



Canadian Foundation *for*
Advancement *of* Investor Rights

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Re: CSA Notice and Request for Comment on Proposed Amendments to Multilateral Instrument 62-104 Take-Over Bids and Issuer Bids, Proposed Changes to National Policy 62-202 Take-Over Bids and Issuer Bids and Proposed Consequential Amendments

FAIR Canada is pleased to offer comments to the Canadian Securities Administrators (the “CSA”) regarding proposed amendments to 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”) (collectively, the “Proposed Bid Amendments”).

FAIR Canada is a national, charitable organization dedicated to putting investors first. As a voice of Canadian investors, FAIR Canada is committed to advocating for stronger investor protections in securities regulation. Visit www.faircanada.ca for more information.

1. Executive Summary

- 1.1. FAIR Canada is generally supportive of the CSA’s Proposed Bid Amendments as they increase shareholder rights and protections in the take-over bid process.
- 1.2. Under the current rules, take-over bids are required to be open for at least 35 days. There are no minimum tender requirements, and no requirements to extend the offer period once the securities have been tendered. Under the Proposed Bid Amendments, take-over bids will remain open for a minimum of 120 days (the “120 Day Rule”), although this

period may be reduced by target boards where friendly bids are received (referred to hereafter as “Waiver”). Bidders must receive 50% of the outstanding securities that are subject to the bid (excluding those owned by the bidder itself or its joint actors) (the “Minimum Tender Requirement”); and the take-over bid must be extended for an additional 10 day period after the 120 day deposit period is over and all other conditions have been met (the “10 Day Extension”).

- 1.3. FAIR Canada strongly supports the new rules for the Minimum Tender Requirement and 10 Day Extension and supports extending the minimum deposit period beyond 35 days as these mechanisms will provide shareholders with the capacity to engage in effective decision-making. . However, FAIR Canada does not think that the proposed deposit period of 120 days under the 120 Day Rule will help target shareholders find value maximizing alternatives in the take-over bid process. Instead, we think the 120 Day Rule will deter potential bidders from making take-over bids due to increased costs and risks associated with keeping the bid in play for 120 days. This will not be in the interests of economic efficiency or investor protection.
- 1.4. FAIR Canada thinks a deposit period longer than 95 days would cease to benefit shareholders and instead unduly benefit the target board. In light of benchmarking to other leading jurisdictions and existing empirical evidence, we recommend that a deposit period of no more than 95 days be required.
- 1.5. Furthermore, FAIR Canada questions the appropriateness of providing the Board with the Waiver option under the 120 Day Rule. FAIR Canada recommends that the target shareholders be given the ability to reduce the timeframe to 35 days rather than provide this ability to the target board.
- 1.6. FAIR Canada also urges the CSA to examine the take-over bid requirements in conjunction with other corporate and securities laws that may be applicable in situations where a change of control is proposed. In particular, FAIR Canada urges the CSA not to disregard other ways in which there can be a change of control, such as via changes to the composition of the board. FAIR Canada reminds the CSA of the prohibitively expensive current requirements for using proxy circulars, and continues to urge the CSA to consider reforming this area of the law. On such points, FAIR Canada provides some additional recommendations for improvement at section 3.10 below.

2. General Overview of Take-Over Bid Period

2.1. FAIR Canada believes that a properly functioning take-over regime will benefit shareholders. Bidders are likely to bring in better directors and management following a successful bid, or “improve the target’s performance by reconfiguring its assets or exploiting synergies”¹ resulting in an increase in the target’s value. FAIR Canada understands that extending the current bid period will allow the target board additional time to find a more suitable bidder (white knight) which may result in greater value for the target shareholders. In addition, where the directors and management believe they risk being the target of an acquisition should they mismanage the company, the prospect of a take-over is likely to keep the directors and management at the top of their game. The result of both scenarios is greater value for the target’s shareholders.² Moreover, empirical studies show that a target’s shareholders experience significant positive returns from a take-over event.³ Given the benefits of take-over bids, particularly the benefits to the target’s shareholders, FAIR Canada thinks it is important to ensure the rules governing take-over bids do not, by their design, deter potential bidders from pursuing Canadian targets. Therefore, FAIR Canada supports changes to the take-over bid rules that will generate more value maximizing alternatives for shareholders to consider.

