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BY EMAIL

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
c/o Me Philippe Lebel
Corporate Secretary and Executive Director, Legal Affairs, Autorité des marchés financiers
Email: consultation-en-cours@lautorite.qc.ca
Financial and Consumer Services Commission of New Brunswick
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island
Nova Scotia Securities Commission
Office of the Superintendent of Securities, Service NL
Northwest Territories Office of the Superintendent of Securities
Office of the Yukon Superintendent of Securities
Nunavut Securities Office

Dear Sirs/Mesdames:

Re: CSA Notice and Request for Comment – Proposed Amendments and Changes to the Issuer Bid, Take-Over Bid and Beneficial Ownership Reporting Regimes

We are writing in response to the CSA Notice and Request for Comment – *Proposed Amendments and Changes to the Issuer Bid, Take-Over Bid and Beneficial Ownership Reporting Regimes* of May 14, 2026 (the "**Proposal**"). We commend the Canadian Securities Administrators (the "**CSA**") for its efforts to improve the issuer bid, take-over bid and early warning reporting regimes, including its efforts to reduce regulatory burden, clarify certain rules and provide supplemental guidance. Our comments are organized to follow the order in which the topics are set out in the Proposal.

1. NEW SELECTIVE REPURCHASE EXEMPTION

We support the proposed Selective Repurchase Exemption (as defined in the Proposal) to permit limited selective buybacks in order to selectively repurchase securities through privately negotiated transactions without the necessity to seek exemptive relief. The Selective Repurchase Exemption will reduce the cost, delay and uncertainty associated with seeking discretionary relief for transactions that do not raise material policy concerns.

1.1 5% Repurchase Limit Should be Increased and Expressly Confirmed as a Non-Exclusive Safe Harbour

We think the proposed repurchase limit of 5% of the outstanding securities of a class may be unduly restrictive. A 5% repurchase may not provide a meaningful exit opportunity for large securityholders who would still need to rely on market transactions in order to sell their residual blocks. It seems that the CSA has set the 5% repurchase limit in part on the basis of the ability of an issuer to repurchase an aggregate of 20% of a class of its securities in a given 12-month period by relying on a combination of other issuer bid exemptions (a number that perhaps not coincidentally aligns with the take-over bid threshold).[1] Repurchases made under these other bid exemptions, however, are largely market-driven events initiated by the issuer for capital allocation reasons, whereas a selective buyback requires the impetus of a large selling securityholder. In other words, the circumstances that lead to the exercise of the other bid exemptions may not overlap in any practical way with the circumstances leading to the use of the Selective Repurchase Exemption. Accordingly, we think it is more appropriate to view the Selective Repurchase Exemption as a tool that will be used in isolation from the other issuer bid exemptions, and not as simply one phase of an issuer-led repurchase program to which an annual aggregate cap should apply. With that in mind, the CSA should consider increasing the repurchase limit. Specifically, we think a higher threshold of 10% would make the exemption more effective in addressing the blockholder liquidity and market overhang concerns that underlie the Selective Repurchase Exemption, with the other conditions of the exemption providing sufficient safeguards.

At a minimum, the 5% repurchase limit should not operate to the exclusion of the continuing availability of the discretionary relief authority in section 6.1 of NI 62-104 – *Take-Over Bids and Issuer Bids* for selective repurchases that exceed 5% or otherwise do not satisfy the requisite conditions of the Selective Repurchase Exemption. We suggest that National Policy 62-203 – *Take-Over Bids and Issuer Bids* expressly confirm that issuers may continue to apply for relief under section 6.1 of NI 62-104 and that failure to satisfy the Selective Repurchase Exemption should not create a presumption that the proposed repurchase is prejudicial to securityholders or contrary to the public interest. The CSA could also consider a streamlined relief process where a repurchase transaction satisfies all of the conditions of the exemption other than the 5% limit, such as where the repurchase does not exceed 10% and would not materially affect control of the issuer.

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1 Proposal at Part C.1(c)(i): "In addition, we believe 5% to be an appropriate threshold having regard to the fact that, in the aggregate, an issuer could potentially repurchase up to 20% of the securities of a class in a given 12-month period by relying on a combination of the Selective Repurchase Exemption, the employee, officer, director, and consultant exemption in section 4.7 of NI 62-104, and the normal course issuer bid (NCIB) exemption in section 4.8 of NI 62-104 (the NCIB Exemption)".

1.2 The Reference Price Should be the Lower of Spot and 20-day Simple Average

We support determining the permitted consideration by reference to the closing price on the principal market on the date of the bid as compared to a post-announcement reference price. The closing price is objective, transparent and ascertainable when the parties agree to the transaction. A post-announcement reference price would introduce significant commercial and regulatory uncertainty, as the announcement of the repurchase may affect the market price of the subject issuer's securities in unanticipated ways and, if the market price were to decline following announcement, a post-announcement pricing requirement would materially alter the agreed economics of the repurchase transaction and make the utility of the exemption undesirable from a commercial perspective. However, there is a significant risk that the one-day closing price reference may allow for more opportunistic market timing than would be possible with a longer reference period, such as the 20-day simple average closing price concept used in the private agreement take-over bid exemption in subsection 4.2(1)(c) of NI 62-104. For this reason, we recommend that the reference price be the lower of the closing price and the 20-day simple average closing price of the shares.

1.3 Seller Identification Should Not be Required in All Circumstances

We do not think that the news release contemplated by the Selective Repurchase Exemption should be required to identify the selling securityholder in all circumstances. In our view, identification of the seller in the news release should only be required where the transaction would otherwise be disclosable by the selling securityholder, such as pursuant to insider or early warning reporting, where the transaction is disclosable as a related party transaction or where conflicts of interest could otherwise be of concern. In these circumstances identification may assist investors in assessing potential conflicts, or changes in control or voting influence over the issuer.

Where the seller is an arm's length party whose ownership and dispositions would not otherwise be publicly reportable, the information relevant to investors is principally the number and percentage of securities acquired, the selling price and the discount to market, the aggregate consideration, and the issuer's aggregate reliance on the exemption over the rolling 12-month period. In these cases, it should be sufficient to disclose that the seller is an arm's length party that is not a reporting insider or related party. The seller's identity adds little to investors' ability to evaluate those matters. Nor is mandatory public identification necessary to permit regulators to monitor compliance with the five person and five transaction limits; the issuer could instead be required to maintain records identifying each seller and to provide that information to securities regulatory authorities on request.

1.4 Clarify Drafting of the Rolling Limits

It appears that, as drafted, the Selective Repurchase Exemption does not actually impose the intended 5% limit or the five person and five transaction limits. Proposed subsection paragraphs 4.6.1(1)(a) and (b) refer to securities acquired by the issuer in reliance on the exemption during the "12 months immediately preceding the date of the bid". Read in conjunction with proposed section 2.20 of NP 62-203, which provides that the "date of the bid" is the date on which the offer to acquire is made, this language would exclude the securities to be acquired under the current bid, since the acquisition occurs after the date of the bid. We suggest that the limits be imposed using language similar to that used in subsections 4.1(a)-(b) and subsections 4.8(3)(a)-(b) of NI 62-104, which provide for restrictive limits that are inclusive of the current bid.

Moreover, we highlight that proposed subsection 4.6.1(a) confusingly refers to, in the case of convertible debt securities, both the “aggregate principal amount” and “securities of that class outstanding”, producing an ambiguity as to what the correct reference point is to measure the 5% limit in respect of the repurchasing of convertible debt securities. As well, we question whether the “aggregate principal amount” of convertible debt securities would be the appropriate measure against which to impose the 5% limit rather than the “as converted” amount of securities underlying the convertible instrument.

1.5 Capped Call Transactions

We also encourage the CSA to consider a repurchase exemption for capped call transactions that accompany convertible debt offerings. We understand that these transactions are fairly common in convertible debt offerings in the United States. We recommend that the CSA consider exempting from the issuer bid regime repurchases made pursuant to capped call transactions that are (i) conducted concurrently with an offering of convertible debt and (ii) where the purpose of the capped call transaction is to limit dilution to shareholders.

