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CSA Issues Staff Notice Regarding Varying the Terms of Take-Over Bids

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The Canadian Securities Administrators (the “CSA”) has recently issued CSA Staff Notice 62-305 – *Varying the Terms of Take-Over Bids* (the “Notice”). The Notice was issued in response to concerns expressed by certain market participants regarding the ability of an offeror to, at its sole discretion, during the course of a formal take-over bid (a “Bid”), negatively vary the terms of a bid (a “**Negative Variation**”). The CSA is of the view that Negative Variations include situations where an offeror:

- a) lowers the consideration offered under the Bid;
- b) changes the form of consideration offered;
- c) lowers the proportion of outstanding securities subject to the Bid; or
- d) adds a new condition to the Bid.

The purpose of the Notice is to underpin the CSA’s view that offerors may only make offers that they are prepared to honour, given that the commencement of a Bid may affect the market price of the offeree issuer’s securities and will create a legitimate expectation among security holders of the offeree issuer, other potential offerors and other market participants that the Bid will be completed

at the specified price so long as the conditions of the Bid are satisfied or waived.

Reducing Offer Price or Adding New Conditions Prior to the Expiry of the Bid

Bids are required to remain open for acceptance for at least 35 days and the securities subject to the Bid must be taken up and paid for at the specified price if the conditions of the Bid are satisfied or waived. Pursuant to applicable Bid regime rules¹ (the “**Bid Rules**”), offerors are required to have sufficient funds in place to pay the consideration offered under the Bid. The CSA is of the view that pursuant to the Bid Rules, an offeror cannot unilaterally withdraw a Bid if all the conditions of the Bid have been satisfied or waived, nor can an offeror vary the offer price downwards or introduce new conditions.

The CSA note that certain Bid circulars

¹ Collectively, National Policy 62-203 – *Take-Over Bids and Issuer Bids*, Multilateral Instrument 62-104 – *Take-Over Bids and Issuer Bids*, Part XX of the *Securities Act* (Ontario) and Ontario Securities Commission Rule 62-504 – *Take-Over Bids and Issuer Bids*.

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contain language contemplating that an offeror may vary the terms of a Bid at any time in its sole discretion, including by reducing the offered consideration. The CSA is of the view that such language is inconsistent with the Bid Rules.

Reducing Offer Price or Adding New Conditions Where Conditions Have Not Yet Been Satisfied or in Response to a Failure of a Condition

An offeror is entitled to let its Bid expire and not take up and pay for the securities subject to the Bid if a condition of the Bid has not been satisfied. An offeror can then proceed and make a new offer with different terms. The CSA is of the view that if it is clear during the course of Bid (i.e. prior to the expiry of the Bid) that the terms and conditions of the Bid will not be satisfied, an offeror may vary its Bid by adding new conditions or reducing the offered consideration, so long as such variation is not prejudicial to securities holders. In determining whether to challenge a Negative Variation, the CSA will consider whether such Negative Variation: (a) is in response to the failure of a *bona fide* condition of the Bid; (b) is effected as an alternative to allowing the Bid to expire unsuccessfully; (c) provides sufficient procedural protections to offeree security holders and other market participants affected by the variation; and (d) would not be abusive to offeree security holders. The CSA has noted that it may request written submissions and confirmations from the offeror to justify its position that a *bona fide* condition of the Bid has not been or will not be satisfied. In making its determination, the CSA will consider whether the offeror has in a timely fashion informed the market of the failure of a condition, the events giving rise to such failure and the reasonableness of procedural protections established by the offeror to protect the offeree security holders and other market participants. The notice of variation filed by the offeror in this circumstance must clearly disclose the procedural

protections available to offeree security holders. Such procedural protections include the period of extension to allow offeree security holders time to consider the varied bid, to allow the board of directors of the offeree issuer time to assess the varied offer and communicate its recommendation to the offeree security holders and to allow sufficient time for other potential offerors to evaluate the revised offer and determine whether they wish to participate in an auction for the offeree issuer.

Other Matters

Where an offeror varies the terms of a Bid, offeree security holders who have already tendered to the Bid must take active steps to withdraw their securities if they no longer wish to tender to the varied Bid. The CSA is of the view that some offeree security holders may not become aware of a variation and therefore not withdraw the securities they have tendered to the original offer and thereby possibly accept an offer they would not have accepted in the first instance. To address this concern, the CSA has noted that offerors should consider launching a new Bid, as opposed to varying the terms of the original Bid.

Where an offeror's conditions are not *bona fide* and interpreted in good faith, the CSA has advised that it may take the position that the reliance on such a condition by the offeror undermines the statutory requirement that securities subject to Bid be taken up and paid for where the terms and conditions of the Bid have been satisfied. The CSA may intervene to ensure that an offeror, in exercising its judgment or discretion in the determination of whether a condition has been satisfied, is exercising such judgment or discretion in a reasonable manner. In exercising its sole discretion, an offeror should act honestly, in good faith and on reasonable grounds.

Finally, a Negative Variation should never be used to avoid the obligation of the offeror to make arrangements to have sufficient funds in place to pay

the consideration offered under the Bid. The CSA has advised that it may request documentation to confirm the offeror had sufficient funds in place to pay the initially offered consideration under the Bid.

For more information on the subject of this bulletin, please contact the author.

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