

December 20, 2024

Mr. Stan Magidson
Chair, Canadian Securities Administrators (CSA), and
Chair and Chief Executive Officer
Alberta Securities Commission
Suite 600, 250 - 5th Street SW
Calgary, AB

Via Email: Stan.Magidson@asc.ca

Dear Mr. Magidson:

Re: Standardizing and Enhancing Normal Course Issuer Bids

The Investment Industry Association of Canada (“IIAC”) is the national association representing investment firms that provide products and services to Canadian retail and institutional investors. Our members manufacture and distribute a variety of securities including ETFs, mutual funds, closed-end funds, and other exempt products.

We write with respect to National Instrument 62-104, *Take-Over Bids and Issuer Bids* (“NI 62-104”) and National Policy 62-203, *Take-Over Bids and Issuer Bids* (“NP 62-203”). In particular, we write to propose amendments to the normal course issuer bid (“NCIB”) exemptions in NI 62-104 and related commentary in NP 62-203 to streamline and simplify NCIB requirements across all exchanges in Canada.

Overview

Normal course issuer bids are a valuable tool for public issuing companies and investors. For example, NCIBs allow companies to demonstrate confidence in the intrinsic value of their shares potentially leading to a re-evaluation of the stock for the benefit of shareholders, improve financial metrics for shareholders, exercise flexibility in capital structure, increase liquidity, and offset share dilution. The NCIB exemptions in NI 62-104 are critically important to issuers in that they provide an alternative to the costly and often complicated issuer bid process prescribed by Part 2 of NI 62-104.

However, the requirements that must be satisfied in order to rely on the NCIB exemptions in NI 62-104 differ depending on the marketplace on which the NCIB is completed. This has contributed to a fragmented NCIB regime that creates avoidable obstacles for issuers.

For the reasons set out below, we submit that NI 62-104 ought to be amended to establish common NCIB rules for all exchanges in Canada.

The Normal Course Issuer Bid Exemption

As you are aware, Part 2 of NI 62-104 includes a series of rules and requirements that apply to issuer bids including time limits, notice requirements, and prohibitions on the issuer's sale/purchase of securities during the bid period. Importantly, Division 2 of Part 4 of NI 62-104 includes the NCIB exemption, which relieves issuers from the issuer bid requirements found in Part 2 of NI 62-104 where the bid is completed in the normal course.

Specifically, s. 4.8(2) of Part 4 currently provides that an issuer bid is exempt from Part 2 if the bid is made in the normal course through and in accordance with the bylaws, rules, regulations, and policies of a "designated exchange". However, there is a notable disparity between the detailed NCIB rules found in the TSX Company Manual and the less comprehensive rules that have been adopted by other exchanges. Moreover, there have been substantial market changes in Canada since the creation of the TSX's NCIB rules in or around 2005. Complicating matters further, there are notable differences between the buyback rules that apply to exchanges in the United States and the NCIB rules that have been adopted by exchanges in Canada.

Recommendations

We recommend that the CSA amend NI 62-104 and NP 62-203 to create a common set of NCIB rules across all exchanges in Canada. In particular, we recommend that the NCIB requirements found in NI 62-104 be replaced with a single set of rules across all Canadian exchanges based on the current requirements set out in the TSX Company Manual, with revisions to improve the competitiveness of Canadian exchanges. This will simplify the existing NCIB regime and allow for more flexibility among issuers in planning for the repurchase of securities.

Our proposed amendments are summarized as follows:

- 1) Subsections 4.8(1), (2), and (4) of Part 2, Division 2, of NI 62-104 should be rescinded to eliminate the requirement for issuers to comply with the discrete bylaws, rules, and policies of different "designated exchanges"; and
- 2) Subsections 4.8(2) and (4) of Part 2, Division 2, of NI 62-104 should be replaced with a set of rules for all Canadian exchanges based in substance on the NCIB requirements found in section 628 and 629 of the TSX Company Manual, with the following variations:
 - a) **Definition of "Issuer Bid"**: The definitions of "issuer bid" found in the TSX Company Manual and NI 62-104 should be combined to provide for a common definition across all exchanges.
 - b) **Definition of "average daily trading volume"**: The definition of "average trading volume" found in the TSX Company Manual¹ should be revised to account for trading volume on all marketplaces to allow for a more complete measure of a security's trading volume. In addition, average daily trading volume ought to be measured over a four-week rolling period rather than the 6-month

¹ S. 628(a)(i).

