prohibited from extending its take-over bid if all the terms and conditions have been complied with or waived, unless the offeror first takes up all securities deposited under the bid and not withdrawn (s. 2.32(4)).

The current take-over bid regime includes exceptions to the take up and payment provisions for partial take-over bids. Section 2.26 provides that, if a greater number of securities are deposited to a partial take-over bid than the offeror is bound or willing to acquire under the bid, the offeror must take up and pay for the securities proportionately according to the number of securities deposited by each security holder. This *pro rata*

requirement is intended to ensure that all depositing security holders to a partial take-over bid are treated equally, rather than permitting an offeror to take up its desired number of offeree issuer securities on a first-come-first-served basis or arbitrarily from the pool of deposited securities. To permit *pro rata* treatment of security holders, an offeror is only required to take up, by the specified times, the maximum number of securities that the offeror can take up without contravening the *pro rata* requirement at the expiry of the bid (s. 2.32(5)).

(b) Proposed Bid Amendments

(i) Prohibition on take up of deposited securities until conditions satisfied

Under the Proposed Bid Amendments (s. 2.29.1), an offeror is prohibited from taking up securities deposited under its bid unless

(a) 120 days, or the number of days determined in accordance with section 2.28.2 or section 2.28.3, have elapsed from the date of the bid,

(b) all terms and conditions of the bid have been complied with or waived, and

(c) more than 50% of the outstanding securities of the class that are subject to the bid, excluding securities beneficially owned, or over which control or direction is exercised, by the offeror or by any person acting jointly or in concert with the offeror, have been deposited under the bid and not withdrawn.

(ii) Obligation to take up and pay for deposited securities

We propose that if at the expiry of the initial deposit period, (i) the 120 Day Requirement is satisfied, (ii) all terms and conditions of the bid have been complied with or waived, and (iii) the Minimum Tender Requirement is satisfied, the offeror must immediately take up securities deposited under the bid (s. 2.32.1(1)). As discussed below, an exception to this general obligation is available for partial take-over bids.

(iii) General take up and payment provisions

As is the case under the current bid regime, the Proposed Bid Amendments require that an offeror must pay for securities taken up as soon as possible, and in any event, not later than 3 business days after the securities deposited under the bid are taken up (s. 2.32.1(2)).

Securities deposited to a take-over bid (other than a partial take-over bid) during the mandatory 10 day extension period or a subsequent extension period must be taken up and paid for by the offeror no later than 10 days after the deposit of securities (s. 2.32.1(3)). For a take-over bid that is not a partial take-over bid, an offeror is also prohibited from extending its bid at any time after the expiry of the mandatory 10 day extension period unless it has first taken up all securities deposited to the bid (s. 2.32.1(4)).

(iv) *Partial Take-Over Bids*

As is the case under the current bid regime, an offeror that has made a partial take-over bid is required to take up securities tendered on a *pro rata* basis where a greater number of securities are deposited under the bid than the offeror is bound or willing to acquire. The Proposed Bid Amendments exempt an offeror making a partial take-over bid from the general obligation to immediately take up all deposited securities if, at the expiry of the initial deposit period, the specified bid conditions in section 2.32.1(1) are satisfied; instead, the offeror is only required to take up at that time the maximum number of securities that it can without contravening the *pro rata* requirement (s. 2.32.1(6)). The Proposed Bid Amendments further provide that an offeror making a partial take-over bid must take up any securities deposited during the initial deposit period and not already taken up by it in reliance on subsection 2.32.1(6), and securities deposited during the mandatory 10 day extension period, on a *pro rata* basis and not later than one day after the expiry of the mandatory 10 day extension period (s. 2.32.1(7)). Partial take-over bids cannot be extended beyond the expiry of the mandatory 10 day extension period.

7. Withdrawal Rights

(a) *Current Bid Regime*

The take-over bid regime provides that a security holder can withdraw securities deposited by it under a take-over bid (a) at any time before those securities have been taken up by the offeror, (b) at any time before the expiration of 10 days from the date of a notice of change or a notice of variation (subject to exceptions), or (c) if the securities have not been paid for by the offeror within 3 business days after the securities were taken up (s. 2.30(1)).