2. ENHANCED DISCLOSURE OF EQUITY EQUIVALENT DERIVATIVES IN SPECIFIED CIRCUMSTANCES

Given the absence of evidence of the abusive or otherwise problematic use of equity equivalent derivatives[2] by soliciting shareholders and bidders provided by the CSA, we do not think that the CSA has demonstrated that the need for the enhanced disclosure rule for such derivatives clearly outweighs the significant costs that would arise from the rule.[3] We are of the view that the CSA should not proceed with the enhanced disclosure rule at this time. Our arguments in support of this recommendation are set out in Parts 2.1 through 2.7. If the CSA decides to proceed with the Proposal nonetheless, then the rule should be revised to reflect the considerations set out in Part 2.8.

2.1 The CSA Should Not Amend the Early Warning Reporting Regime to Aggregate Beneficial Ownership and Economic Interests

We agree with the CSA’s proposal not to alter the early warning system to require aggregation of beneficial ownership and economic interests for the purposes of calculating the early warning reporting triggers. We agree with the CSA’s comments that “take-over bids and shareholder activism can serve as accountability mechanisms in our capital markets”.[4] As the CSA notes in National Policy 62-202 – *Take-Over Bids – Defensive Tactics*, “take-over bids play an important role in the economy by acting as

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[2] The CSA uses the term “equity equivalent derivatives” in the Proposal, which we understand is intended to encompass both physically-settled and cash-settled equity derivatives. Our concerns with the proposed enhanced disclosure rule are principally with the application of those rules to cash-settled derivatives.

[3] See Part 2.7 for a discussion of these costs.

[4] Proposal at Part 2(a).

a discipline on corporate management and as a means of reallocating economic resources to their best uses".[5] Similarly, a wide body of academic literature supports the view that activist investors play an important role in bringing a measure of accountability to underperforming companies and boards. It is now generally understood that, in light of the potentially significant costs of shareholder engagement, the ability of an activist to offset these costs through the use of non-reportable, cash-settled equity derivatives to build economic exposure to an issuer at an unaffected price is often a key part of its strategy, particularly in campaigns in respect of large-cap Canadian issuers. Accordingly, we agree with the CSA's decision not to propose real-time disclosure of accumulations of cash-settled derivatives during stake-building in anticipation of a bid or proxy solicitation.

However, notwithstanding the CSA's conclusion in the Proposal that "we do not think that it is appropriate to alter the early warning system to require aggregation of beneficial ownership and economic interests for the purposes of calculating the warning reporting triggers"[6], the CSA has proposed to do just that with the addition of subsection 5.1(6) to National Instrument 62-104, and without any explanation to justify this seeming contradiction.

In 2013 the CSA considered amending the early warning system to deem investors to have control or direction over voting or equity securities underlying derivative positions. Commentators objected to this proposal citing, among other reasons, that there is no

> clear evidence to suggest that derivatives are used in Canada as a means to accumulate substantial economic positions in issuers without public disclosure to exert influence over issuers or voting outcomes, and that the inclusion of derivatives would create a significant compliance burden that may render the early warning threshold calculation unduly complex and onerous for investors without providing relevant information to the market.[7]

The CSA thus concluded in 2014 "that it was not appropriate to proceed with the proposal to require the inclusion of equity equivalent derivatives for the purposes of determining whether an early warning reporting obligation had been triggered".[8] Without providing any new evidence of abuse, the CSA has proposed the addition of subsection 5.1(6) of NI 62-104, which would deem a soliciting shareholder that has an interest in a cash-settled derivative to have acquired and have control or direction over the reference securities underlying that derivative, but only for purposes of sections 5.2 and 5.4 of NI 62-104 and only during the pendency of a proxy contest. The CSA notes that "the purpose of this deeming provision is to require, by application of the early warning system, disclosure of changes in a soliciting securityholder's aggregate economic position" during the period of a proxy contest.[9] But this is not a justification for reversing the CSA's conclusion in 2014 – it is simply a statement that the scope of the reversal is limited. The deeming rule would impose early warning reporting obligations on a soliciting shareholder simply by virtue of its interest in cash-settled derivatives, when such disclosure would

5 National Policy 62-202 – *Take-Over Bids – Defensive Tactics*, at Part 1.1.

6 Proposal at Part 2(b)(i).

7 Proposal at Part 2(a).

8 Proposal at Part 2(a).

9 Proposal at Part 2(b)(ii)(A).

otherwise not be required in the absence of the proxy contest. If the CSA wishes to expand the concept of beneficial ownership for early warning reporting, then it must demonstrate a need for that expansion given its conclusion in 2014 that it was not appropriate to do so.

As we discuss below, market standard cash-settled derivatives by their terms do not confer on the investor beneficial ownership or voting power over the reference securities. The CSA's expansion of the concept of beneficial ownership to cash-settled derivatives creates an unwelcome and potentially dangerous fiction that cash-settled derivatives convey beneficial ownership over reference securities. If unchecked, and indeed endorsed, by the CSA, this fiction threatens to create a basis of further rulemaking that would erode the meaningful and necessary distinction between beneficial ownership of equity securities and investments in cash-settled equity derivatives.

Given the inherent danger in the legislative fiction of the deeming rule, we have strong concerns with its use, particularly because the purpose of the deeming rule – namely, to require real-time updates during a proxy contest of cash-settled derivatives and beneficial ownership of shares representing economic exposure in excess of 10% – could easily be achieved without adopting the controversial notion of deemed beneficial ownership for purposes of triggering early warning disclosure for a contested situation that is already public and for which there is information circular disclosure. For certainty, we do not agree with the CSA's assertion that there is a need for such disclosure, but we are focussed here on the use of an unwelcome fiction of beneficial ownership to trigger early warning reporting obligations. Early warning reports include disclosure requirements that seem, in the context of a proxy contest for which a dissident circular is already required, unnecessary and potentially problematic. For example, the disclosure of a soliciting shareholder's intentions in an early warning report during the pendency of a proxy contest could force premature disclosure, such as where the shareholder is in settlement negotiations with the issuer.

For the foregoing reasons, the CSA should adhere to its conclusion not to amend the early warning reporting regime to include cash-settled derivatives in the absence of evidence of abuse. The CSA should abandon the deeming rule proposed in subsection 5.1(6) of NI 62-104. If the CSA decides to nonetheless proceed with the deeming rule, we have set out in Part 2.8.3 reasons to revise the rule.

2.2 The CSA Has Proposed A Rule To Address Abuse Without Evidence of Any Misuse of Derivatives by Bidders or Activists

The CSA has proposed imposing additional disclosure requirements on bidders and activists on the premise that derivatives arrangements can be abusive to the capital markets but without providing any evidence that derivatives are being used by either group to evade beneficial ownership reporting obligations or to influence the outcome of a bid or proxy contest. In the absence of such evidence, the Proposal seeks to impose increased regulatory burden on stakeholders who carry out important functions in the Canadian capital markets (functions acknowledged by the CSA in the Proposal) without any demonstrated enhancement in investor protection. In this respect, the rule is arbitrary and misaligned with the objective of securities legislation to foster fair, efficient and competitive capital markets.

The CSA notes in the Proposal that it has considered whether the securities regulatory approach to equity equivalent derivatives "ought to be adjusted in light of", among other things, "concerns about possible misuse of equity equivalent derivatives".[10] The Proposal notes that derivatives "can potentially give rise to unique activities in the context of a take-over bid or matter subject to securityholder approval, including hidden ownership, empty tendering, empty voting and 'parking'". Yet, the CSA follows this statement with an acknowledgement that it does "not have evidence that derivatives are being used inappropriately or abusively with any regularity in our capital markets".[11] Speculation as to wrongdoing should not be allowed to overshadow a lack of empirical evidence of that abuse and provide a basis for rulemaking that would impose unmeasured costs.