3. 120 Day Deposit Period

3.1. Under the 120 Day Rule, take-over bids will be required to remain open for a 120 day minimum deposit period as opposed to the current 35 day minimum deposit period. FAIR Canada supports introducing a longer deposit period as we believe the changes will generate more value maximizing alternatives for shareholders to consider. However, we do not agree with the CSA’s proposal that take-over bids should remain open for 120 days. We believe (i) 120 days is unduly long and unnecessary given the realities of hostile bids in Canada, (ii) 120 days will ultimately hurt shareholders by discouraging take-over bids, and (iii) a deposit period beyond the 95th day is unlikely to benefit target shareholders and will instead disproportionately benefit the target board in the take-over bid process.

3.2. Benefits of Longer Take-over Bid Periods: FAIR Canada agrees with the CSA in that it is reasonable to provide the target board and target shareholders a longer timeframe (more than 35 days) within which they must consider and respond to an unsolicited bid. Under the current rules the target board will have to turn to defensive tactics, which are costly in terms of both time and money, in order to fend off or delay a bid. A longer bid period

¹ John Armour and David A. Skeel Jr. “Who Writes the Rules for Hostile Takeovers, and Why? The Peculiar Divergence of US and UK Takeover Regulation” 95 Geo L J 1727 at 1733 available online at: http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1686&context=faculty_scholarship. Further empirical studies have been completed to show that take-overs add value: Gregor Andrade, Mark Mitchel and Erik Stafford “New Evidence and Perspectives on Mergers” J. Econ Persp., Spring 2001 at 103, 110 (summarizing studies from 1973-1998 and finding 22.3% abnormal returns to target shareholders), Marc Goergen and Luc Renneboog “Shareholder Wealth Effects of European Domestic and Cross-Border Takeover Bids” 10 Eur Fin Mgmt 9, at 23.

² *Ibid* at 1733.

³ *Ibid* at 1740.

would reduce the need for target boards to employ these expensive defence tactics.⁴ FAIR Canada therefore supports longer bid periods to the extent they reduce the need for boards to employ expensive defensive tactics and provide more certain outcomes for target shareholders.

- 3.3. *The Experience in Other Jurisdictions:* While FAIR Canada supports introducing a longer bid period, we think that the current proposal for 120 days is unduly long. FAIR Canada urges the CSA to reconsider this time period, and reminds the CSA that the proposed 120 day period is considerably longer than other major common law jurisdictions such as the UK (which mandates an 81 day bid period after the formal take-over offer), Australia (which mandates a 61 day bid period after the formal take-over offer), Hong Kong (which mandates a 60 day bid period after the formal take-over offer), or New Zealand (which mandates a 30-90 day bid period after the formal take-over offer). Given that the CSA has also proposed the 10 Day Extension (discussed in section 5 of this letter and supported by FAIR Canada) the entire process would become 130 days, which seems out of line with that of other leading jurisdictions.
- 3.4. *Hostile Take-over Bids in Canada:* FAIR Canada does not think that 120 day bid period is required in light of the realities of hostile bids in Canada. A 2014 study of hostile bids in Canada showed that competing bids emerged “...an average of 41 days after initiation of the bid” and nearly all completing bids were announced before the 95th day of the bid.⁵ FAIR Canada believes this evidence demonstrates that while targets need more than 35 days to obtain competing bids, 120 days is unnecessary as the number of bids received by targets beyond the 95th day is negligible.
- 3.5. Since 2005, Canada has seen an average of 14 take-over bids per year; the most in any given year was 24 take-over bids, and that occurred in 2006. However, in the past 5 years there has been an average of only 10 take-over bids per year. 2014 saw a total of only 7 take-over bids.⁶ While FAIR Canada understands that many factors influence whether a take-over will be set in motion and ultimately be successful, we worry that the increased risks and costs (as discussed below in section 3.6) likely to be associated with the 120 Day Rule will reduce this number even more. This is inconsistent with the goals of economic efficiency and investor protection.
- 3.6. *Increased Costs and Risks:* Increased costs and risks for bidders may arise as a result of giving targets more time to consider and respond to take-over bids. Specifically, financing costs may be higher, and there is a greater chance that a white knight will be found to make an alternate bid. FAIR Canada is concerned that the combination of greater risk and higher costs would dissuade potential bidders from vying for Canadian targets, and in so

⁴ *Ibid* at 1732. The UK take-over bid regime, which is structured to provide shareholders with 81 days to consider and respond to a bid, is heralded as being “quicker, cheaper and more certain” than a system such as Delaware’s which has no limit and relies on traditional defensive tactics.