(b) *Proposed Bid Amendments*

(i) *Suspension of withdrawal rights for partial take-over bids*

The Proposed Bid Amendments include new restrictions on the availability of withdrawal rights in respect of partial take-over bids.

Securities deposited under a partial take-over bid must be taken up on a *pro rata* basis by the offeror. Under the Proposed Bid Amendments, an offeror would not be able to determine the exact number of securities that it could take up *pro rata* from each depositing security holder at the expiry of the initial deposit period because it may receive additional deposits of securities during the mandatory 10 day extension period. An offeror making a partial take-over bid is obliged to determine the portion of securities deposited under the bid at the expiry of the initial deposit period that it is required to take up without contravening the *pro rata* requirement (ss. 2.32.1(1) and (6)). However, an offeror making a partial take-over bid will have to defer take up of at least some number of deposited securities until the end of the mandatory 10 day extension period when the pro-ration factor can be finally determined. As a consequence, a number of securities deposited to a successful partial take-over bid that has met the Minimum Tender Requirement and all other conditions to the bid under subsection 2.32.1(1) would remain

subject to rights of withdrawal for lack of take up and/or in respect of a notice of change issued after the expiry of the initial deposit period but before the deposited securities are taken up upon expiry of the mandatory 10 day extension period. We do not think this outcome would be consistent with the framework of the Proposed Bid Amendments which impose a mandatory extension period for a partial take-over bid when an offeror would otherwise be in a position to take up securities and complete its offer.

We propose to suspend or remove a depositing security holder's withdrawal rights in respect of securities deposited under a partial take-over bid before the expiry of the initial deposit period but not taken up by the offeror at the expiry of the initial deposit period in reliance on the exception for pro-rata in subsection 2.32.1(6). The suspension of withdrawal rights for lack of take up of these securities and removal of withdrawal rights for these securities in respect of a notice of change or notice of variation after the expiry of the initial deposit period are set out in new provisions in subsections 2.30(1.1) and 2.30(2)(a.1). We believe these provisions are appropriate because the offeror's delay in taking up deposited securities is necessitated by its obligation to comply with the *pro rata* requirement and a depositing security holder is otherwise assured that, in any event, the partial take-over bid will be completed in a timely manner once the mandatory 10 day deposit period has expired. As noted in the "Changes in Information for a Bid" section above, we also think that security holders who have an opportunity to deposit securities to a bid during the mandatory 10 day extension period, after a bid has already succeeded in meeting the Minimum Tender Requirement and all other conditions to the bid, should make their tender decisions with assurance that the bid cannot fail as a result of withdrawal rights being exercised and the Minimum Tender Requirement no longer being met.

(ii) *Removal of withdrawal rights in respect of certain variations*

The bid regime provides that a security holder can withdraw securities deposited under a take-over bid at any time before the expiration of 10 days from the date of a notice of change or a notice of variation. This particular right of withdrawal is not available if (a) the securities have already been taken up by the offeror, or (b) the variation consists either solely of an increase in consideration offered for the securities and an extension of time for deposit of securities (to not later than 10 days after the date of the notice of variation), or a waiver of one or more of the conditions of the bid where the consideration offered for offeree issuer securities consists solely of cash (s. 2.30(2)).

We propose that the right of withdrawal in respect of a notice of variation not apply to a variation in the terms of a take-over bid *subsequent to the expiry of the initial deposit period* where the variation consists of *either* (i) an increase in the consideration offered for the securities subject to the bid, *or* (ii) an extension of the time for deposit to not later than 10 days from the date of the notice of variation (s. 2.30(2)(b)(iii)). We believe that an increase of consideration or a limited extension of time for deposits after all conditions of the bid under subsection 2.32.1(1) have been satisfied (such as an extension to provide for the mandatory 10 day extension period) does not warrant the availability of a withdrawal right for security holders, particularly where the bid regime otherwise mandates timely take up and payment for deposited securities.