static period currently contemplated in the TSX Company Manual. This revised calculation will be used to determine the daily purchase limit which will more accurately reflect the liquidity of securities at the time of purchase and contribute to more competitive marketplaces in Canada by matching the rules adopted by exchanges in the United States.²

- c) **Definition of “normal course issuer bid”:** Similarly, the definition of “normal course issuer bid”³ found in the TSX Company Manual should be adopted in a revised form to account for trading on all marketplaces. This will allow for a more complete measure of trading activity.
 - d) **Restrictions on Acquisitions at Opening and Closing:** The current restrictions found in the TSX Company Manual⁴ should be amended to allow NCIBs to be completed up to 10 minutes before closing as opposed to the current 30-minute restriction. This will assist in achieving best execution and, again, improve the competitiveness of Canada’s marketplaces by matching the rules adopted by exchanges in the United States.⁵ In addition, we recommend that the rules from the TSX Company Manual that are adopted into NI 62-104 be amended to remove the current prohibition against completing block purchases at the opening of a trading session.
 - e) **Block Purchase Exception:** The block purchase exception currently in the TSX Company Manual⁶ should be revised to allow for one block purchase per calendar day rather than one per week. Relatedly, NP 62-203 should be amended to clearly specify that combining or bundling blocks is permitted and that the block purchase exception is not limited to “naturally occurring blocks”.⁷ This TSX restriction, which preferences one investor over another, is inconsistent with current market practice and can unintentionally disclose the nature of the buyer. More generally, this requirement is unduly restrictive given the relatively limited liquidity of Canadian listed issuers compared to US listed issuers.
 - f) **Sales from Insiders:** The current restrictions in the TSX Company Manual on NCIB sales from a control person of an issuer should be amended to allow for an exemption process for sales up to 25% of an insider block subject to the existing reporting obligations for insider trades.⁸ The exemption process and issuer reporting obligations should sufficiently mitigate any concerns related to market manipulation.
- 3) The NCIB requirements currently found in s. 4.8(3) and (5) of Part 2, Division 2, of NI 62-104 would continue to apply to all published markets other than Canadian exchanges.

We have prepared a draft of our proposed amendments to NI 62-104 and NP 62-203, which are attached hereto at **Schedule “A”** and **Schedule “B”**.

² SEC Rule 240.10b-18, s.2(a)(1).

³ S. 628(a)(ix).

⁴ S. 629(l)(8).

⁵ SEC Rule 240.10b-18, s.2(b)(2)(ii).

⁶ S. 629(l)(7).

⁷ [TSX Staff Notice 2022-0001](#).

⁸ S. 629(l)(4).

We recognize that, in order to implement and harmonize our proposed amendments across marketplaces in Canada, all such exchanges will be required to amend their manuals and related documents and have therefore included them in this correspondence.

We would be pleased to discuss at your convenience.

Sincerely,

Investment Industry Association of Canada

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Schedule "A"
Proposed Amendments to NI 62-104, *Take-Over Bids and Issuer Bids*

PART 4 EXEMPTIONS

Division 1 Definitions and Interpretation

1.1 In this Instrument,

"**issuer bid**" means an offer to acquire or redeem securities of an issuer made by the issuer to one or more persons, any of whom is in the local jurisdiction or whose last address as shown on the books of the offeree issuer is in the local jurisdiction, and also includes an acquisition or redemption of securities of the issuer by the issuer from those persons, but does not include an offer to acquire or redeem, or an acquisition or redemption if

- (a) no valuable consideration is offered or paid by the issuer for the securities,
- (b) the offer to acquire or redeem, or the acquisition or redemption is a step in an amalgamation, merger, reorganization or arrangement that requires approval in a vote of security holders,
- (c) the securities are debt securities that are not convertible into securities other than debt securities;
- (d) the securities are purchased or otherwise acquired in accordance with the terms and conditions attaching thereto that permit the purchase or acquisition of the securities by the issuer without the prior agreement of the owners of the securities, or where the securities are purchased to meet sinking fund or purchase fund requirements;
- (e) the purchase or other acquisition is required by the instrument creating or governing the class of securities or by the statute under which the issuer was incorporated, organized or continued; or
- (f) the securities carry with them or are accompanied by a right of the owner of the securities to require the issuer to repurchase the securities and the securities are acquired pursuant to the exercise of such right;

Part 4 Exemptions

Division 2: Exempt Issuer Bids

Normal course issuer bid exemptions

(1) In this section,

"**Average daily trading volume**" means the trading volume on all marketplaces for the most recently completed month preceding the date of acceptance of the notice of normal course issuer bid by an exchange, excluding any purchases made by the listed issuer through the facilities of an exchange under its normal course issuer bid during the last month, divided by the number of trading days for that month.