The legal and commercial realities of cash-settled derivatives correspond with the CSA's lack of evidence of abuse. The industry documentation governing customary cash-settled derivatives, including a key reference guide published in 2002 by the International Swaps and Derivatives Association, are unequivocal in the restrictions and rights governing the relationship between the derivatives investor and the derivatives dealer. Customary cash-settled derivatives by their terms do not convey beneficial ownership or voting power over the securities referenced in the derivative. Moreover, such instruments do not permit investors to direct whether and how the derivatives dealer hedges its exposure. In order to hedge its exposure to the derivative, the dealer may (but is not obligated to) enter into related transactions with other market participants. These hedging transactions may include acquiring, or borrowing, the securities referenced in the swap by purchasing securities of the same class or other correlated assets, entering into opposite-way derivative contracts referencing the same class of securities or a related class of securities or netting the exposure against other assets in the derivative dealer's portfolio. Contractually, the investor has no ability to instruct the dealer whether to hedge its exposure or, if the dealer elects to hedge, how it does so. Those choices are solely within the purview of the dealer. Similarly, if the dealer does acquire the underlying shares, it is also uniformly accepted market practice that the investor has no ability to instruct the dealer as to how to vote those shares.[12] The same practices apply to derivatives transactions that the dealer may enter into to hedge its own exposure.

Although the legitimate use of cash-settled derivatives by shareholder activists in quiet stake-building is well-established, the use of equity derivatives by bidders is perhaps less understood. The Proposal recognizes that derivatives could be used for stake-building in anticipation of a bid but it does not provide any details on how derivatives are actually being used by bidders. For example, a bidder could invest in cash-settled derivatives in advance of launching a bid with the aim of using its economic exposure to the offeree issuer at an unaffected share price to recoup the costs of launching the offer should its bid lose to a topping offer from another acquiror. The Proposal does not address this

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10 Proposal at 2(b)(i).

11 Proposal at 2(b)(i).

12 See International Swaps and Derivatives Association, Inc., 2002 Equity Derivatives Definitions, Section 13.2 "Agreements and Acknowledgements regarding Hedging Activities," which, if incorporated into the confirmation evidencing a security-based swap transaction, constitutes an acknowledgement by both parties that the long party (i.e., in this case, the investor) has no ability to dictate whether the short party (i.e., in this case, the dealer) hedges its exposure to the swap transaction, and if such hedging does occur, the long party has no beneficial or other interest in the stock comprising that hedge, nor any ability to direct the voting of such stock.

potential legitimate use of derivatives. Instead, it offers conjecture about the use of derivatives by bidders to manipulate the price of the offeree issuer's securities. The Proposal provides:

> a prospective offeror repeatedly accumulating and/or disposing of substantial economic positions via equity equivalent derivatives could result in the counterparty hedging its position by repeatedly acquiring and/or disposing of the reference securities, which could have a distortive impact on the market price, particularly if the securities are relatively illiquid. A prospective bidder could also time market purchases of equity securities in coordination with their derivative arrangements in a manner that impugns compliance with the provisions of NI 62-104 that regulate pre-bid acquisitions.[13]

We emphasise that the CSA has provided no evidence of such uses of derivatives by bidders actually occurring. In light of the market standard terms of cash-settled derivatives, which provide the investor with no say over whether and how the dealer hedges its disclosure, we also emphasise that the CSA's conjecture in this respect is rather tenuous.

Notwithstanding the absence of any evidence of abuse, and in the face of market practice and clear contractual terms, the CSA's suspicion with the use of derivatives endures without any explanation. To our mind, the CSA's justification for the enhanced disclosure rule appears to be based solely on the decision by a panel of the Alberta Securities Commission (the "**ASC**") in *Re Bison Acquisition Corp.*[14] We do not think the *Bison* decision can justify the existence of the enhanced disclosure rule and its unmeasured costs. The ASC panel found that the bidder's use and disclosure of the swaps was clearly abusive of both the capital markets and the target's securityholders. Central to the panel's decision to exercise its public interest powers to sanction the bidder's use of the swaps was its conclusion that the bidder had "created a situation"[15] in which the swap counterparty's own commercial interest would likely align with the bidder's:

> BMO had an extensive commercial relationship with Brookfield. In these circumstances, we believed it highly unlikely that BMO would reject the Brookfield Offer and refuse to tender the Swap Shares. Accordingly, we were prepared to assume that all of BMO's deemed holding of Swap Shares would be tendered to the Brookfield Offer. In addressing our conclusion that Brookfield's conduct was clearly abusive, we considered that the public interest called for the protection of IPL shareholders (other than Brookfield and BMO) through modification of the statutory Minimum Tender Condition to neutralize the effect of all of the Swap Shares being tendered.[16]

This conclusion was reached notwithstanding that the panel was unable to conclude that BMO was a "captive and compliant counterparty"[17] and without evidence as to BMO's hedging activities in respect

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13 Proposal at 2(b)(ii)(A).

14 *Re Bison Acquisition Corp.*, 2021 ABASC 188 [*Bison*]. See Proposal at 2(a).

15 *Bison* at para 434.

16 *Bison* at para 515.

17 *Bison* at para 453.

of the swaps. Indeed, in the absence of such evidence, "[the panel was] left with evidence that swap dealers in BMO's position would be expected to hedge the IPL Swaps":

> Whether though deliberate obfuscation or carelessness in adducing its evidence, Brookfield has left us little choice in how to treat the Swap Shares. Accordingly, we determined that the fairest approach was to deem BMO to have hedged all 9.9% of the IPL Swaps by holding or acquiring Swap Shares representing 9.9% of the issued and outstanding IPL Shares.
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> We accepted the evidence that BMO would consider its own commercial interests in dealing with the Swap Shares. In the context of the Brookfield Offer, the choice was binary – either accept the offer and tender the Swap Shares, or reject the offer and decline to tender the Swap Shares.
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> BMO had an extensive commercial relationship with Brookfield. In these circumstances, we believed it highly unlikely that BMO would reject the Brookfield Offer and refuse to tender the Swap Shares.[18]

In the end, the ASC's determination was highly controversial because it was made in the absence of evidence of: how the derivatives dealer hedged the swap transaction; any arrangement or understanding between the bidder and dealer beyond their contractual agreement; and any exertion of pressure or of communication of commercial incentives or disincentives. *Bison* should not provide any basis for the enhanced disclosure rule. Indeed, the decision itself is evidence of the already existing powers of the securities regulators to sanction abusive conduct (should it so find)[19], and moreover the ASC's concerns regarding the bidder's disclosure of its economic position were addressed under existing disclosure rules. In light of the foregoing, we do not think *Bison* provides a compelling reason to propose the enhanced disclosure rule.

Apart from *Bison*, we are not aware of any securities commission decision that has sanctioned the use of derivatives by an activist in the context of a proxy solicitation or a bidder in the context of a take-over bid. For example, we are not aware of any public interest hearing in which it was found that derivatives were used by an activist or a bidder to park securities or seek an advantage through empty tendering/voting by a derivatives dealer. Given the paucity of information concerning the use of derivatives in these circumstances, including the absence of evidence in *Bison*, and given that there has been no subsequent regulatory hearing concerning the issue, we believe that the introduction of a rule to enhance disclosure of cash-settled derivatives is unfounded.

If the CSA wishes to avoid making new disclosure requirements that "could potentially have unintended impacts on bidders", we recommend that the CSA first engage in a study on the use of derivatives by bidders in consultation with capital market participants familiar with the matter. In the absence of doing so, the Proposal, by design, risks having "unintended impacts"[20] on bidders and the availability of take-over bids in the Canadian capital markets. In the light of the CSA's ongoing efforts to support the

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18 *Bison* at paras 513-515.

19 See Part 2.6.

20 Proposal at Part C.2(b)(ii).

competitiveness of the Canadian capital markets[21], any decision to impose new disclosure requirements should be made only after careful consideration of its impacts on take-over bids and the "important role" they play "in the economy by acting as a discipline on corporate management".[22]

The Proposal imposes a heightened disclosure burden on both activists and bidders and threatens to also impose additional defence burdens on them by encouraging issuers to bring forward new, speculative challenges.[23] In the absence of any evidence of abusive use of derivatives, the Proposal would impose burdens on important participants in the capital market without any corresponding, demonstrated enhancement in investor protection. In this respect, the enhanced disclosure rule is arbitrary and is misaligned with the objective of securities legislation to foster fair, efficient and competitive capital markets.

