

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

September 11, 2014

Introduction

On March 14, 2013, the Canadian Securities Administrators (the **CSA** or **we**) 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**). This notice provides an update on the CSA's consideration of these two defensive tactics policy proposals and our proposed regulatory approach going forward.

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

Canadian securities regulators currently review defensive tactics under their respective public interest jurisdictions in light of the guidance in National Policy 62-202 *Defensive Tactics* (the **Defensive Tactics Policy**). We developed the CSA Proposal, and the AMF developed the AMF Proposal, with a view to revising the application of the Defensive Tactics Policy by securities regulators in response to developments subsequent to the implementation of the Defensive Tactics Policy.

New Harmonized Bid Amendments Proposal

In light of the comments received and following further reflection and analysis, the CSA have determined not to proceed with the CSA Proposal and the AMF has determined not to proceed with the AMF Proposal. Instead, the CSA intend to publish for comment, subject to necessary approvals, a new harmonized regulatory proposal based on amendments to the take-over bid regime contained in Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids* (for jurisdictions other than Ontario) and Part XX of the *Securities Act* (Ontario) and Ontario Securities Commission Rule 62-504 *Take-Over Bids and Issuer Bids* (for Ontario) (collectively, the **Proposed Bid Amendments**).

The Proposed Bid Amendments will address key issues identified in the CSA Proposal and the AMF Proposal, as further informed by the comments received in respect of those proposals. In general, the Proposed Bid Amendments will aim to facilitate the ability of shareholders to make

voluntary, informed and co-ordinated tender decisions and provide target boards with additional time to respond to hostile bids, each with the objective of rebalancing the current dynamics between hostile bidders and target boards.

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

- (1) be subject to a mandatory tender condition that a minimum of more than 50% of all outstanding target securities owned or held by persons other than the bidder and its joint actors be tendered and not withdrawn before the bidder can take up any securities under the bid;
- (2) be extended by the bidder for an additional 10 days after the bidder achieves the mandatory minimum tender condition and the bidder announces its intention to immediately take up and pay for the securities deposited under the bid; and
- (3) remain open for a minimum of 120 days, subject to the ability of the target board to waive, in a non-discriminatory manner when there are multiple bids, the minimum period to a period of no less than 35 days.

At this time, the CSA are not contemplating any changes to the current take-over bid exemptions or the Defensive Tactics Policy.

Subject to receipt of necessary approvals, we will publish for comment the complete details of the Proposed Bid Amendments and their application.

Overview of 2013 CSA Proposal and AMF Proposal

CSA Proposal

The purpose of the CSA Proposal was to create a framework for the regulation of security holder rights plans (**Rights Plans**) adopted by boards of directors of target issuers in response to, or in anticipation of, hostile bids. Rights Plans are the most common form of defensive measure adopted by target boards and, under the CSA's current approach, are typically cease traded by securities regulators within 45 to 55 days after the commencement of the hostile bid.

The CSA Proposal would have allowed a target board to maintain a Rights Plan in the face of a hostile bid if a majority of the equity or voting securities of the target issuer (excluding the securities of the hostile bidder and its joint actors) were voted in favour of the Rights Plan either in the face of the hostile bid or at the issuer's previous annual meeting. The CSA Proposal contemplated that securities regulators would generally not intervene to cease trade Rights Plans adopted under the CSA Proposal when security holders had approved the Rights Plan within 90 days from its adoption by the board or the commencement of the hostile bid.

We intended the CSA Proposal to address concerns about the utility of a Rights Plan to the target issuer in response to a hostile bid, while ensuring that a majority of the holders of equity or voting securities of the target issuer supported the application of the Rights Plan as proposed by

the target board. The CSA Proposal would have potentially provided additional time for a target board to exercise its discretion in responding to a hostile bid, allowed target issuer security holders to, effectively, make a collective decision about a hostile bid by endorsing a Rights Plan and enhanced harmonization in the review of Rights Plans among the CSA.

AMF Proposal

While the CSA Proposal only addressed the use of Rights Plans by target boards, the AMF Proposal raised more fundamental issues regarding the regulation of defensive measures in Canada, including the role of boards of directors when faced with unsolicited take-over bids and the structural imbalance between bidders and target boards, and sought comments on the specific changes to the take-over bid regime set out in the AMF Proposal.