In the case of securities which have been listed on an exchange for a period of less than six months, the ADTV for such securities shall be based on the period since the date of listing;

"Block" means a quantity of securities that either:

- (a) has a purchase price of \$200,000 or more; or
- (b) is at least 5,000 securities and has a purchase price of at least \$50,000; or (c) is at least 20 board lots of the security and total 150% or more of the ADTV for that security;

and are not owned, directly or indirectly, by an insider of the listed issuer;

"Broker" means the participating organization designated by the listed issuer to make all purchases of listed securities for the purposes of the normal course issuer bid;

"Circular bid" means a take-over bid or issuer bid that is subject to Part 2 of this Instrument;

"Insider" means,

- (a) a director or officer of a reporting issuer,
- (b) a director or officer of a person or company that is itself an insider or subsidiary of a reporting issuer,
- (c) a person or company that has,
 - (i) beneficial ownership of, or control or direction over, directly or indirectly, securities of a reporting issuer carrying more than 10 per cent of the voting rights attached to all the reporting issuer's outstanding voting securities, excluding, for the purpose of the calculation of the percentage held, any securities held by the person or company as underwriter in the course of a distribution, or
 - (ii) a combination of beneficial ownership of, and control or direction over, directly or indirectly, securities of a reporting issuer carrying more than 10 per cent of the voting rights attached to all the reporting issuer's outstanding voting securities, excluding, for the purpose of the calculation of the percentage held, any securities held by the person or company as underwriter in the course of a distribution,
- (d) a reporting issuer that has purchased, redeemed or otherwise acquired a security of its own issue, for so long as it continues to hold that security,
- (e) a person or company designated as an insider,

"Investment fund" has the same definition found in National Instrument 51-102 Continuous Disclosure Obligations;

"Normal course issuer bid" means an issuer bid by a listed issuer to acquire its listed securities on an exchange where the purchases:

(a) if the issuer is not an investment fund, do not, when aggregated with all other purchases by the listed issuer during the same trading day on all marketplaces aggregate more than the greater of:

- (i) 25% of the average daily trading volume of the listed securities of that class; and
- (ii) 1,000 securities;

(b) if the issuer is an investment fund, do not, when aggregated with all other purchases by the listed issuer during the preceding 30 days on all Canadian exchanges aggregate more than 2% of the listed securities of that class outstanding on the date of acceptance of the notice of normal course issuer bid by an exchange; and

(c) over a 12-month period, commencing on the date specified in the notice of the normal course issuer bid, do not exceed the greater of

- (i) 10% of the public float on the date of acceptance of the notice of normal course issuer bid by an exchange, or
- (ii) 5% of such class of securities issued and outstanding on the date of acceptance of the notice of normal course issuer bid by an exchange, excluding any securities held by or on behalf of the listed issuer on the date of acceptance of the notice of normal course issuer bid,

and for the purposes of (b) and (c), whether such purchases are made through the facilities of an exchange or otherwise, but excluding purchases made under a circular bid;

"Principal security holder" of a listed issuer means a person or company who beneficially owns or exercises control or direction over more than 10% of the issued and outstanding securities of any class of voting securities or equity securities of the listed issuer; and

"Public float" means the number of securities of the class which are issued and outstanding, less the number of securities that are pooled, escrowed or non-transferable, and less the number of securities of the class, known to the issuer after reasonable inquiry, beneficially owned, or over which control or direction is exercised by:

- (a) the listed issuer;
- (b) every senior officer or director of the listed issuer; and
- (c) every principal security holder of the listed issuer.

(2) A normal course issuer bid that is completed on a Canadian Exchange is exempt from Part 2 provided that the requirements in this division have been satisfied.

Commencement of normal course issuer bid

(3) An issuer must commence a normal course issuer bid by,

(a) Filing a draft notice of intention to make a normal course issuer bid with an exchange in the form prescribed by that exchange setting out the total number of securities that the issuer has determined may be acquired through the normal course issuer bid and a statement that the issuer has a present intention to purchase securities under the normal course issuer bid, if accepted by an exchange;

(b) Issuing a press release indicating that the issuer intends to make a normal course issuer bid subject to the an exchange's acceptance of the issuer's notice of intention to make a normal course issuer bid and setting out the material contents of the notice including:

(i) the number of securities that the issuer intends to repurchase;

(ii) the method of disposition of the securities,

(iii) the reason for the bid, and

(iv) details of any previous purchases by the issuer of the same class of securities in the preceding 12-month period; and

(c) upon acceptance of by an exchange of the issuer's draft notice of intention to make a normal course issuer bid, the issuer must file a final version of the notice executed by a senior officer or director or the issuer and must issue a final press release to announce the exchange's acceptance of the notice.

