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**THIS EXAMINATION CONSISTS OF 9 PAGES (INCLUDING THIS PAGE)  
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**THE UNIVERSITY OF BRITISH COLUMBIA  
PETER A ALLARD SCHOOL OF LAW**

**FINAL EXAMINATION – DECEMBER 2019**

**LAW 460  
Advanced Corporate Law**

**Section 1  
Harjit S. Sangra  
Rod Talaifar**

**TOTAL MARKS: 100**

**TIME ALLOWED: 2.5 HOURS**

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- NOTE:**
- 1. This is a limited open book examination, and, in addition to the materials provided herein, candidates may refer to their class notes and course materials, other than the course text book. TEXT BOOKS MAY NOT BE BROUGHT TO OR UTILIZED DURING THE EXAM.**
  - 2. ANSWER ALL QUESTIONS.**
  - 3. READ ALL PAGES FIRST TO BUDGET YOUR TIME.**

**THIS EXAMINATION CONSISTS OF 3 QUESTIONS**

**QUESTION 1 – 28 Marks****Glossary**

**Board** Board of Big Investment Bank Co. ("**BIG Co.**"), which is comprised of the following six directors:

- Director A – The CEO of Big Co. He has held the position since director B's retirement 5 years ago and has worked his way up from the trading floor of Big Co. to the position of CEO over his 35-year career with the company.
- Director B – Chairman of the Board. He is a non-employee director of Big Co. and was its Chief Executive Officer until he retired approximately 5 years ago from such position. He is not involved in the day-to-day management of Big Co. at the executive level.
- Director C - A non-employee director. He is the former CEO of a large U.S. food products company.
- Director D – A non-employee director. She is the former CEO of the largest Latin-American manufacturer of widgets.
- Director E – She is the Deputy Chief Executive Officer of Big Co., and is in charge of its substantial trading division.
- Director F – A non-employee director. She was formerly global head of accounting at one of the world's largest accounting firms.
- Director G – A non-employee director. She was a former partner at a large international law firm, which has not previously acted for Big Co.

**Big Co.** A multinational investment bank and financial services company. Big Co. is the largest investment bank in the world. A class of its common shares are traded on the Toronto Stock Exchange and the New York Stock Exchange. Big Co. is incorporated under the *Business Corporations Act* (British Columbia).

In addition to its worldwide presence, Big Co. is by far the most successful foreign investment bank in Malaysia, holding a 25% market share in the country's investment banking industry - double that of its nearest rival. Most of this business is due to its relationship and business with the country's sovereign wealth fund, the "Malaysia Fund".

Based on its most recent annual financial statements, Big Co. has total global revenues of \$36.0 billion and net income of \$10.0 billion. The Malaysian

business of the Company accounted for \$1.9 billion of Big Co.'s revenues in such year

You are a lawyer at Pearson, Specter and Litt. The Chairman of Big Co. calls you to seek your advice.

The Chairman tells you that in 2016 Big Co. was the lead investment bank for a major bond offering completed by the Malaysia Fund, which has been set up at such time with the initial mandate of establishing finance and infrastructure deals in Malaysia.

The Chairman tells you that three days ago Big Co. received a whistleblower complaint that alleged that members of Big Co.'s Asian management have been assisting the Prime Minister of Malaysia and his inner circle in misappropriating funds from the Malaysia Fund, including to fund the Prime Minister's recent election campaign. Specifically, the whistleblower complaint alleged that Big Co.'s director of Malaysian operations and its managing director for Asia had very close relationships with the Prime Minister and had knowingly helped him setup various structures to clandestinely redirect funds from the Malaysia Fund for personal purposes.

The Chairman further advises that two days ago, an investigative officer of the Malaysian National Police contacted Big Co. stating that they had initiated an investigation against its director of Malaysian operations, its managing director for Asia and certain other individuals in Big Co.'s Asian operations team as part of a larger investigation against the Prime Minister's alleged misappropriation of funds from the Malaysia Fund. Further, the financial regulator in Malaysia also provided notice to Big Co. that it had launched an investigation into the role of Big Co. and its personnel in the matter.

The Chairman has reviewed the financial data for Big Co. and noticed that its business with the Malaysia Fund and the government of Malaysia had some of the highest profit margins in its business.