The AMF Proposal identified three main concerns with the current take-over bid regime and application of the Defensive Tactics Policy:

- (1) the take-over bid regime has become too “bidder friendly” and is inconsistent with its stated goal of neutrality as between bidders and target boards and their management;
- (2) the Defensive Tactics Policy is being applied to inappropriately limit the target board’s ability to exercise its fiduciary duty, including to maximize security holder value in the long term; and
- (3) the take-over bid regime is structurally coercive to target security holders as it does not permit them to make a collective decision about the transaction.

The AMF Proposal proposed two changes to address these concerns. First, it suggested replacing the Defensive Tactics Policy with a new policy that would recognize the fiduciary duty of the target board to the issuer when responding to a hostile bid. The new policy would limit the intervention of securities regulators to circumstances where security holders are deprived from considering a *bona fide* offer because the target board failed to take measures to address its conflicts of interest and risk of entrenchment.

Second, the AMF Proposal contemplated that the take-over bid regime be amended to require a minimum tender condition of more than 50% of all outstanding target securities owned or held by persons other than the bidder and its joint actors, along with a mandatory 10 day extension of the bid following the announcement that the minimum tender condition has been met to give the remaining security holders the opportunity to tender to the bid.

Public Comments on the CSA Proposal and the AMF Proposal

The comment period on the CSA Proposal and the AMF Proposal ended on July 12, 2013. We received approximately 70 comment letters from various market participants, including issuers, institutional investors, industry associations and law firms that reflected a broad diversity of opinions on the CSA Proposal and the AMF Proposal. Many commenters provided helpful

substantive submissions, information and alternative considerations. We have reviewed the comments and wish to thank all of the commenters for their contributions.

We intend to provide a general summary of comments received in respect of the CSA Proposal and AMF Proposal when, subject to necessary approvals, we publish the Proposed Bid Amendments for comment.

Next Steps

We are in the process of developing the Proposed Bid Amendments and, subject to necessary approvals, intend to publish them for comment in the first quarter of 2015.

Questions

Please refer your questions to any of the following:

Ontario Securities Commission

Naizam Kanji
Deputy Director, Corporate Finance
Head, Mergers & Acquisitions and Shareholder Rights
Ontario Securities Commission
(416) 593-8060
nkanji@osc.gov.on.ca

Jason Koskela
Senior Legal Counsel
Mergers & Acquisitions and Shareholder Rights
Corporate Finance Branch
Ontario Securities Commission
(416) 595-8922
jkoskela@osc.gov.on.ca

Adeline Lee
Legal Counsel
Mergers & Acquisitions and Shareholder Rights
Corporate Finance Branch
Ontario Securities Commission
(416) 595-8945
alee@osc.gov.on.ca

Autorité des marchés financiers

Lucie J. Roy
Senior Director, Corporate Finance
Autorité des marchés financiers
(514) 395-0337, ext. 4361
Toll free: 1 (877) 525-0037
Lucie.roy@lautorite.qc.ca

Diana D'Amata
Senior Policy Adviser
Autorité des marchés financiers
(514) 395-0337, ext. 4386
Toll free: 1 (877) 525-0037
Diana.damata@lautorite.qc.ca

Andrée-Anne Arbour-Boucher
Senior Securities Analyst, Corporate Finance
Autorité des marchés financiers
(514) 395-0337, ext. 4394
Toll free: 1 (877) 525-0037
Andree-anne.arbour-boucher@lautorite.qc.ca

British Columbia Securities Commission

Gordon Smith
Senior Legal Counsel, Corporate Finance
British Columbia Securities Commission
(604) 899-6656
Toll free across Canada: 1 (800) 373-6393
gsmith@bcsc.bc.ca

Leslie Rose
Senior Legal Counsel, Corporate Finance
British Columbia Securities Commission
(604) 899-6654
Toll free across Canada: 1 (800) 373-6393
lrose@bcsc.bc.ca

Alberta Securities Commission

Ashlyn D'Aoust
Legal Counsel
Corporate Finance
(403) 355-4347
Ashlyn.daoust@asc.ca

Tracy Clark
Legal Counsel
Corporate Finance
(403) 355-4424
tracy.clark@asc.ca

Financial and Consumer Affairs Authority of Saskatchewan

Sonne Udemgba
Deputy Director, Legal, Securities Division
Financial and Consumer Affairs Authority of Saskatchewan
(306) 787-5879
sonne.udemgba@gov.sk.ca

Manitoba Securities Commission

Chris Besko
Acting General Counsel & Acting Director
Manitoba Securities Commission
(204) 945-2561
chris.besko@gov.mb.ca