(4) A normal course issuer bid may commence on the date that is two trading days after the later of:

(a) the date of acceptance by the exchange of the listed issuer's notice of intention to make a normal course issuer bid; or

(b) the date of issuance of the news release required by subsection 4.8(5)(c).

Disclosure to security holders

(5) The issuer shall include a summary of the material information contained in the notice of intention to make a normal course issuer bid in the next annual report, information circular, quarterly report or other document mailed to security holders and indicate that security holders may obtain a copy of the notice, without charge, by contacting the listed issuer.

Variation of terms

(6) During a normal course issuer bid, a listed issuer may amend its notice of intention to make a normal course issuer by filing an amended notice in the form prescribed by the listing exchange along with a draft news release;

(7) An amended notice of intention to make a normal course issuer which seeks to increase the number of securities being repurchased may not exceed:

- (a) the maximum percentages referred to in the definition of normal course issuer bid; or
- (b) provided that the issuer has increased its number of issued securities which are subject to the bid by at least 25% from the number of issued securities as at the date of acceptance of the notice of normal course issuer bid, the maximum percentages referred to in the definition of normal course issuer bid, as at the date of the amended notice.

(8) When the amended notice is in a form acceptable to the listing exchange, the listed issuer shall file the amended notice in final form, duly executed by a senior officer or director of the listed issuer, for acceptance by the exchange.

(9) Upon acceptance of the amended notice by the exchange, the issuer shall issue and file a final press release.

(10) The amended normal course issuer bid may commence on the date that is two trading days after the later of:

- (a) the date of acceptance by the exchange of the listed issuer's notice of intention to make a normal course issuer bid; or
- (b) the date of issuance of the news release required by subsection 4.8(11).

Reporting Purchases

(11) Within 10 days of the end of each month in which any purchases are made, the listed issuer shall report to the exchange that accepted the notice of intention to make a normal course issuer on the purchases made on all exchanges over the preceding month including the following information:

- (a) The total number of securities purchased;
- (b) The volume weighted average purchase price; and
- (c) Confirmation on whether the purchased securities have been cancelled, reserved for issuance or otherwise dealt with.

Trustees

(12) A trustee or other purchasing agent for a pension, stock purchase, stock option, dividend reinvestment or other plan in which employees or security holders of a listed issuer may participate, shall be deemed to be making an offer to acquire securities on behalf of the listed issuer where the trustee is non-independent.

(13) A trustee shall be deemed to be non-independent where:

- (a) The trustee is an employee, director associate or affiliate of the listed issuer; or

(b) The listed issuer, directly or indirectly, has control over the time, price, amount and manner of purchases or the choice of the broker through which the purchases are to be made.

(14) A trustee that is deemed to be non-independent is subject to the requirements set out in this division.

Price Limitations

(15) Purchases made by listed issuers pursuant to a normal course issuer bid shall be made at a price which is not higher than the last independent trade of a board lot of the class of securities which is the subject of the normal course issuer bid.

(16) Notwithstanding the foregoing, a trade shall not be deemed to have been made at a price that is higher than the last independent trade if the following conditions are satisfied:

- (a) The independent trade occurs no more than one second before the NCIB purchase creating the uptick;
- (b) The independent trade is a down tick to the previous trade and the NCIB purchase would not have created an uptick to the trade prior to the last independent trade; and
- (c) the price difference between the NCIB purchase and the independent trade is not more than \$0.02.

Restrictions on acquisitions during normal course issuer bid

(17) A listed issuer shall not make any purchases of its securities pursuant to a normal course issuer bid during the circular bid for those securities. This restriction applies during the period from the first public announcement of the bid until the termination of the period during which securities may be deposited under such bid, including any extension thereof.

(18) The restriction set out subsection (17) does not apply to purchases made solely as a trustee pursuant to a pre-existing obligation under a pension, stock purchase, stock option, dividend reinvestment or other plan.

Restrictions on acquisitions at closing

(19) A listed issuer shall not make any purchases of its securities pursuant to a normal course issuer bid at the opening of a trading session, or during the 10 minutes before the scheduled close of a trading session.

Prohibition against prearranged trades and private agreements

(20) Intentional cross trades and pre-arranged trades under a normal course issuer bid are not permitted unless such trade is made in connection with a block purchase exception.

