

By email

April 23, 2024

To the Canadian Securities Administrators (“**CSA**”):

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority
of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Nova Scotia Securities Commission

Financial and Consumer Services Commission (New
Brunswick)
Office of the Attorney General, Prince Edward Island
Securities Commission of Newfoundland and
Labrador
Superintendent of Securities, Yukon Superintendent
of Securities, Northwest Territories
Superintendent of Securities, Nunavut

c/o

The Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor
Toronto, Ontario
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E-mail: comments@osc.gov.on.ca

M^e Philippe Lebel
Corporate Secretary and Executive Director,
Legal Affairs
Autorité des marchés financiers
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Dear CSA Members:

Re: Recommended amendments to National Instrument 62-104 *Takeover Bids and Issuer Bids* – Payment for Taken up Deposited Securities under Take-over Bids and Issuer Bids

On behalf of the members of the Canadian Capital Markets Association (“**CCMA**”), we are requesting that the CSA adopt amendments to National Instrument 62-104 *Takeover Bids and Issuer Bids* (“**NI 62-104**”) to align payment deadlines for taken up deposited securities under takeover bids and issuer bids with settlement practices being adopted in Canada on May 27, 2024.

CCMA BACKGROUND

The CCMA is a national, federally incorporated, not-for-profit organization, launched in 1999 to identify, analyze and recommend ways to meet the challenges and opportunities facing Canadian and international capital markets. Its mandate is to communicate, educate and help co-ordinate the different segments of the Canadian investment industry on projects spanning multiple parts of Canada’s capital markets.

The CCMA works through an industry steering committee and four working groups. More than 500 committee and working group members, comprised of individuals working for investment and asset managers, investment fund manufacturers, investment and mutual fund dealers, custodians, infrastructure entities, service bureaus, vendors, regulators, self-regulatory organizations, and others, continue to discuss issues and solutions relating to the move to a shortened settlement cycle.

SHORTENING THE SECURITIES SETTLEMENT CYCLE

For a significant period of time, the securities settlement cycle in Canada was five business days after the trade date (“**T+5**”). In 1995, following the U.S. lead, Canada reduced the securities settlement period to three business days after the trade date (“**T+3**”). This persisted until 2017 when the period was further reduced to two business days after the trade date (“**T+2**”) to align with the U.S. Canada’s settlement cycle will be reduced again, to one business day after the trade date (“**T+1**”) effective May 27, 2024, to be in synch with the U.S.

The CCMA believes a shortened securities settlement cycle is critical for Canada’s capital markets (and all of its stakeholders, including investors, issuers, and registrants) and the broader economy. A critical consideration in shortening Canada’s securities settlement cycle has been, and is, alignment with the U.S. Failing to align operational timelines with the U.S., such as the securities settlement cycle, would result in undesirable systemic risk and could lead to confusion in the markets with respect to settlement that could put investors at risk.

TAKEOVER BIDS AND ISSUER BIDS

The CCMA members have agreed that the maximum period:

- to pay for taken up deposited securities under a take-over bid or an issuer bid should be reduced from three business days to one business day after take up, and
- that a security holder must wait to receive payment before withdrawing deposited securities that have been taken up under a take-over bid or an issuer bid should be reduced from three business days to one business day.

The recommended reduction in the payment deadline for taken up deposited securities (and associated withdrawal where payment has not be received) aligns with the securities settlement cycle of T+1 coming into effect in Canada, the U.S., and Mexico in 2024. The recommended payment period will align Canada with the U.S. As described in the next section of this letter, the U.S. looks to current settlement practices in determining the appropriate payment period for tender offers.

The payment expectations for taken up deposited securities under take-over bids and issuer bids are “as soon as possible” as provided in NI 62-104. The recommendation reduces the maximum period for which to pay to one business day. The change to one business day (coinciding with

settlement practices) will provide security holders with more timely receipt of payment and improve the efficiency of the markets. It would also mitigate against potential processing complexities involving Canada-U.S. inter-listed securities involving tender offers.

U.S. APPROACH

The Securities Exchange Act of 1934 (“**Exchange Act**”) provides:

s. 14e-1 Unlawful tender offer practices.

As a means reasonably designed to prevent fraudulent, deceptive or manipulative acts or practices within the meaning of section 14(e) of the Act, no person who makes a tender offer shall: ...

*(c) Fail to pay the consideration offered or return the securities deposited by or on behalf of security holders **promptly** after the termination or withdrawal of a tender offer. This paragraph does not prohibit a bidder electing to offer a subsequent offering period under 14d-11 from paying for securities during the subsequent offering period in accordance with that section.”*

...

s. 13e-4(f)(5)

*The issuer or affiliate making the tender offer shall either pay the consideration offered, or return the tendered securities, **promptly** after the termination or withdrawal of the tender offer.*

(emphasis added)

“Promptly” is not a defined term in the Exchange Act. However, the Securities and Exchange Commission (“**SEC**”) has issued consistent commentary on its interpretation of “promptly”.