The Chairman tells you that he has known both Big Co.'s director of Malaysian operations and the managing director for Asia throughout his career, having worked closely with both of them as part of the trading operations of Big Co. in the New York office of Big Co. He thinks they are both people with integrity and would be very surprised if the allegations against them were true.

The Chairman states that, at this stage, the above is all the information Big Co.'s board of directors has on the matter. However, based on discussions with members of management, he believes that, if the allegations are true, Big Co. may face potential fines of up to \$1.5 billion and the reputational hit could reduce its annual revenues by \$6.0 billion.

**QUESTION 1:**

**MARKS**

**28**

**The Chairman asks that you provide Big Co. and its board of directors general advice on how the board of directors should proceed in the case at hand and whether they should be making any public disclosure at this stage. Please advise him.**

## QUESTION 2

### Glossary

- "**MedCo**" is a public company whose shares are listed on the TSX and is incorporated under the British Columbia *Business Corporations Act*. It develops and produces cancer drugs, has annual revenues of about \$1 billion, it is cash-flow positive, marginally profitable but is in a capital intensive industry, meaning large amounts of financial resources are required for research, development and operating costs. In addition, MedCo carries debt levels that are higher than its industry peers.
- MedCo's share price is currently at \$19.25 per share. The 52-week trading range for its shares has varied between \$15 and \$21. In the past 12 months, MedCo has been very active in seeking and considering M&A opportunities, including potential acquisitions of and business combinations with other drug companies or acquiring rights to new drugs. It has utilized I Bank as an advisor on most of these initiatives. However, to date, it has not found an acquisition or opportunity that would be attractive or provide sufficient value to its shareholders.
- MedCo is currently developing a new drug for treating some forms of lung cancer (the "**Cure Pill**") that has shown a lot of promising results but has not yet had any clinical or human testing. Such testing and eventual production and sales after governmental approvals can take several years. If successful, the Cure Pill could more than double MedCo's revenues.
- MedCo's board of directors – consists of 7 individuals including its CEO as follows:
  - Director A – (also referred to as "**MedCo Chairman**"), non-employee director, Chairman of the Board, senior executive of a private equity firm which owns approximately 9% of the outstanding MedCo shares.
  - Director B – non-employee director, past senior executive in the drug business.
  - Director C – non-employee director, past capital markets experience.
  - Director D – non-employee director, senior executive of CC Hedge Fund.
  - Director E – non-employee director, with past broad business experience.
  - Director F – non-employee director, has an affiliated company that provides consulting services to MedCo and has provided consulting services to the CC Hedge Fund.

- Director G – CEO of MedCo, one of its founders, significant experience in the drug business, also has other investments in the biotech, generic drug and regular drug businesses.
- "**NationalCo**" is a public company whose shares are also listed on the TSX. It is a direct competitor to MedCo in the cancer drug business and has overlapping operations, drugs and research and development. It is approximately 60 - 90% larger than MedCo in terms of revenues, market capitalization, net income and cash flow. Although the drug business is capital intensive, it has significantly more cash on hand and less indebtedness than MedCo and thus has much more financial flexibility and capital resources.
- "**NationalCo CEO**" believes that a business combination of NationalCo and MedCo would create long-term shareholder value, believes that there are a number of synergies that can be realized if the companies are combined, both in producing and selling cancer drugs and in particular, overlapping research and development of new drugs like the Cure Pill. He has canvassed the NationalCo board of directors who are all supportive of a proposed business combination with MedCo.
- "**CC Hedge Fund**" means a significant hedge fund that owns approximately 19% of the outstanding shares of MedCo that has a reputation for being litigious. It also has other investments in the drug business in its portfolio of investments. CC Hedge Fund is the single largest shareholder of MedCo.
- "**I Bank**" means the investment banking arm of a Canadian Chartered Bank, and a long-standing financial advisor to MedCo. The commercial banking part of the bank is the largest debt lender to MedCo.
- "**MedCo Institutional Holders**" means 10 large institutional shareholders of MedCo who are all unrelated, none owns more than 9% of the outstanding MedCo shares but they collectively own approximately 38% of the outstanding MedCo shares.
- "**TSX**" means Toronto Stock Exchange.