2.3 The Enhanced Disclosure Regime Will Create An Imbalance in Favour of Issuers and Parties Adverse to Bidders and Soliciting Securityholders

In light of the important role played by take-over bids and shareholder activism in our capital markets, together with the principles of investor protection and fair, efficient and competitive capital markets that animate Canadian securities legislation, we think it is important that the CSA remains committed to pursuing rule making that is open and even-handed as between bidders and activists, on the one hand, and issuers and management insiders on the other hand. The Proposal appears to be neither neutral nor even-handed. We are concerned that in practice management may seek to weaponize the enhanced disclosure rule as a defensive tool against shareholders and bidders and thereby impose a one-sided (i.e., disproportionate) burden on bidders and soliciting shareholders.

In the Proposal, the CSA remarks that "[t]here is currently an asymmetry of information concerning the aggregate economic position of a bidder or soliciting securityholder when a take-over bid or proxy solicitation for which an information circular is required to be sent, as applicable, is commenced". "Insiders of reporting issuers", the CSA notes in the Proposal:

> are required to disclose their aggregate economic positions in accordance with insider reporting obligations; however, there is no express comparable requirement for bidders or soliciting securityholders who are not insiders to disclose their aggregate economic positions in an information circular or otherwise.[24]

Although we disagree with the CSA's view that this informational asymmetry is a "wrong" that should be eradicated,[25] we are of the view that the proposed enhanced disclosure requirements would create a new informational asymmetry in favour of management insiders in the context of an unsolicited bid or

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21 See CSA Consultation Paper 51-406 – *Modernizing the Regulation of Public Companies*, dated July 16, 2026.

22 National Policy 62-202 – *Take-over Bids – Defensive Tactics* at Part 1.1(1).

23 For a discussion of the defence burden imposed on bidders and activists by the enhanced disclosure rule, see Part 2.3.

24 Proposal at 2(b)(ii).

25 See Part 2.5.

proxy contest. The existing insider reporting obligations in respect of “related financial instruments” do not require the level of disclosure contemplated by the proposed enhanced disclosure requirements, including information regarding the relationships between the insider and the derivatives dealer. The CSA’s concerns with conflicts of interests between bidders or soliciting shareholders, on the one hand, and derivative dealers, on the other hand, in theory also apply to relationships between issuers (and their executives) and derivatives dealers. In this respect, the proposed enhanced disclosure requirements depart from the principle of regulatory even-handedness by favouring management insiders against bidders and activists. This would not create a “more balanced transparency” and should therefore be avoided.[26]

The Proposal promotes a suspicion that bidders and soliciting shareholders, on the one hand, and derivatives dealers, on the other hand, may conspire to affect the outcome of a contested situation. This suspicion seems premised on an unverified regulatory belief that ordinary commercial relationships may render a large, sophisticated derivatives dealer “captive and compliant” to a bidder’s or activist’s interests. The CSA’s proposed disclosure rule, designed to invite inferences of extra-contractual and improper conduct through the disclosure of commercial relationships, threatens to create a one-sided regulatory environment in which issuers are effectively encouraged to attack the arrangements between activists (or bidders) and derivatives dealers, regardless of whether such challenges are warranted by the facts, bogging down engaged investors and bidders in costs, litigation and investigations – costs which go unidentified or measured in the Proposal. Buoyed by the CSA’s own endorsement of these suspicions, issuers will in effect be deputized to raise public interest concerns on behalf of the securities regulators. The enhanced disclosure rule thus makes a target out of bidders and activists without any empirical justification for doing so.

In the light of this potentially significant weaponization of disclosure against bidders and activists, we highlight the CSA’s remark in the Proposal that “[i]n general, concerns that could arise in connection with” hidden ownership, empty tendering, empty voting and parking are “substantially mitigated through compliance with the existing early warning system”.[27] If the CSA’s concerns of abuse are already substantially mitigated by the existing rules, the imposition of the enhanced disclosure obligation threatens to impose a disproportionate burden on bidders and activists relative to potential concerns and in the absence of any demonstrated enhancement in investor protection.

2.4 The Requirement to Name Counterparties May Have a Chilling Effect on the Cash-Settled Derivatives Market

The enhanced disclosure rule requires that a bidder or soliciting shareholder that is a party to a cash-settled derivative provide a description of any past or present relationship with the counterparty, including the name of the counterparty, “that, to a reasonable person, could be perceived to affect that counterparty’s decision to acquire, dispose of or vote securities of the company”. This broad and vague disclosure standard and naming of counterparties creates a significant risk that cash-settled derivatives dealers will not transact with bidders or activists for fear of being alleged to be participating in an

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26 Proposal at 2(b)(ii).

27 Proposal at 2(b)(i).

abusive scheme to affect the outcome of a contested situation simply on the basis of having been the short part to an ordinary course cash-settled derivative with a long party with whom they have an ordinary commercial relationship. This risk is all the more likely to manifest because large derivatives dealers are reputation-risk averse and will not wish to be drawn into public interest and other enforcement proceedings in respect of such contentious matters. This concern is only heightened by the *Bison* decision, which impugned the bidder's use of derivatives because of the existing commercial relationships between the bidder and the counterparty, notwithstanding the absence of any arrangement or understanding as to how the counterparty would hedge the derivative or vote hedged securities.

In light of the CSA's prior stance on the disclosure of the identities of derivatives counterparties, the CSA's proposal to now require such identification is curious. The CSA previously considered the question of counterparty disclosure when it amended the early warning reporting requirements in 2016 to add provisions requiring the disclosure of the material terms of a "related financial instrument". The CSA concluded at that time, and Item 6 of Form 62-103F1 currently states, that the naming of counterparties is expressly not required.[28] The CSA does not explain why it is departing from this earlier decision.

The proposed disclosure requirement therefore threatens to have a chilling effect on the willingness of counterparties to transact with activist shareholders and on the cash-settled derivatives market generally, which may also extend to reducing liquidity in the market generally and impacting price discovery. As the CSA is aware, activists' access to cash-settled derivatives is fundamental to the business of activism, which in turn is fundamental to the health of our capital markets. The risk presented by the enhanced disclosure rule to the availability of cash-settled derivatives to bidders and activists is thus significant, and unfortunately not addressed in the Proposal.

2.5 The Policy Rationales for the Enhanced Disclosure Rule are Not Compelling

In the Proposal, under the heading "Policy Rationale for Proposed Amendments and Proposed Changes" to the reporting of equity equivalent derivatives, the CSA notes that "[t]here is currently an asymmetry of information concerning the aggregate economic position of a bidder or soliciting securityholder when a take-over bid or proxy solicitation … is commenced".[29] The CSA goes on to state that:

> Insiders of reporting issuers are required to disclose their aggregate economic positions in accordance with insider reporting obligations; however, there is no express comparable requirement for bidders or soliciting securityholders who are not insiders to disclose their aggregate economic positions in an information circular or otherwise. Bidders and soliciting

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[28] See CSA Notice of Amendments to Early Warning System – *Amendments to MI 62-104 Take-Over Bids and Issuer Bids, NI 62-103 The Early Warning System and Related Take-Over Bid and Insider Reporting Issues, and Changes to NP 62-203 Take-Over Bids and Issuer Bids*, dated February 25, 2016: "The Amendments also include new instructions that the concept of 'material terms' is not intended to capture the identity of the counterparty or proprietary or commercially sensitive information".