With its adoption of new rules for tender offers effective January 7, 1980, the SEC stated that “promptly”, as it applied to payment of consideration offered for securities tendered under tender offers [Rule 14e-1(c)] or issuer tender offers [Rule 13e-4(f)(5)], would be determined by the practices of the industry, including current settlement practice:

Rule 14e-1(c) has been revised to require a person making a tender offer to pay the consideration offered or to return the securities deposited by or on behalf of security holders promptly after the termination or withdrawal of the tender offer. This standard is also the standard applicable to issuer tender offers under Rule 13e-4(f)(5). Thus, any person making a tender offer is required to use all reasonable efforts to pay promptly for or to return deposited securities. The commission recognizes that the operation of this standard will be affected by the practices of the financial community and the following factors: current settlement, handling and delivery procedures relating to tenders made by guaranteed deliveries by appropriate institutions; procedures to cure technical defects in tenders; and the application of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 and the rules promulgated thereunder. The Commission believes that this provision will protect investors

*by ensuring that deposited securities are not tied up for an unreasonable length of time and will not unduly burden either the offeror or its depository in their operations after the termination of a tender offer.*¹

Prior to 1995, the settlement cycle was T+5 which would have represented the standard for prompt payment for taken up securities under tender offers.

The SEC addressed the matter again in its interpretive guidance regarding tender offers issued on July 24, 2000. The SEC reiterated its view from 1980 that the practices of the financial community, including current settlement practices, are instructive with regards to the standard for prompt payment and specifically referenced the settlement practice in place at that point (T+3) as the standard for “prompt” payment:

*Rule 14e-1(c) requires the bidder to pay the consideration offered or return the tendered securities promptly after the termination or withdrawal of the tender offer. The rule does not define "promptly." However, we have stated that this standard may be determined by the practices of the financial community, including current settlement practice. In most cases, the current settlement practice is for the payment of funds and delivery of securities no later than the third business day after the date of the transaction. We view payment within these time periods as "prompt" under Rule 14e-1(c). We understand that some bidders have waited up to 30 days to pay tendering security holders. We believe that this delay in payment is inconsistent with the prompt payment requirements of Rule 14e-1(c).*²

The SEC’s interpretation of “prompt” as being in accordance with settlement practice was also referenced in commentaries on international tender and exchange offers in 1990 and 1991.³

RECOMMENDED AMENDMENTS

The recommended amendments to NI 62-104 are listed in Appendix 1, as marked.

The CCMA would be pleased to answer any questions or elaborate on industry views at your convenience.

¹ Exchange Act Release No. 16384 (November 29, 1979) [44 FR 70326]
https://archives.federalregister.gov/issue_slice/1979/12/6/70292-70332.pdf#page=35.

² <https://www.sec.gov/rules/interp/34-43069.htm>.

³ International Tender and Exchange Offers, Release Nos. 33-6897 (June 5, 1991) [56 FR 27582]. Footnote 152 “The Commission has generally looked to the clearance and payment practices of the target’s home country in this respect.” https://archives.federalregister.gov/issue_slice/1991/6/14/27564-27611.pdf#page=19. See also, Concept Release Multinational Tender and Exchange Offers, Release No. 33-6866 (June 6, 1990) [55 FR 23751] “In addition, the Commission has construed the prompt payment and notice requirements in light of the customary clearing and settlement practices of the home country.” https://archives.federalregister.gov/issue_slice/1990/6/12/23747-23754.pdf#page=5.

Yours sincerely,

"Keith Evans"

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Appendix 1

Recommend Amendments to NI 62-104

Part 2 – Bids

...

Withdrawal of securities

2.30

(1) A security holder may withdraw securities deposited under a take-over bid or an issuer bid

...

(c) if the securities have not been paid for by the offeror within ~~3~~1 business days after the securities have been taken up.

...

Mandatory 10-day extension period – take-over bids

2.31.1 If, at the expiry of the initial deposit period, an offeror is obligated to take up securities deposited under a take-over bid pursuant to subsection 2.32.1(1), the offeror must

...

(b) promptly issue and file a news release disclosing the following:

...

(iv) in the case of a take-over bid that

(A) is not a partial take-over bid, that the offeror will immediately take up the deposited securities and pay for securities taken up as soon as possible, and in any event not later than ~~3~~1 business days after the securities are taken up, or

(B) is a partial take-over bid, that the offeror will take up and pay for the deposited securities proportionately in accordance with applicable securities legislation and in any event will take up the deposited securities not later than one business day after the expiry of the mandatory 10-day extension period and pay for securities taken up as soon as possible and in any event not later than ~~3~~1 business days after the securities are taken up.

...

Obligation to take up and pay for deposited securities – issuer bids

2.32

...

(2) An offeror must pay for any securities taken up under an issuer bid as soon as possible, and in any event not later than ~~3~~1 business days after securities deposited under the bid are taken up.

...

Obligation to take up and pay for deposited securities – take-over bids

2.32.1

...

(2) An offeror must pay for any securities taken up under a take-over bid as soon as possible, and in any event not later than ~~3~~1 business days after the securities deposited under the bid are taken up.