

**CSA Notice of Amendments to
Take-Over Bid Regime
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
Consequential Amendments**

February 25, 2016

Introduction

The Canadian Securities Administrators (the **CSA** or **we**) are adopting amendments to the regime governing the conduct of take-over bids set out in Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids* (**MI 62-104**) and changes to National Policy 62-203 *Take-Over Bids and Issuer Bids* (**NP 62-203**) (together, the **Bid Amendments**)¹.

Currently, MI 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**). NP 62-203 applies in all jurisdictions of Canada. In this notice, MI 62-104, the Ontario Act, the Ontario Rule and NP 62-203 are collectively referred to as the **take-over bid regime** or **bid regime**.

In Ontario, legislative amendments were made to the Ontario Act to accommodate the adoption of MI 62-104 in Ontario, as amended by the Bid Amendments and the Early Warning Amendments (as defined below), such amended instrument, **NI 62-104**. These legislative amendments will come into effect upon proclamation by the Lieutenant Governor of Ontario. The repeal of the Ontario Rule and the related consequential amendments and changes necessary to facilitate the adoption of NI 62-104 in Ontario are referred to as the **Harmonization**.

As a result of the Bid Amendments and the Harmonization, we are also adopting consequential amendments and changes, as applicable, to each of the following, in the applicable jurisdictions in which such instruments and/or policies have been adopted (collectively, the **Consequential Amendments**):

- Multilateral Instrument 11-102 *Passport System* (**MI 11-102**);
- Multilateral Instrument 13-102 *System Fees for SEDAR and NRD* (**MI 13-102**);

¹ The Bid Amendments also include a technical amendment to the meaning of “market price” in MI 62-104 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 MI 62-104.

- National Instrument 43-101 *Standards of Disclosure for Mineral Projects* (**NI 43-101**);
- Multilateral Instrument 51-105 *Issuers Quoted in the U.S. Over-the-Counter Markets* (**MI 51-105**);
- Companion Policy 55-104CP *Insider Reporting Requirements and Exemptions* (**55-104CP**);
- Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions* (**MI 61-101**);
- Companion Policy 61-101CP to MI 61-101 (**61-101CP**); and
- National Instrument 62-103 *The Early Warning System and Related Take-Over Bid and Insider Reporting Issues* (**NI 62-103**).

In addition, we are also concurrently adopting amendments and changes to the early warning system, which amendments and changes are set out in the CSA Notice of Amendments to Early Warning System dated February 25, 2016 (collectively, the **Early Warning Amendments**).

In some jurisdictions, Ministerial approval is required for these amendments and changes. Except in Ontario, provided all necessary approvals are obtained, the Bid Amendments, Consequential Amendments, and Early Warning Amendments will come into force on **May 9, 2016**. In Ontario, NI 62-104, amendments and changes related to the Harmonization, and the Consequential Amendments will come into force on the later of (a) May 9, 2016, and (b) the day on which certain sections of Schedule 18 of the *Budget Measures Act, 2015* (Ontario) are proclaimed into force. Please refer to Annex N to the version of this notice published in Ontario for more information.

Substance and Purpose

The Bid Amendments will 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 Bid Amendments will 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 105 days unless

- (a) the offeree board states in a news release a shorter deposit period for the bid of not less than 35 days, 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 intends to effect, pursuant to an agreement or otherwise, a specified alternative transaction, in which case all contemporaneous take-over bids must remain open for a deposit period of at least 35 days.

We are also amending other aspects of the take-over bid regime in conjunction with these key amendments. A comprehensive discussion of the purpose and objectives of the Bid Amendments, as originally proposed, is included in the CSA Notice and Request for Comment dated March 31, 2015 (such notice, proposed bid amendments, and related changes are collectively referred to as the **2015 Materials**).

The Bid Amendments involve fundamental changes to the bid regime to establish a majority acceptance standard for all non-exempt take-over bids, a mandatory extension period to alleviate offeree security holder coercion concerns, and a 105 day minimum deposit period to address concerns that offeree boards do not have enough time to respond to an unsolicited take-over bid. The CSA has determined not to amend National Policy 62-202 *Defensive Tactics* (**NP 62-202**) in connection with these amendments. We wish to remind participants in the capital markets of the continued applicability of NP 62-202, which means that securities regulators will be prepared to examine the actions of offeree boards in specific cases, and in light of the amended bid regime, to determine whether they are abusive of security holder rights.

Background

Prior proposals

On March 14, 2013, the CSA published for comment proposed National Instrument 62-105 *Security Holder Rights Plans* and proposed Companion Policy 62-105CP *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.

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.

Proposed Bid Amendments

On September 11, 2014, we published CSA Notice 62-306 *Update on Proposed National Instrument 62-105 Security Holder Rights Plans and AMF Consultation Paper An Alternative Approach to Securities Regulators' Intervention in Defensive Tactics* to advise that, 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.

On March 31, 2015, we published the 2015 Materials setting out the specific proposed amendments to the bid regime.

Summary of Written Comments Received by the CSA

The comment period for the 2015 Materials ended on June 29, 2015. We received 22 comment letters in respect of the 2015 Materials from various market participants. We have considered the comments received and thank all of the commenters for their input.

The names of the commenters are set out in Annex A to this notice and a summary of their comments, together with our responses, are contained in Annex B to this notice.