[29] Proposal at 2(b)(ii)

securityholders who have an interest in equity equivalent derivatives will, themselves, be aware of the existence, terms, and duration of those agreements, as well as the possibility that the counterparties may have hedged their positions by acquiring the reference securities. In a take-over bid or contest for control, that information is material to a securityholder's understanding in order to:

> evaluate whether such interests are pertinent to the bidder or soliciting securityholder's influence and leverage in the determination of the matter;
>
> understand that any securities underlying equity equivalent derivatives held by the bidder or soliciting securityholder are subject to counterparty tendering and voting practices;
>
> and assess the viability of success of the bid or solicitation and potential alternative options.[30]

As the CSA is aware, information asymmetry is inherent in the capital markets and not all information asymmetries warrant intervention. The information asymmetry concerning a bidder's or soliciting shareholder's cash-settled derivatives position is a product of the bidder's or shareholder's own investment decisions following often considerable research and analysis. This asymmetry is not impermissible – unlike undisclosed material facts in the possession of a management insider, it is not information that would restrict the bidder or activist from trading in the securities – and we therefore question why the CSA has identified it as a basis, in and of itself, to require disclosure. An insider's obligation to disclose transactions in related financial instruments is tied to the fundamental principles underlying insider trading laws more generally, including to provide protection to investors from unfair or improper trading by insiders who are advantaged by their access to company information.[31] It is an unjustified leap in rulemaking to suggest that if insiders are required to disclose their interests under a regime designed to prevent them from trading on company information, then non-insider shareholders must be obliged to do the same, even though they do not have access to company information.

The CSA suggests that the enhanced disclosure relating to cash-settled derivatives is material to a securityholder in the context of a bid or proxy contest but we do not think this has been sufficiently demonstrated for two reasons. First, the CSA suggests that this information is material to a securityholder because it will enable the securityholder to evaluate whether such derivatives interests are pertinent to the bidder or soliciting shareholder's "influence and leverage in the determination of the matter". This rationale perpetuates the myth that cash-settled derivatives confer on the investor the ability to determine whether and how the counterparty hedges its exposure to the derivatives, or at the very least the belief that a bidder's or soliciting shareholder's holding of cash-settled derivatives will result in an equivalent number of shares being removed somehow from the market, thereby increasing the voting power of the soliciting shareholder and altering the likelihood of success of the bid or proxy contest. As we noted above, an investor in a cash-settled derivative has no contractual right to determine whether the counterparty hedges, nor can it dictate how the counterparty hedges if it so

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30 Proposal at 2(b)(ii).

31 *Kitmitto (Re)*, 2022 ONCMT 12 at para 155.

decides. Acquiring the reference securities is but only one of the myriad ways in which a counterparty can hedge its exposure to a cash-settled derivative. The CSA has not demonstrated how a bidder's or soliciting shareholder's investment in ordinary cash-settled derivatives translates into the bidder or shareholder gaining influence or leverage over the issuer, and consequently has not demonstrated how the disclosure of such information could be material to securityholders to evaluate a bidder's or shareholder's influence or leverage. In fact, the disclosure may undermine its own objectives, creating a distorted, embellished view of the shareholder's or bidder's influence.

Second, the other justifications for the enhanced disclosure rule – namely, that the information is material to securityholders because with it they will (i) understand that any securities underlying the cash-settled derivatives will be subject to counterparty tendering and voting practices and also (ii) assess the viability of success of the bid or solicitation – are premised on the same unfounded assertion that the bidder has control over the counterparty's hedging of its exposure to the derivatives.

In the absence of any evidence of abuse of cash-settled derivatives, we do not think that the CSA has demonstrated how the proposed disclosure is material to securityholders. If anything, the rule would seemingly encourage suspicion of the use of cash-settled derivatives as duplicitous fictions, and issuers would be encouraged to challenge such uses. In that respect we do not think the CSA has clearly made out its case that the enhanced disclosure rule will "support confidence in our capital markets", especially once reasonable alternatives to the rule are considered.[32]

2.6 The CSA Has Not Demonstrated How the Existing Rules are Insufficient to Address Concerns of Abuse

The CSA notes in the Proposal that "[i]n general, concerns that could arise in connection with" hidden ownership, empty tendering, empty voting and parking are "substantially mitigated through compliance with the existing early warning system".[33] The CSA has not demonstrated how the existing early warning system is unable to address the CSA's residual concerns with the use and disclosure of cash-settled derivatives.

Under the current rules, if an acquiror is required to file an early warning report on the basis of its beneficial ownership or control or direction over securities, then that person must also disclose in the report "the material terms of the related financial instrument and its impact on the acquiror's securityholdings" and the material terms of any other agreement, arrangement or understanding that has the effect of altering, directly or indirectly, the acquiror's economic exposure to the securities. Moreover, the CSA has included guidance in section 3.1 of NP 62-203 that an acquiror that is a party to an equity or similar derivative arrangement may under certain circumstances have deemed beneficial ownership of, or control or direction over, the securities held by the derivative counterparty. This could occur, the CSA provides expressly, where the acquiror is able, formally or informally, to obtain such securities from the counterparty or to direct the voting of the securities held by the counterparty.

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32 See Part 2.7.

33 Proposal at 2(b)(i).

Paired with this guidance is the decision of the Ontario Securities Commission ("**OSC**") in *Sears Canada Inc. et al*, in which a panel of the OSC issued a warning about the abusive use of swap transactions:

> We wish to underscore that there might well be situations, in the context of a take-over bid, where the use of swaps to "park securities" in a deliberate effort to avoid reporting obligations under the Act and for the purpose of affecting an outstanding offer could constitute abusive conduct sufficient to engage the Commission's public interest jurisdiction.[34]

In *Bison*, the ASC panel noted that the bidder and its legal advisors "would have been aware of" the OSC's remarks in *Sears*.[35] Indeed, the panel in *Bison* did not think it required new regulation in order to make its decision.

If a bidder or soliciting shareholder invested in cash-settled derivatives to evade reporting obligations or to induce the derivatives dealer to vote or tender in line with the shareholders' interests, then such arrangement should be caught by the existing concept of beneficial ownership. The CSA has not demonstrated why the existing regime is insufficient to address these concerns; to the contrary, it has noted that its concerns with the abusive use of derivatives "are substantially mitigated" by the current regime. In this respect, we recommend that the CSA consider the recent Corporation Finance Interpretations issued by the staff of the U.S. Securities and Exchange Commission (the "**SEC**") on July 9, 2026, which illustrate how the construct of beneficial ownership can be developed purposively to capture the use of derivatives trading to evade reporting obligations or to otherwise influence the control or voting of securities.[36]

2.7 There are Reasonable Alternatives That Have Not Been Considered by the CSA

Securities legislation requires the notice of any proposed rule change to include a discussion of all alternatives to the proposed rule that were considered by the regulator and the reasons for not proposing the adoption of the alternatives considered.[37]

The CSA has not considered the alternative of simply enforcing the existing beneficial ownership reporting obligations, and has simply noted that the existing regime "substantially mitigates" concerns of abuse. As we note in Part 2.6, the CSA has not demonstrated why the enforcement of the existing rules are not sufficient to address its concerns regarding abusive use of cash-settled derivatives.

Another alternative to the proposed enhanced disclosure rule would be to require bidders and soliciting shareholders to confidentially file their derivatives positions with the securities regulators at the time of making a bid or solicitation. The regulators could then assess whether there are concerns with non-

34 *Sears Canada Inc. et al.*, 2006 ONSEC 13, at para 111.

35 *Bison* at para 443.

36 SEC Division of Corporation Finance, Exchange Act Sections 13(d) and 13(g) and Regulation 13D-G Beneficial Ownership Reporting, Corporation Finance Interpretations (updated July 9, 2026) (available here).

37 For example, see 143.2(2) of the *Securities Act* (Ontario).

compliance or abuse. This would leave any residual concerns that the CSA has with the use of derivatives to be dealt with as a matter of enforcement without inviting issuers to bring challenges as a defensive matter of course. In keeping with this objection, the filings should not be subject to public access.[38]

Each of these alternatives mitigates against the costs associated with the enhanced disclosure rule – namely, the cost of imposing a greater defence burden on activists and bidders (see Part 2.3) and the cost of the chilling effect on the derivatives market (Part 2.4). The latter costs are potentially of a systemic nature, as they account for a reduction in activism as a result of the restriction in the availability of cash-settled derivatives, which in turn will have a detrimental effect on the public markets through the diminishment of a significant "accountability mechanism" in our capital markets.[39] The Proposal does not identify those costs, nor does it account for the inadequacy of the alternatives proposed in this Part 2.7. Section 143.2(2) of the *Securities Act* (Ontario) requires the notice of any proposed rule to include a qualitative and quantitative analysis of the anticipated costs and benefits of the proposed rule. We do not think this requirement has been sufficiently satisfied in order to proceed with the enhanced disclosure rule.