## Events

### January 5

NationalCo CEO reaches out to MedCo Chairman to have a preliminary discussion regarding the potential merits of a business combination between NationalCo and MedCo. They discuss the potential merits of a combination, including the potential to realize synergies and to enhance shareholder value. They briefly touch on the "people issues" – there will be redundant senior executives and employees and overlapping research and development for new drugs including the Cure Pill. They both discuss the high costs of drug research and development, the long lead time needed for testing and the time, costs and risks about getting regulatory approval for a new drug, including from the U.S. FDA. They discuss how, without regulatory approval for a new drug, the research costs related thereto which are generally many millions of dollars are often

essentially lost. MedCo Chairman states he can see the potential merits of a combination but is not sure how his board would feel about a transaction.

Further he advises that in addition to the people issues, the most significant issue for MedCo and its shareholders would be the amount of consideration in any transaction.

He closes the meeting by saying: "if NationalCo wanted to provide a proposal or indication of interest, he would certainly take it to his board".

### **January 8**

NationalCo CEO sends to the MedCo Chairman a non-binding expression of interest proposing a potential business combination between the two entities, requesting due diligence access, suggesting that subject to such due diligence the consideration could be in the range of \$20 and \$26 per MedCo shares. The consideration would be in the form of cash, NationalCo shares or a combination thereof.

### **January 11**

MedCo conducts a board meeting to review the proposal. While there is a general consensus amongst the board as to the potential merits of a business combination, there is no agreement as to the value for MedCo shares. At the conclusion of the meeting, the MedCo board, by a vote of 5 to 2 determines to enter into a confidentiality agreement with NationalCo for a short period so that both parties may conduct due diligence upon each other to see if the proposal has further merit. At the meeting, Director D discussed CC Hedge Fund's other investments in the drug business and the potential of the Cure Pill and Directors D and G voted against the resolution.

Each party conducts high level due diligence upon each other for 10 days and is generally satisfied with the results of the same.

### **January 22**

NationalCo provides a formal offer letter setting forth a proposal whereby it would be prepared to effect a business combination with MedCo to acquire all of the issued and outstanding shares of MedCo in consideration of a price of \$26 per MedCo share. The consideration would be in the form of cash (subject to a maximum cap), shares of NationalCo, or a combination of the two. Each MedCo shareholder may elect one of these options under the offer. In the event that MedCo shareholders are entitled to receive cash in excess of the maximum cap, they would only receive cash up to the maximum cap on a pro rata basis and the balance of the consideration to them would be in the form of NationalCo shares. The offer letter talks about combining the two companies' current operations and resources and the combined entity pursuing new opportunities. The offer letter has been approved by the board of NationalCo and provides a short time for acceptance by MedCo and if accepted, a short period of "exclusivity" for the parties to settle definitive agreements.

**QUESTION 2(A):**  
**MARKS**

- 45            A.    **The Chairman of MedCo calls you (in your capacity as a highly regarded public company lawyer) and asks you to act on MedCo's behalf in respect of the foregoing.**

**He asks you to prepare a memorandum as to what MedCo should do in the context of the proposal, what are the potential issues, duties of the directors, and how best to proceed. He tells you that he expects that the board may be divided on how to proceed, but thinks a majority will support the proposal. He thinks Directors D and G will most likely be against the proposal and it is likely that Director F will follow them in opposition. He says he believes a majority of the board believes it is a good transaction for shareholders but are concerned about director's liability. He says he thinks if they proceed they want to ensure the deal gets done (advise on the process and measures that could help get this done) and are concerned about dissident directors and/or CC Hedge Fund attacking or trying to stop the same.**



**QUESTION 2(B):****MARKS**

27

- B. The NationalCo CEO contacts you and asks you to act on NationalCo's behalf. [Note – there is no conflict as to you as a lawyer as this is separate and apart from question 2(a) above.]**

**He wants you to review his options and potential structures to effect the business combination. While he wants to acquire MedCo, he has heard rumours of potential divisions amongst the board of MedCo and even amongst its shareholders. While he wants to acquire MedCo, he wants some comfort that the transaction will get done and wants your advice on how to minimize the risks of a failed deal. Additionally, he wants to ensure that he acquires 100% of MedCo. He does not want to be left in the position where he takes up 51% of MedCo and has a significant minority interest as he believes this would stop him from realizing the potential synergies between the two companies which is what permits him to pay the higher value.**

**END OF EXAMINATION**