Summary of Changes since Publication for Comment

After consideration of the comments received on the 2015 Materials, and further reflection and analysis, we have made some revisions to the 2015 Materials. Those revisions are reflected in the amendments and changes we are publishing in Annexes C and E to this notice. As these changes are not material, we are not publishing the Bid Amendments for a further comment period.

The following is a summary of the key changes that were made to the 2015 Materials. A blackline comparison showing all changes to current MI 62-104 as a result of the Bid Amendments is set out in Annex D to this notice.

(a) Minimum Deposit Period

In the 2015 Materials, we proposed that all non-exempt take-over bids be subject to a minimum deposit period of 120 days, subject to exceptions. We have determined to adjust the minimum deposit period to 105 days in light of our consideration of the potential impact of the 120 Day Requirement on an offeror's ability to utilize compulsory acquisition provisions under business corporation statutes in Canada.

Federal and provincial business corporation statutes in Canada provide a method by which an offeror that holds not less than 90% of a class of the offeree issuer's shares can acquire all of the remaining shares of the class on an expedited basis and without approval by the holders of the remaining offeree issuer shares² (the **Compulsory Acquisition Provisions**). However, the Compulsory Acquisition Provisions are generally available only where the take-over bid is accepted by holders of not less than 90% of the shares of the class subject to the bid *within 120 days after the date of the bid*. As a result, the 120 Day Requirement (and 10 Day Extension

² See, for example, ss. 206(2) of the *Canada Business Corporations Act*.

Requirement) could result in the Compulsory Acquisition Provisions not being available to an offeror following a take-over bid where the 120 Day Requirement applies.

In light of the foregoing, we have adjusted the minimum deposit period to 105 days. We believe that a minimum deposit period of 105 days will generally allow sufficient time for an offeror to conclude its bid and satisfy the subsequent 10 Day Extension Requirement before the 120th day from the date of its bid, while taking into account the potential impact that holidays in various Canadian jurisdictions may have on the offeror's ability to receive acceptances. This minimum deposit period meets the CSA's policy objective of providing offeree boards with a longer, fixed period of time to respond to a take-over bid while making it reasonably practicable for an offeror to avail itself of the Compulsory Acquisition Provisions.

(b) Definition of “alternative transaction”

We have made drafting changes to the definition of “alternative transaction” and related guidance in NP 62-203 in order to clarify the intended scope of the definition and assist with its interpretation and application. In particular, we have removed clause (b) from the definition and have instead incorporated the substance of that former clause as guidance for the overall scope of the definition. Section 2.13 of NP 62-203 now states, in part, that the definition of “alternative transaction” is intended to encompass transactions agreed to or initiated by the issuer that could result in the acquisition of the issuer or the business of the issuer as an alternative to doing so by means of a take-over bid.

We have also revised the guidance in NP 62-203 in light of comments received. Since the “alternative transaction” provisions apply to the minimum deposit period for an offeror's bid, an offeror should assess whether or not an issuer has entered into an “alternative transaction”. As such, the guidance in section 2.14 of NP 62-203 now recommends that an offeror should reasonably determine whether an issuer's announced transaction is an “alternative transaction” before either, as the case may be, (i) reducing the initial deposit period of its outstanding take-over bid to not less than 35 days or (ii) commencing a take-over bid for the issuer with an initial deposit period of not less than 35 days.

(c) Deposit period news release

We have revised the definition of “deposit period news release” to remove the words “that is acceptable to the board of directors of the offeree issuer” when describing the initial deposit period stated in the offeree issuer's news release. We presume that any initial deposit period stated by an offeree issuer in respect of a bid will, in fact, be acceptable to the offeree board and have removed that concept from the definition because it is not otherwise relevant to the operation of the definition.

(d) Mandatory 10-day extension period

We have clarified that, except in the case of a partial take-over bid, the mandatory 10-day extension period for a bid referred to in paragraph 2.31.1(a) of NI 62-104 must be a period of *at least* 10 days and not, as the original drafting may have suggested, exactly 10 days. We note,

however, that if an offeror chooses to extend its bid after expiry of the initial deposit period for a period of more than 10 days, the bid regime still requires that the offeror take up securities deposited during the extension period not later than 10 days after deposit of the securities.

We have also clarified in section 2.31.2 of NI 62-104 that, in the case of a partial take-over bid, the mandatory 10-day extension period must not exceed 10 days, nor can an offeror extend its partial take-over bid after the expiry of the mandatory 10-day extension period. As noted in the 2015 Materials, an extension period of more than 10 days is not necessary because a partial take-over bid is for a fixed number of securities subject to pro-ration, such that the offeror will have effectively achieved its desired minimum number of tenders before commencement of the mandatory 10-day extension period and the number of securities ultimately taken up will not increase as a result of tenders during the mandatory 10-day extension period.

(e) Proportionate take up mechanics for partial take-over bids

A number of commenters on the 2015 Materials indicated that it would be helpful if the CSA provided examples showing how the proportionate take up provisions applicable to partial take-over bids would apply after adoption of the Bid Amendments. We have added examples in section 2.17 of NP 62-203.

(f) Transition

We have included a transition provision in section 7.1 of NI 62-104 to clarify the application of the Bid Amendments to take-over bids made in respect of offeree issuers in certain circumstances both before and after the effective date of the Bid Amendments.

Local Matters

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

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Annex M Amendments to NI 62-103
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Questions

Please refer your questions to any of the following:

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