2.8 Revisions to the Enhanced Disclosure Rule

Although we are of the view that the CSA has not demonstrated a compelling reason for the enhanced disclosure rule and should therefore abandon it, if the CSA nonetheless proceeds with the rule then it should be revised to reflect the considerations outlined in this Part 2.8.

2.8.1 The Rule Should Provide for a Safe Harbour for Cash-Settled Derivatives

The rule should be revised to include a safe harbour for cash-settled derivatives transactions with dealers on the customary terms of a cash-settled derivative, which convey no beneficial ownership or voting power over the underlying securities and provide the investor with no power to control or direct whether or how the dealer hedges its exposure. We do not think the CSA has demonstrated a concern regarding the use of ordinary cash-settled derivatives that is not already addressed by existing beneficial ownership rules. A safe harbour for such instruments would mitigate against the unintended costs associated with the enhanced disclosure rule – namely, the cost of imposing a greater defence burden on activists and bidders (see Part 2.3) and the cost of the chilling effect on the derivatives market through the disclosure of the identity of dealers (Part 2.4). This safe harbour would also provide certainty to bidders, activists and the market more generally on the use of derivatives as part of a legitimate pre-bid or pre-solicitation trading strategy. The provision of this level of certainty should be a primary objective of the Proposal.

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38 For example, see 140(2) of the *Securities Act* (Ontario).

39 Proposal at 2(b)(ii).

2.8.2 The CSA's Public Interest Guidance Should be Clarified

The Proposal includes the addition of guidance in National Policy 62-203 and in Companion Policy 51-102CP – *Continuous Disclosure Obligations* that "[t]he disclosure or use of equity equivalent derivatives in a manner that is abusive of the capital markets may engage securities regulatory authorities' public interest jurisdiction". In the case of a bid, the CSA notes that it may have public interest concerns where:

> investors do not clearly and accurately differentiate between beneficial ownership of securities and economic interests in their public disclosures and instead express them as an aggregate economic interest, which can generate confusion in the market. We may also have public interest concerns where equity equivalent derivatives are used in a deliberate effort to accumulate substantial economic positions in an issuer if the holder seeks to influence the outcome of a potential take-over bid by either exerting pressure on a counterparty or communicating expectations of commercial incentives or disincentives for the counterparty or its affiliates dependent on how or when the counterparty acquires, disposes of or votes securities of the offeree issuer.[40]

This guidance does not resolve the confusion created by *Bison*. It does not address the facts of that decision, facts which are arguably relevant to future bidders and activists; there was no evidence in *Bison* of either the exertion of pressure by the bidder on the counterparty or any communication of expectations of commercial incentives or disincentives. Moreover, concerns regarding the bidder's disclosure of its economic position were addressed under existing disclosure rules. The panel's public interest decision in *Bison* was grounded in its conclusion that the commercial relationships between the bidder and counterparty created a conflict of interest that influenced the counterparty's decision to tender to the bid. The panel cited no evidence of misconduct; misconduct was simply inferred from the relationship. The omission of any discussion in the guidance of the facts in *Bison* has added to the uncertainty regarding the regulation of derivatives in bids and proxy contests and fostered the circumstances in which jurisdictions may approach the issue differently, undermining the predictability of the regime.

Moreover, it is entirely unclear in what circumstances there will be public interest concerns where investors do not differentiate in their press release or other public disclosure between beneficial ownership and economic interest. Will this be considered abusive at all times; or only during a bid or solicitation; or during a public engagement with a company that precedes a bid or solicitation? This uncertainty may compel bidders and activists to disclose their economic positions earlier than they would otherwise be required to under the early warning reporting rules, which would undermine the

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40 In the case of a solicitation, the Proposal offers analogous guidance: "For example, we may have public interest concerns where investors do not clearly and accurately differentiate between beneficial ownership of securities and economic interests in their public disclosures and instead express them as an aggregate economic interest, which can generate confusion in the market. We may also have public interest concerns where equity equivalent derivatives are used in a deliberate effort to accumulate substantial economic positions in an issuer if the holder seeks to influence the outcome of a matter subject to securityholder approval by either exerting pressure on a counterparty or communicating expectations of commercial incentives or disincentives for the counterparty or its affiliates dependent on how or when the counterparty acquires, disposes of or votes securities of the issuer".

CSA's position that it is "not proposing to require real-time disclosure of accumulations of equity equivalent derivatives during stake-building in anticipation of a bid or proxy solicitation".[41]

As well, it is unclear in what circumstances the securities regulators' public interests concern that a shareholder with a substantial economic position has influenced the outcome of a vote or bid will arise. Will such misconduct be inferred simply on the basis of the existence of a long-standing commercial relationship between the investor and the dealer? Or will it be inferred from the fact that the counterparty actually holds the reference securities as a hedge, or happens to vote the reference securities in a manner that is aligned with the shareholder? Will the exertion of pressure by the shareholder be enough to trigger the public interest concern even if the pressure does not result in a commitment, agreement or understanding to vote or tender the securities?

The CSA should clarify its position in respect of the foregoing uncertainties and strive to make its rule changes additive to the predictability of the take-over bid and solicitation regimes:

> In its decision (*Aurora Cannabis Inc. (Re)*), the Commission emphasized the importance of predictability of take-over bid regulation, in order to ensure that investors and market participants know with reasonable certainty what rules govern the bid environment. We repeat and emphasize that objective in this context as well.[42]

As it stands, the guidance is too open-ended and, if left as such, threatens to open the door wide to speculative or otherwise unsubstantiated allegations of abuse, adding to the arsenal available to target issuers to defend against bidders and activists.

We also urge the CSA to consider the types of commercial relationships that may exist between derivatives dealers and bidders or activists and to refine the factors relevant to a dealer's independence. For example, professional investors can have standing, long-term contractual relationships with derivative dealers to facilitate ease of execution. These types of contractual relationships should not give rise to a negative presumption that the dealer's voting decision will be affected. More fundamentally, ordinary commercial relationships should not give rise to a presumption of conflict. As discussed above, this can have a potentially chilling effect on the derivatives market.

We also have concerns with the remedies that could be made available to securities regulatory authorities exercising their public interest jurisdiction to sanction the use of cash-settled derivatives absent evidence of beneficial ownership of the reference securities. The bid regime already regulates the use of collateral agreements by bidders, excludes the shares held by joint actors from the minimum tender condition and excludes from the minority vote to approve a second-step business combination those shares held by any recipient of a collateral benefit. In *Bison*, the Commission panel excluded the "Swap Shares" from the minimum tender condition. In so doing, the panel appeared to suggest that there exist relationships that do not rise to the level of acting jointly or in concert, but which are still sufficiently problematic (in the panel's view) to warrant the exclusion of a party's shares for purposes of the minimum tender condition. This constitutes a departure from established law that could have

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41 Proposal at Part C.2(b)(ii)(A).

42 *ESW Capital, LLC (Re)*, 2021 ONSEC 7 at para 80 (internal citations omitted).

significant and far-reaching implications if it results in joint-actor type consequences being visited upon parties who, although not joint actors, are considered insufficiently arm's length of one another, or whose commercial interest are aligned with each other or whose interests are misaligned with those of the minority shareholders. Extending beyond the categories of joint acting, collateral agreements and collateral benefits, as was done in *Bison* to exclude the Swap Shares from the minimum tender, in effect represents a lowering of these standards for the sole purpose of targeting derivative transactions where a dealer may be acting legitimately and legally in its own commercial interest but where such interest does not align with the balance of minority investors. This imposes a new threshold for voting and tendering exclusion without any express legislation. In so doing, it is unwarranted and threatens to create uncertainty and could produce differing results in its application across the various jurisdictions.