CONSEQUENTIAL AMENDMENTS

Unless otherwise noted below, the Consequential Amendments update section and regulation references to reflect the Proposed Harmonization.

We have proposed certain consequential changes to Regulation 62-103 to provide policy guidance in respect of the proposed amendments to Regulation 62-104.

The consequential amendments to Regulation 43-101 reflect the fact that, for the purposes of the technical report filing requirement in subparagraph 4.2(5)(a)(ii) of that regulation in respect of disclosure contained in a directors' circular, the appropriate reference in that subparagraph is to the expiry of the initial deposit period, not the expiry of the bid.

The Ontario Securities Commission and the Autorité des marchés financiers are proposing to change section 4.1 of Policy Statement 61-101 to clarify, for the avoidance of doubt, that it is their view that notwithstanding that Form 62-104F1 *Take-Over Bid Circular* of Regulation 62-104 is not specifically referenced in subsection 2.2(1)(d) of Regulation 61-101, the disclosure set out in such form is required for insider bids.

ANTICIPATED IMPACT OF PROPOSED BID AMENDMENTS

The following are some expected impacts of adopting the Proposed Bid Amendments.

1. Mitigation of coercive aspects of the current tender process

- We expect that the Minimum Tender Requirement and the 10 Day Extension Requirement will address the “pressure to tender” and coercion concerns associated with the existing tender process. We believe this would ensure the legitimacy of individual security holder tender decisions.
- The possibility that an offeror would waive its minimum tender condition may lead security holders that do not support the bid to tender to the bid or risk being left holding less liquid securities of the offeree issuer. The mandatory Minimum Tender Requirement would prevent this circumstance.

2. Collective majority security holder decision-making

- The Minimum Tender Requirement would ensure that an effort to gain control of a company, or a controlling interest in a company, would succeed only with the uncoerced approval of a majority of independent security holders. Further, security holders would have additional time to assess bid information as a result of the 120 Day Requirement.
- One consequence of the Minimum Tender Requirement is that minority security holders who tender to a bid will not have their securities taken up where holders of a majority of the securities do not support the bid.

3. Increased leverage for offeree boards

- The 120 Day Requirement would provide offeree boards with more time to communicate their vision for the issuer and provide information about its value. The offeree board would also have more time to attract competing offers or seek value-maximizing strategic alternatives.
- The fact that the 120 day minimum deposit period can be shortened if an offeree board issues a news release stating an acceptable shorter deposit period may provide an incentive for offerors to negotiate with the offeree issuer.

4. Higher quality bids

- Offerors may put forward higher quality bids to win the support of a majority of independent security holders.

5. Fewer partial take-over bids

- The Proposed Bid Amendments could reduce the number of partial take-over bids because all partial take-over bids would have to satisfy the Minimum Tender Requirement to proceed.

ALTERNATIVES CONSIDERED

The CSA Proposal and the AMF Proposal, and comments thereon, were alternatives considered. The Proposed Bid Amendments are now the CSA's preferred regulatory approach for the regulation of take-over bids.

UNPUBLISHED MATERIALS

In developing the Proposed Bid Amendments, we have not relied on any significant unpublished study, report, or other written materials.

SUBSTANCE AND PURPOSE OF THE PROPOSED MARKET PRICE AMENDMENT

The normal course issuer bid exemption set out in paragraph 4.8(3)(c) of Regulation 62-104 (the **Other Published Markets Exemption**) requires that the value of the consideration paid by the issuer not be in excess of the "market price" at the date of acquisition, as determined in accordance with section 1.11 of Regulation 62-104. As currently drafted, section 1.11 of Regulation 62-104 determines "market price" with reference to an average of the closing price, highest and lowest prices, closing bid and ask prices, as applicable, over a preceding 20 business day period. Accordingly, in order to rely on the Other Published Markets Exemption, an issuer would have to acquire securities on a published market other than a designated exchange (each, an **Other Published Market**) at a price representing the applicable average of prices of the securities for the prior 20 business days, and not the current trading price. Given that securities are acquired through the trading system of the applicable Other Published

Market at the prevailing market price, it is not clear how this would be possible in practice.