⁵ Fasken Martineau “2015 Canadian Hostile Bid Deal Study” available online at: <http://www.fasken.com/hostile-takeover-bids-canada/>.

⁶ *Ibid*.

doing, deprive shareholders of the chance to maximize their share value through the take-over bid process.

- 3.7. 120 Days Benefits Target Boards, not Target Shareholders The CSA says the 120 Day Rule will afford the target board 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.”⁷ A 120 day minimum deposit period would provide target boards with “leverage and time” in order to effectively negotiate with an unsolicited bidder and “make obtaining the target board’s cooperation valuable to the bidder...”⁸ FAIR Canada is opposed to take-over bid rules that will simply maximize value for target boards and is concerned that under the proposed 120 Day Rule the target board will be afforded additional power for that purpose. Deposit periods beyond the 95th day are unlikely to benefit target shareholders. On the contrary, additional time is likely to be unnecessary, and may actually reduce the number of bids. FAIR Canada is therefore of the opinion that this provision will benefit target boards at the expense of target shareholders, and we would urge the CSA, in light of this, to reduce the time-frame.
- 3.8. FAIR Canada instead believes that the take-over bid should be structured so as to maximize value for the target shareholders (the owners of the target). Nearly all target companies have found competitor bids prior to the 95th day of a bid. The target shareholders are therefore in a position to review viable alternate bids prior to the 120th day. In light of this empirical evidence and the benchmarking conducted to other leading jurisdictions (referred to in section 3.3 above) FAIR Canada recommends that the take-over bid period not remain open beyond 95 days.
- 3.9. CSA should consider additional reforms: While the CSA has proposed to change the take-over bid process with the Proposed Bid Amendments, reforms have not been proposed to address alternative transactions used to effect a change of control. Specifically, the CSA has no addressed creeping bids in the Proposed Bid Amendments nor has it considered reforms to proxy contests. Given the low number of hostile take-over bids seen in Canada, FAIR Canada recommends that the CSA reform other policies and instruments as they relate to changes of control.

⁷ CSA Notice and Request for Comment “Proposed Amendments to Multilateral Instrument 62-104 – *Take-over Bids and Issuer Bids*, Proposed Changes to National Policy 62-203 – *Take-Over Bids and Issuer Bids*, and Proposed Consequential Amendments” March 31, 2015 at 3, available online at: https://www.osc.gov.on.ca/en/SecuritiesLaw_csa_20150331_62-104_rfc-proposed-admendments-multilateral-instrument.htm.

⁸ Letter in response to the CSA Notice and Request for Comments issued on March 14, 2014 regarding National Policy 62-105, Proposed Companion Policy 62-105CP and Proposed Consequential Amendments, “Submission by Ad Hoc Senior Securities Practitioners Group” July 11, 2013 at p 6, available online at: https://www.osc.gov.on.ca/documents/en/Securities-Category6-Comments/com_20130711_62-105_adhocsrsec.pdf.

3.10. As stated in our 2011 letter to the Toronto Stock Exchange and the Ontario Securities Commission,⁹ FAIR Canada continues to recommend that securities regulators undertake a public consultation to examine reforms that would allow shareholders to put forward nominees for election to the board of directors and have their nominees listed in the management proxy circular without the onerous and expensive current legal requirements. FAIR Canada also continues to recommend that securities regulators undertake a public consultation to examine ways to allow shareholders to communicate or solicit other shareholders without the need to file a dissident proxy circular. Doing so would be in the interests of shareholders and good corporate governance. We recognize that changes to corporate laws and securities laws may be required to institute these changes.