2.8.3 Deemed Acquisition Rule in Subsection 5.1(6) of NI 62-104 is Unwarranted

In Part 2.1 we set out our reasons for why the CSA should abandon its proposal to add subsection 5.1(6) to NI 62-104, which would "deem"[43] a soliciting shareholder to have acquired a security if the shareholder "is a counterparty to an equity equivalent derivative of the security". If the CSA nonetheless maintains the deeming rule in subsection 5.1(6), the CSA should include an express exclusion of the moratorium provisions in subsection 5.3(1) of NI 62-104 where the deeming rule would trigger an early warning filing obligation under sections 5.2 and 5.4, like the CSA has proposed with subsection 5.3(3) of NI 62-104. As well, where a soliciting securityholder is required to file an early warning report under subsection 5.1(6), would that securityholder have to file an exit report under the current subsection 5.2(3) at the time that the securityholder is no longer deemed to own or control the security under 5.1(6)(b)? We suggest that the CSA clarify this uncertainty.

We also suggest that the CSA include clarifying guidance on how a soliciting securityholder should translate its interest in an equity equivalent derivative into beneficial ownership for purposes of early warning reporting. For example, if the derivative provides a rate of return of less than 100% of the rate of return of the reference security, should the soliciting securityholder nonetheless count the full security in calculating its beneficial ownership for purposes of subsection 5.1(6)(b)?

We note that the proposed language of subsection 5.1(6) does not actually use the word "deem" but rather "has acquired" and "has, control or direction", while "deemed" is used in the proposed subsections 5.1(3)-(5). What is the reason for the difference in language across the new subsections? As well, the reference to the soliciting securityholder as the "counterparty" in subsection 5.1(6) appears to be inconsistent with the use of the term "counterparty" throughout the balance of the proposed rules to refer to the counterparty to the bidder or soliciting securityholder (i.e., the derivatives dealer). We suggest this language be revised to avoid any confusion in the application of the rule.

We do not agree that a shareholder should be required to make a disclosure of changes in its beneficial ownership and economic interests during a proxy contest if it is not otherwise within the early warning reporting regime and therefore we recommend that the CSA abandon this concept. However, if the CSA does go down this path it should consider the availability of a more reasonable, more tailored, less intrusive alternative, namely, simply a requirement that the shareholder update its proxy circular

43 Proposal at Part C.2(b)(ii)(A).

disclosure by way of press release for material changes in its ownership and economic interests during the pendency of the proxy contest, without introducing the fiction of deemed beneficial ownership.

2.8.4 The "Reasonable Person" Standard is Too Broad

The Proposal includes a requirement for a bidder or soliciting securityholder that has, or in the case of a bid has had within the 6-month period ending on the date of the bid or solicitation, an interest in a related financial instrument (or any other agreement that has the effect of altering the bidder's or securityholder's economic exposure to the issuer) to disclose any past or present relationship with the counterparty to the instrument "that, to a reasonable person, could be perceived to affect that counterparty's decision to acquire, dispose of or vote securities of" the offeree issuer or company, as the case may be.

We question whether "reasonable person" is the appropriate objective standard as compared to a "reasonable investor", the latter being a disclosure standard referenced throughout securities legislation and regulatory guidance which is, in principle, more tailored to the circumstances than the officious bystander standard evoked by "reasonable person". Regardless, however, of which standard is used, we think it should be refined to produce greater certainty and objectivity in the application of the test. The use of "could" (as in, "could be perceived to affect") is broader in scope than "would" (as in, "would be perceived to affect"), with the latter suggesting that something is more likely than not.[44] We note that the linkage of a "reasonable person" standard to a "would" standard is already used in securities legislation and encourage the CSA to adopt this narrower standard.[45] The standard could also be appropriately refined by further narrowing the standard to a "reasonable person aware of all relevant facts".[46]

The provision of guidance in respect of the types of relationships that may be of concern to securities regulators is welcome but is overly broad. In the context of bids, the Proposal provides:

> Such relationships may include instances where the counterparty or an affiliate of the counterparty has a material financial interest in the offeror or any joint actor, has a material financial interest in future business involving the offeror or any joint actor, acts as a financial advisor to the offeror or any joint actor, or acts as a lead or co-lead lender or manager of a lending syndicate in connection with the bid. A relationship with a counterparty, or an affiliate of

44 For example, in the context of defining "material adverse effect" in merger agreements, practitioners negotiate the use of the "could" or "would" standard (as in, a material adverse effect is an event that "would reasonably be expected" or "could reasonably be expected" to have a material adverse impact on the target company), with "could" generally understood to be a much lower standard. See Paul Blyschak, *Private M&A in Canada: Transactions and Litigation*, at para 4.05. Also see, Robert T. Miller, "A New Theory of Material Adverse Effects", *The Business* Lawyer, Summer 2021, Vol 76, No 3, at 761.

45 For example, see National Instrument 41-101 – *General Prospectus Requirements*, definition of "junior issuer", Part 3A.4(2) and Part 5.8.

46 For example, see National Instrument 43-101 – *Standards of Disclosure for Mineral Projects*, Section 1.5 (Independence): "In this Instrument, a qualified person is independent of an issuer if there is no circumstance that, in the opinion of a reasonable person aware of all relevant facts, could interfere with the qualified person's judgment regarding the preparation of the technical report" (emphasis added).

> that counterparty, that terminated more than 24 months before a bid was commenced generally would not have to be disclosed on the basis that it could not be perceived to affect the counterparty's decision to acquire, dispose of or vote securities of the offeree issuer.[47]

It may be relevant that a counterparty has a material financial interest in the bidder, but we question the appropriateness of the other examples offered in the guidance. For example, as discussed above, for reasons of efficiency, many professional investors have relationships with a handful of swaps dealers with whom they have in place negotiated standard documentation that can be reused, transaction to transaction, without further negotiation. It is probable that both the investor and the swaps dealer would expect to deal again with each other in the future. Would that relationship give rise to a concern that the swaps dealer "has a material financial interests in future business" with the investor? This type of uncertainty can be expected to be disruptive to the swaps market. In addition, we question whether a counterparty acting as a lead or co-lead lender of a lending syndicate is, in the absence of a materiality threshold, a relevant relationship. The CSA should clarify that the mere existence of a creditor-debtor relationship does not necessarily give rise to concern, and that ultimately the test is whether, in the circumstances, the relationship is one that, to a reasonable person, could be perceived to affect that counterparty's decision to tender or vote securities (as such standard is amended to reflect the comments above). We also question the appropriateness of including financial advisors in this list. The presumption, consistent with *Bison*, that the swaps dealer might be corruptible because its affiliated investment dealer is a financial advisor in the relevant transaction ignores both the reality of firewalls between the bank and its affiliated dealer (which the securities laws do respect in other contexts) and the general reputation of Canadian banks for integrity and compliance.

2.8.5 The Enhanced Disclosure Rules Should Not Apply to Exempt Solicitations

We agree with the CSA's proposal not to extend the enhanced disclosure rules for related financial instruments to the solicitation of proxies by a soliciting securityholder pursuant to the "public broadcast" exemption under 9.2(4) of National Instrument 51-102. This exemption, like its corporate analogue, was implemented to ensure that shareholders would be free to communicate without engaging the otherwise broadly framed proxy solicitation rules.[48] This exemption is not a solicitation tool so much as it is a safe harbour to ensure shareholder communication is not inhibited. Accordingly, to the extent the CSA is concerned with the use and disclosure of related financial instruments by soliciting securityholders in formal proxy contests, we think it would be inappropriate, as a matter of policy, if such concerns were applied to the use of the broadcast exemption from the solicitation rules.

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47 In the case of a solicitation, the Proposal offers analogous guidance: "Such relationships may include instances where a counterparty or an affiliate of the counterparty has a material financial interest in the person or company, has a material financial interest in future business involving the person or company, acts as a financial advisor to the person or company, or acts as a lead or co-lead lender or manager of a lending syndicate in connection with the solicitation. A relationship with a counterparty, or an affiliate of that counterparty, that terminated more than 24 months before a solicitation was commenced generally would not have to be disclosed on the basis that it could not be perceived to affect the counterparty's decision to acquire, dispose of or vote securities of the company."