Subsection 1.11(3) of Regulation 62-104, which applies to normal course purchases made during the currency of a take-over bid, provides an alternative meaning for market price, being the price of the last standard trading unit of securities of that class purchased by a person who was not acting jointly or in concert with the offeror. The application of a “market price” requirement in respect of the Other Published Markets Exemption was first introduced in February 2008. It was the intention that such requirement mirror the requirement for exempt normal course purchases during a take-over bid. Accordingly, the Proposed Market Price Amendment amends subsection 1.11(3) of Regulation 62-104 so that the alternative meaning of “market price” in that subsection also applies for the purposes of the Other Published Markets Exemption.

LOCAL MATTERS

An annex to this Notice is being published in any local jurisdiction that is making related changes to local securities laws, including local notices or other policy instruments in that jurisdiction. It also includes any additional information that is relevant to that jurisdiction only.

REQUEST FOR COMMENTS

We welcome your comments on the Proposed Bid Amendments. In addition to any general comments you may have, we also invite comments on the following specific questions:

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?
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.
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 Policy Statement 62-203 assist with interpretation of the alternative transaction provisions?

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.
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?
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?
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.

How to provide your comments

Please provide your comments in writing by June 29, 2015. Please provide your comments in Microsoft Word format.

Please address your submissions to all members of the CSA as follows:

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

Please send your comments **only** to the addresses below. Your comments will be distributed to the other participating CSA jurisdictions.

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The Secretary
Ontario Securities Commission
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Toronto, Ontario M5H 2S8
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Please note that all comments received will be made publicly available and posted on the websites of certain securities regulatory authorities. We cannot keep submissions confidential because securities legislation in certain CSA jurisdictions requires publication of a summary of the written comments received during the comment period. Therefore, you should not include personal information directly in comments to be published.

Annexes

Annex A.1 Summary of Comments on CSA Proposal

Annex A.2 Summary of Comments on AMF Proposal

Questions

Please refer your questions to any of the following:

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ANNEX A.1

SUMMARY OF COMMENTS ON CSA PROPOSAL

The following is a general summary of comments received on the CSA Proposal, including comments received that relate to aspects of the Proposed Bid Amendments. The summary does not review comments on specific or technical aspects of the CSA Proposal since the CSA has determined to proceed with the Proposed Bid Amendments as an alternative to that proposal.

The CSA Proposal put forward a framework for the regulation of security holder rights plans adopted by boards of directors of offeree issuers in response to unsolicited bids. Under the proposal, an offeree board could maintain a security holder rights plan if a majority of the equity or voting securities of the offeree issuer (excluding the securities of the offeror and its joint actors) were voted in favour of such plan, either in the face of the unsolicited bid or at the offeree issuer's previous annual meeting.

1. General Comments

We invited comments on whether the CSA Proposal was preferable to the status quo.

We received comments that both supported and disagreed with the proposal.

- Many commenters said that the CSA Proposal was preferable to the status quo. They noted that the current regime has led to inconsistent decisions and the timing of the termination of a security holder rights plan by securities regulators is uncertain.
- Other commenters indicated that the CSA Proposal was not preferable to the status quo as it would discourage bids or prevent bids from going to security holders for consideration, or lead to management entrenchment at the expense of security holders. Many of these commenters felt that shareholders, as owners of a corporation, were best placed to determine what is in their best interest and should be left with the decision to tender their securities to a take-over bid.

2. Appropriate Security Holder Approval Period

The CSA Proposal did not specifically include a proposal for a minimum bid period as contemplated by the Proposed Bid Amendments. However, the CSA Proposal allowed for an approval period of 90 days for security holder rights plans and invited comments on whether the 90-day period was appropriate.

We received the following comments on that proposal:

- Some commenters suggested that a 90-day period was not long enough. They recommended that the period provided to a board of directors to obtain shareholders' approval under the CSA Proposal be increased to 120 days. In their view, the 90-day period could be insufficient to complete the due diligence required in an auction process.

