

Summary of Comments on AMF Proposal

The following is a general summary of comments received on the AMF Proposal, including comments received that relate to aspects of the Proposed Bid Amendments. The summary does not review comments on specific or technical aspects of the AMF Proposal since the CSA has determined to proceed with the Proposed Bid Amendments as an alternative to the proposal.

1. Minimum Tender Requirement and Mandatory Extension Requirement

The AMF Proposal included a proposed amendment to the take-over bid regime to require that all take-over bids receive tenders from more than 50% of all outstanding securities of the offeree issuer owned or held by persons other than the offeror (the minimum tender requirement). The AMF Proposal also proposed a mandatory 10-day extension of the bid following an announcement that the minimum tender requirement had been met.

Along with this proposal, the AMF invited comments on whether the proposed changes would (i) allow offeree security holders to make a voluntary, undistorted collective decision to sell, and (ii) promote the efficiency of capital markets.

The AMF received a number of comments on the proposed amendments in the AMF Proposal. The following is a general summary of the views expressed by commenters:

- Commenters were generally supportive of adopting these provisions.
- Many commenters were of the view that these provisions would provide security holders with the opportunity to make more informed decisions and would allow offeree security holders to make voluntary, undistorted collective decisions to sell. In their view, this would address the collective action concerns associated with our take-over bid regime and ensure fair treatment of security holders.
- Some commenters indicated that the proposed changes would alleviate the pressure on certain security holders to tender into the bid or to sell their shares in the secondary market for fear of being left in the minority. They also suggested that the proposed changes were akin to security holder approval and increased the legitimacy of the bid process. More specifically, they noted that the minimum tender requirement would act like a referendum among security holders and the 10-day extension of the bid would allow undecided shareholders to tender.
- Some commenters submitted that it is important to level the playing field for all security holders, as only larger companies tend to adopt the “permitted bid” security holder rights plan. The proposed changes reflect elements of the “permitted bid” concept under most security holder rights plans.
- Similar to the bid regime amendments in the AMF Proposal, some commenters suggested that securities regulators mandate that all security holder rights plans contain the terms of

the “permitted bid” security holder rights plan, including that a waiver of a security holder rights plan with respect to one bid results in a waiver for all bids.

- Many issuers felt that there are currently regulatory imbalances that unduly favour offerors and that the bid regime amendments included in the AMF Proposal would enhance the efficiency of capital markets by reducing coercion and the pressure to which security holders are subjected.
- Some commenters expressed concern that offeree boards of directors have no real ability to protect offeree issuers from structurally coercive bids and, in particular, from bids that substantially undervalue the offeree issuer. These commenters noted that boards do not have the ability to maintain a security holder rights plan indefinitely in the face of a bid.
- A few commenters argued that the suggestion that the current take-over bid regime is too “offeror friendly” is not supported by empirical evidence. In their view, the current regime appropriately provides security holders with an unrestricted ability to accept a premium bid.

2. Board Discretion

In addition to proposing the minimum tender requirement and the 10-day mandatory extension requirement, the AMF Proposal also contemplated policy changes that would recognize the fiduciary duty of the board of directors of the offeree issuer when responding to an unsolicited bid.

The AMF invited comments on whether giving appropriate deference to directors in the exercise of their fiduciary duty would negatively impact the ability of offeree issuer security holders to tender their securities to an unsolicited take-over bid.

Several commenters were of the view that directors should have a greater ability to fulfill their fiduciary duty in response to a take-over bid.

They voiced the following views:

- The CSA should recognize that boards are constrained by their fiduciary duties and by existing shareholder rights, including rights to submit proposals and to appoint new directors, adding that a proposal that gives priority to shareholders undermines board authority under corporate law.
- The CSA should allow boards of directors the discretion to act in what they determine to be the best interest of the corporation, including the ability to “say no” to a hostile take-over bid.
- Directors can legitimately conclude that an unsolicited offer is not in the corporation’s best interests and that alternatives better aligned with the corporation’s best interests exist.

Some commenters favoured the shareholder-focused status quo. They found the AMF Proposal unacceptable for the following reasons:

- It would give directors broad discretion to adopt defensive tactics that could prevent security holders from tendering into bids.
- The AMF Proposal could tilt the balance of power too far in favour of the offeree issuer's directors, making hostile take-over bids very difficult to carry out without replacing the offeree board.

Some commenters indicated that security holders generally had the appropriate tools to discipline boards under corporate law. They commented that the right of shareholders to elect and to remove directors, along with their right to sue for breach of fiduciary duty or seek relief under the oppression remedy, provides a powerful check on directorial authority.

However, other commenters did not agree that security holders have the appropriate tools to discipline directors. They took the view that the tools available to security holders had largely been ineffective, as demonstrated by the difficulty pursuing a claim in courts and the fact that the exercise of the shareholders' voting rights to withhold votes does not generally lead to the removal of the director. In their view, it is difficult for minority shareholder voices to be heard given that the shareholder base of many Canadian companies is quite concentrated.

3. Role of securities regulators

Law firms and issuers generally indicated that courts would be an appropriate forum to address disputes regarding defensive tactics, as it is the case in the U.S.

Institutional investors generally expressed concerns with a decreased role for securities regulators, particularly under the AMF Proposal. They commented that securities regulators have a specific mandate, not shared by the courts, to protect the interests of investors; they did not wish to see that mandate or involvement weakened.