4. Waiver

4.1. In conjunction with the 120 Day Rule, the CSA has proposed to provide target boards with the power and discretion to waive the 120 day minimum deposit period to a period of no less than 35 days where it is ready to accept an offer. FAIR Canada believes this measure gives the target board an excessive amount of power and discretion over the take-over bid process; the target board would *de facto* have the power to unilaterally end the bidding process, and in doing so end the possibility of any value maximizing alternatives coming to light. The target shareholders will be denied the ability to find out what alternative bids may await, and will not have the opportunity to consider all potential options under the proposed reform by giving this discretion to the target board. FAIR Canada disagrees with providing the target board with the ability exempt itself from the minimum deposit period. In its place, we would ask that the CSA permit the minimum deposit period to be reduced only in circumstances where a majority of the target shareholders (excluding shareholders whose securities are beneficially owned, or over which control or direction is exercised by the bidder or by any person acting jointly or in concert with the bidder) vote in favour of doing so.

5. 50% Minimum Tender Requirement

5.1. FAIR Canada supports the CSA's proposed Minimum Tender Requirement which requires that more than 50% of the outstanding securities owned by the target shareholders, other than the bidder and any joint actors, must tender their shares before the bidder can take up shares under the bid (the Minimum Tender Requirement). The Minimum Tender Requirement will provide target shareholders with greater effective decision-making capacity in the take-over bid process as collective shareholder support will be required for any bid to go through. Furthermore, the Minimum Tender requirement will ensure that all target shareholders are able to benefit from control premiums offered through the take-over bid. FAIR Canada

⁹ FAIR Canada, Letter to the Toronto Stock Exchange and the Ontario Securities Commission regarding proposed amendments to Part IV of the TSX Company Manual outlined in the amendments to Part IV of the TSX Company Manual – Request for Comments dated October 11, 2011, available online at: <http://faircanada.ca/wp-content/uploads/2011/01/111011-FAIR-Canada-submission-to-TSX-re-Part-IV-of-the-Manual.pdf>.

approves of the CSA's Minimum Tender Requirement as it ultimately works to benefit shareholders.

- 5.2. The purpose of the CSA's Minimum Tender Requirement "...is to address the current possibility that control of, or a controlling interest in, a [target] issuer can be acquired through a take-over bid without a majority of the independent security holders of the [target] issuer supporting the transaction if the [bidder] elects, at any time, to waive its minimum tender condition and ends its bid by taking up a smaller number of securities."¹⁰ Moreover, the Minimum Tender Requirement will allow 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."¹¹
- 5.3. The Minimum Tender Requirement is more in line with the UK's take-over bid regime, which includes a 'mandatory bid rule'. Under the UK regime, when a shareholder holds 30% or more of the voting rights in the target's share capital, the shareholder (now bidder) must make an offer for the remainder of the target's share capital. The UK's 'mandatory bid rule' is intended to protect minority shareholders by ensuring that all shareholders get the opportunity to share in the payment of a control premium. FAIR Canada is pleased to see the CSA follow this approach and recognize the importance of protecting minority shareholders.
- 5.4. FAIR Canada further praises the CSA's proposal for the Minimum Tender Requirement as the proposed rule has incorporated requirements specific to partial take-over bids. The Minimum Tender Requirement provides guidance for partial bids, and mandates the bidder to take up 50% plus 1 of the remaining shares on a pro-rata basis. Again, we believe this will serve to further protect target shareholders during the take-over bid process.

6. 10 Day Mandatory Extension

- 6.1. The Proposed Bid Amendments will require the bidder to extend the offer by an additional 10 days once the 120 day deposit period has been achieved and all other conditions of the bid have been complied with or waived. The 10 Day Extension requires the bidder to promptly issue a press release disclosing that the minimum tender requirement has been satisfied, the number of securities that have been deposited, and inform all shareholders that the bid period shall remain open for an additional 10 days.
- 6.2. FAIR Canada strongly supports the 10 Day Extension. It will ensure that shareholders are not coerced into supporting bids in an effort to 'not get left behind'. This is of particular importance for individuals with small shareholdings in the target, as they may feel pressure to tender simply because they believe that all other shareholders will do the same. Under the new 10 Day Extension rule, shareholders will have the opportunity to 'wait and see' before committing their shares.

¹⁰ CSA Notice and Request for Comment at s. 2.

¹¹ *Ibid* at s. 2.

We thank you for the opportunity to provide our comments and views in this submission. We welcome its public posting and would be pleased to discuss this letter with you at your convenience. Should you have further questions, please contact Neil Gross at neil.gross@faircanada.ca / 416-214-3408 or Kate Swanson at kate.swanson@faircanada.ca / 416-214-3442.

Sincerely,



Canadian Foundation for Advancement of Investor Rights