- Other commenters believed that 90 days was too long. These commenters indicated that the proposed 90-day period could result in additional delays and financing costs for offerors, which, in turn, could result in fewer unsolicited take-over bids.
- Several commenters believed that a period of 90 days would ordinarily provide sufficient time for a board of directors of an offeree issuer to seek alternatives to a hostile bid, to obtain the highest reasonably available price for its securities and to assess the offer. They were of the view that a 90 day period would not have a significant effect on the willingness of hostile offerors to make bids.

3. Board Discretion

We asked in the CSA Proposal whether the discretion given to a board of directors under the proposal was appropriate. Some of the views expressed included the following:

- Many commenters agreed that, as under the CSA Proposal, shareholders should have the ultimate decision over whether to maintain a security holder rights plan. They expressed concern that boards may use security holder rights plans, even temporarily, as an entrenchment mechanism.
- Many commenters felt that, in general, the discretion given to boards of directors under the CSA Proposal was appropriate and would afford offeree boards more time to exercise their fiduciary duties. However, a few commenters were concerned that, under the CSA Proposal, a board of directors could maintain a “just say no” security holder rights plan between annual general meetings unless the shareholders requisitioned a special meeting to terminate the rights plan.
- Several commenters stated that the CSA Proposal unduly restricted the board of directors’ discretion and did not adequately empower boards of directors. In their view, allowing shareholders to ratify the board of directors’ decision to adopt a security holder rights plan by way of shareholder vote did not constitute a sufficiently “hands-off” approach.

4. Structure of Take-over Bids in Canada

We invited comments on whether the CSA Proposal would have any negative impact on the structure of take-over bids in Canada.

Most commenters agreed that the CSA Proposal would not unduly discourage or impose serious impediments to the making of unsolicited bids. They added that, in their view, the CSA Proposal would result in more negotiated bids.

Many commenters indicated that the CSA Proposal would likely lead to more proxy contests, which they anticipated would be time- and resource-consuming for the offeror and the offeree issuer.

Many commenters stated general concerns about the quality of votes obtained under the proxy system in Canada. Consequently, they believed that voting results might not accurately reflect shareholders' views.

5. Role of Securities Regulators

We also invited comments on whether the CSA Proposal would reduce the need for securities regulators to review security holder rights plans through public interest hearings.

Some commenters agreed that the number of hearings might decrease but, in their view, the involvement of securities regulators would continue, albeit in other circumstances.

Some commenters believed that the CSA Proposal would address current concerns relating to arbitrary and inconsistent results from regulatory intervention, while others noted that it was unclear as to what circumstances might engage the public interest jurisdiction of securities regulators under the CSA Proposal.

ANNEX A.2

SUMMARY OF COMMENTS ON AMF PROPOSAL

The following is a general summary of comments received on the AMF Proposal, including comments received that relate to aspects of the Proposed Bid Amendments. The summary does not review comments on specific or technical aspects of the AMF Proposal since the CSA has determined to proceed with the Proposed Bid Amendments as an alternative to the proposal.

1. Minimum Tender Requirement and Mandatory Extension Requirement

The AMF Proposal included a proposed amendment to the take-over bid regime to require that all take-over bids receive tenders from more than 50% of all outstanding securities of the offeree issuer owned or held by persons other than the offeror (the minimum tender requirement). The AMF Proposal also proposed a mandatory 10-day extension of the bid following an announcement that the minimum tender requirement had been met.

Along with this proposal, the AMF invited comments on whether the proposed changes would (i) allow offeree security holders to make a voluntary, undistorted collective decision to sell, and (ii) promote the efficiency of capital markets.