(21) Purchases made through normal course issuer bids must be completed as open public transactions.

Block Purchase Exception

(22) A listed issuer may make one block purchase per calendar day which exceeds the daily repurchase restriction contained in definition of normal course issuer bid subject to maximum annual aggregate limits.

Appointment of Broker

(23) An issuer shall appoint only one broker at any one time as its broker to make normal course issuer bid purchases.

(24) The listed issuer shall inform all Canadian exchanges in writing of the name of the responsible broker and registered representative.

Cancellation

(25) A listed issuers cancelling securities purchased through a normal course issuer bid must ensure that such securities are withdrawn and cancelled on the transfer agent's register in a timely manner once the purchase has been settled.

Undisclosed material Information

(26) A listed issuer shall not make any purchases of its securities pursuant to a normal course issuer bid while the listed issuer has knowledge of a material fact or material change with respect to the issuer before that material fact or material change has been generally disclosed.

(37) Notwithstanding the forgoing, subsection 4.8 (29) does not apply to normal course issuer bids carried out pursuant to automatic securities purchase plans established by the listed issuer in accordance with applicable securities laws and rules of the listing exchange.

Sales from control

(38) Purchases pursuant to a normal course issuer bid shall not be made from a person or company effecting a sale from control block unless the sale involves the trade of no more than 25% of the control block.

Issuer bids on a Marketplace other than a Canadian Exchange

(39) An issuer bid that is made in the normal course on a published market, other than a Canadian exchange, is exempt from Part 2 if all of the following conditions are satisfied:

(a) the bid is for not more than 5% of the outstanding securities of a class of securities of the issuer;

(b) the aggregate number of securities or, in the case of convertible debt securities, the aggregate principal amount of securities acquired in reliance on this exemption by the issuer and any person acting jointly or in concert with the issuer within any 12-month period does not exceed 5% of the securities of that class outstanding at the beginning of the 12-month period;

(c) the value of the consideration paid for any of the securities acquired is not in excess of the market price at the date of acquisition as determined in accordance with section 1.11, plus reasonable brokerage fees or commissions actually paid.

(41) An issuer making a bid under subsection (39) must issue and file, at least 5 days before the commencement of the bid, a news release containing the following information:

- (a) the class and number of securities or principal amount of debt securities sought;
- (b) the dates, if known, on which the issuer bid will commence and expire;
- (c) the value, in Canadian dollars, of the consideration offered per security;
- (d) the manner in which the securities will be acquired; and
- (e) the reasons for the issuer bid.

Schedule “B”

Proposed Amendments to NP 62-203, *Take-Over Bids and Issuer Bids*

Part 3 - Normal Course Issuer Bids

2.18 Reporting Purchases – A listed issuer may delegate these reporting requirements to the broker appointed to make its purchases. However, the listed issuer bears the responsibility of ensuring timely reports are made. These reporting obligations apply to purchases by non-independent trustees and to purchases by any party acting jointly or in concert with the listed issuer. Nil reports are not required

2.19 Trustees – A listed issuer shall not be considered to have control over the time, price, amount, or manner of purchase or the choice of a broker through which the purchases are to be made, where the purchase is made on the specific instructions of the employee or security holder who will be the beneficial owner of the securities. Exchanges should be contacted where there is uncertainty as to the independence of the trustee.

2.20 Price Limitations – The following are not considered “independent trades”:

- (a) trades directly or indirectly for the account of an insider or an account under the direction of an insider;
- (b) trades for the account of the broker making purchases for the bid or an account under the direction of the broker making purchases for the bid;
- (c) trades solicited by the broker making purchases for the bid; and
- (d) trades directly or indirectly by the broker making purchases for the bid which are made in order to facilitate a subsequent block purchase by the issuer at a certain price.

2.21 Prohibition Against Prearranged Trades and Private Agreements – It is important to investor confidence that all holders of identical securities be treated in a fair and even-handed manner by the listed issuer. Further, it is in the interest of security holders that transactions pursuant to an issuer bid should be made in the open market. This philosophy is also reflected in the OSA, which provides very limited exemptions for private agreement purchases.

2.22 Block Purchase Exception – The block purchase exception is not restricted to naturally occurring blocks or purchases from single sellers. The block purchase exception permits bundling trades to include multiple sellers.

2.23 Brokers – A listed issuer’s broker shall be provided with a copy of the notice of the issuer’s normal course issuer bid and be instructed to make purchases in accordance with the provisions of the Instrument and the terms of such notice. To assist exchanges in their surveillance function, the listed issuer should receive prior written consent of each exchange where it intends to change its broker.