The AMF received a number of comments on the proposed amendments in the AMF Proposal. The following is a general summary of the views expressed by commenters:

- Commenters were generally supportive of adopting these provisions.
- Many commenters were of the view that these provisions would provide security holders with the opportunity to make more informed decisions and would allow offeree security holders to make voluntary, undistorted collective decisions to sell. In their view, this would address the collective action concerns associated with our take-over bid regime and ensure fair treatment of security holders.
- Some commenters indicated that the proposed changes would alleviate the pressure on certain security holders to tender into the bid or to sell their shares in the secondary market for fear of being left in the minority. They also suggested that the proposed changes were akin to security holder approval and increased the legitimacy of the bid process. More specifically, they noted that the minimum tender requirement would act like a referendum among security holders and the 10-day extension of the bid would allow undecided shareholders to tender.
- Some commenters submitted that it is important to level the playing field for all security holders, as only larger companies tend to adopt the “permitted bid” security holder rights plan. The proposed changes reflect elements of the “permitted bid” concept under most security holder rights plans.
- Similar to the bid regime amendments in the AMF Proposal, some commenters suggested that securities regulators mandate that all security holder rights plans contain the terms of

the “permitted bid” security holder rights plan, including that a waiver of a security holder rights plan with respect to one bid results in a waiver for all bids.

- Many issuers felt that there are currently regulatory imbalances that unduly favour offerors and that the bid regime amendments included in the AMF Proposal would enhance the efficiency of capital markets by reducing coercion and the pressure to which security holders are subjected.
- Some commenters expressed concern that offeree boards of directors have no real ability to protect offeree issuers from structurally coercive bids and, in particular, from bids that substantially undervalue the offeree issuer. These commenters noted that boards do not have the ability to maintain a security holder rights plan indefinitely in the face of a bid.
- A few commenters argued that the suggestion that the current take-over bid regime is too “offeror friendly” is not supported by empirical evidence. In their view, the current regime appropriately provides security holders with an unrestricted ability to accept a premium bid.

2. Board Discretion

In addition to proposing the minimum tender requirement and the 10-day mandatory extension requirement, the AMF Proposal also contemplated policy changes that would recognize the fiduciary duty of the board of directors of the offeree issuer when responding to an unsolicited bid.

The AMF invited comments on whether giving appropriate deference to directors in the exercise of their fiduciary duty would negatively impact the ability of offeree issuer security holders to tender their securities to an unsolicited take-over bid.

Several commenters were of the view that directors should have a greater ability to fulfill their fiduciary duty in response to a take-over bid.

They voiced the following views:

- The CSA should recognize that boards are constrained by their fiduciary duties and by existing shareholder rights, including rights to submit proposals and to appoint new directors, adding that a proposal that gives priority to shareholders undermines board authority under corporate law.
- The CSA should allow boards of directors the discretion to act in what they determine to be the best interest of the corporation, including the ability to “say no” to a hostile take-over bid.
- Directors can legitimately conclude that an unsolicited offer is not in the corporation’s best interests and that alternatives better aligned with the corporation’s best interests exist.

Some commenters favoured the shareholder-focused status quo. They found the AMF Proposal unacceptable for the following reasons:

- It would give directors broad discretion to adopt defensive tactics that could prevent security holders from tendering into bids.
- The AMF Proposal could tilt the balance of power too far in favour of the offeree issuer's directors, making hostile take-over bids very difficult to carry out without replacing the offeree board.

Some commenters indicated that security holders generally had the appropriate tools to discipline boards under corporate law. They commented that the right of shareholders to elect and to remove directors, along with their right to sue for breach of fiduciary duty or seek relief under the oppression remedy, provides a powerful check on directorial authority.

However, other commenters did not agree that security holders have the appropriate tools to discipline directors. They took the view that the tools available to security holders had largely been ineffective, as demonstrated by the difficulty pursuing a claim in courts and the fact that the exercise of the shareholders' voting rights to withhold votes does not generally lead to the removal of the director. In their view, it is difficult for minority shareholder voices to be heard given that the shareholder base of many Canadian companies is quite concentrated.

3. Role of securities regulators

Law firms and issuers generally indicated that courts would be an appropriate forum to address disputes regarding defensive tactics, as it is the case in the U.S.

Institutional investors generally expressed concerns with a decreased role for securities regulators, particularly under the AMF Proposal. They commented that securities regulators have a specific mandate, not shared by the courts, to protect the interests of investors; they did not wish to see that mandate or involvement weakened.