48 Jack J. Quinn, *Canada Business Corporations Manual,* 2ed, at 12.42.

The Proposal has added a requirement that a securityholder that is relying on the public broadcast exemption must disclose its beneficial ownership and control or direction over voting securities of the subject issuer. This disclosure requirement would require ownership disclosure in circumstances where the securityholder would not be subject to early warning reporting. In view of the purpose of the solicitation exemptions to facilitate shareholder communication, we do not agree that a securityholder's use of such an exemption should, in and of itself, mandate the disclosure of its ownership interest.

2.8.6 Six-Month Look-Back Disclosure

The requirement to include in a bid circular a six-month history of trading in cash-settled derivatives in the context of a bid should be abandoned because it is potentially needlessly burdensome, especially in the context of an unsolicited bid, where timelines are usually tight, and also, importantly, because it does not serve the purpose suggested in the Proposal. The Proposal states that the purpose of the six-month look-back disclosure requirement, which is analogous to the existing Item 7 of Form 62-104F1 requiring disclosure of trading in securities of the offeree issuer, is "to provide enhanced transparency of trading activities that may have improperly impacted the price of the offeree issuer's securities in the period preceding a take-over bid".[49] "For example", the Proposal provides:

> a prospective offeror repeatedly accumulating and/or disposing of substantial economic positions via equity equivalent derivatives could result in the counterparty hedging its position by repeatedly acquiring and/or disposing of the reference securities, which could have a distortive impact on the market price, particularly if the securities are relatively illiquid. A prospective bidder could also time market purchases of equity securities in coordination with their derivative arrangements in a manner that impugns compliance with the provisions of NI 62-104 that regulate pre-bid acquisitions.[50]

In the absence of evidence of the use of derivatives in this manner we believe the six-month look-back imposes a burden on bidders without proportionate, meaningful investor protection. To begin with, a bidder would not ordinarily have control over or insight into the hedging practices of a counterparty. Moreover, it is not clear to us how the buying and selling of reference securities by a dealer hedging its swap position would necessarily lower the offeree issuer's share price, which presumably would be the objective of the bidder in the lead up to the bid. This connection seems too tenuous to justify a six-month look-back rule, particularly where that rule could be used to impugn a bidder's trading practices and thereby obstruct a bid. If anything, the buying and selling of securities may provide liquidity, undercutting the attraction of a bid for securities that are otherwise relatively illiquid. As well, securities laws already contain anti-fraud provisions designed to capture market manipulation. Existing investigative and enforcement powers would be better suited to examine the trading practices of a bidder, should there be concerns.

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49 Proposal at Part C. 2(b)(ii)(A).

50 Proposal at Part C. 2(b)(ii)(A), footnote 16.

The CSA's concern that a bidder could time market purchases in coordination with its derivative arrangements "in a manner that impugns compliance" with pre-bid integration rules is unclear. The CSA should provide a more detailed articulation of its concern in this regard.

2.8.7 Shareholder Rights Plans Should Not Be Used To Restrict Economic Exposure Through Derivatives

We have seen a few examples in the Canadian marketplace of shareholder rights plans (SRPs) that adopt an atypical and expansive definition of beneficial ownership to deem the acquiror to own reference securities underlying cash-settled derivatives. We think the proposed deeming rule in subsection 5.1(6) of NI 62-104 and the promotion of suspicion of the use of cash-settled derivatives to influence contested situations, will encourage the use of SRPs to restrict shareholders from entering into cash-settled derivatives. The Proposal should include guidance on the CSA's expectations regarding the use of SRPs by issuers to restrict the use of cash-settled derivatives for stake-building activities by bidders and activists, consistent with the general trend in regulatory decisions towards striking down SRP provisions that undermine the predictability of the regime as it applies to share accumulations.[51]

2.8.8 Definition of "Related Financial Instrument"

The proposed enhanced disclosure rule relies on the term "related financial instrument" as defined in National Instrument 55-104 – *Insider Reporting Requirements and Exemptions*. NI 55-104 bifurcates the definition of "related financial instrument", providing its own definition for certain jurisdictions and deferring to the definitions of local securities legislation in the case of other jurisdictions, such as Ontario. The Ontario definition of "related financial instrument", for example, is tied to the holder thereof being an "insider". Of course, a bidder or soliciting shareholder is not necessarily an insider, so it is possible that in some circumstances, depending on the applicable jurisdiction, the concept of "related financial instrument" as used for bidders and soliciting shareholders under NI 62-104 or NI 51-102 will not apply if the bidder or soliciting shareholder is not an insider. We assume that this is not the CSA's intention.

3. DISCLOSURE AND TIMING REQUIREMENTS FOR ACQUIRORS' PLANS OR FUTURE INTENTIONS

The CSA's proposed guidance in section 3.3 of NP 62-203 to clarify its expectations regarding disclosure of the plans or future intentions of an acquiror in EWR filings is problematically vague and may encourage harmful, premature disclosure.

The CSA expects "that, when an acquiror or any joint actor takes significant steps with respect to a particular transaction or event, the acquiror will assess whether those actions, individually or taken together, constitute a change in the plans or future intentions".[52] The CSA then notes that:

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51 *Riot Platforms, Inc. v Bitfarms Ltd.*, 2024 ONCMT 27 at paras 72-74 and 84.

52 Proposal at Annex D, Part 3.3 (emphasis added).

> We generally consider that a change in plans or future intentions will occur at the latest upon the execution of a definitive agreement to enter into a transaction, the commencement of a take-over bid, the public announcement of a proxy solicitation or a similar event, as applicable. However, a change in plans or future intentions may, in some instances, occur at an earlier stage of a particular transaction or a particular event. For example, if an acquiror or any joint actor has taken irrevocable steps to effect a potential transaction, or publicly announced information or facts that differ from the plans or future intentions that were previously disclosed, then those changes generally would trigger further disclosure under the early warning requirements.[53]

In the context of an M&A transaction, the guidance implies that the "irrevocable steps" that are of concern to the CSA are steps that occur prior to the signing of the definitive transaction agreement, with the definitive transaction agreement being the "latest" possible event to trigger a change in plans or future intentions. This guidance is unclear and thus unworkable. We do not understand in practice what event or happening could occur prior to the entering into of a definitive agreement that would constitute an "irrevocable step" to effect the transaction. Even the definitive agreement itself is arguably not irrevocable – it is a contract that is typically subject to conditions precedent, "fiduciary outs" and termination provisions. Because of this lack of clarity, the guidance fails to actually guide market participants and instead engenders new uncertainty.

Moreover, what constitutes a "significant step" in the process leading to the signing of a definitive M&A agreement? The CSA has provided no commentary in this respect, further miring its proposed guidance in section 3.3 of NP 62-203 in obscurity. Is the target's hiring of a financial advisor significant, or the signing of a non-disclosure agreement between the target and a potential acquiror? What about the negotiation of a term sheet or the merger agreement, or an agreement on the deal price? Not one of these events (any of which may be "significant") in the lead up to the signing of a typical M&A agreement would be "irrevocable". By tying the two concepts together, however, the guidance invites market participants and regulators to conflate "significant steps" with "irrevocable steps", creating the potential for inconsistencies in the application of the guidance as market participants question whether a significant step (whatever that may be) amounts to an irrevocable step (whatever that may be). This lack of clarity is unworkable.

The guidance would also undo well-established principles and practices regarding the disclosure of M&A deals. Issuers are obligated to provide timely disclosure of "material changes", not "material facts". In the recent decision of *Lundin Mining Corp. v Markowich*, the Supreme Court of Canada (the "**SCC**") affirmed the long-standing principle that negotiations and internal deliberations, without more, will not usually amount to a "material change" in respect of the issuer, even if they are material.[54] The SCC also referred to the OSC's oft-cited decision in *AiT Advanced Information Technologies Corporation et al.*, in which the OSC ruled that, when assessing whether a proposed M&A transaction constitutes a material change, there must be "sufficient commitment from both parties of the transaction to determine whether a 'decision to implement' the transaction has taken place".[55] The CSA is aware that disclosure of M&A negotiations before a "sufficient commitment" from the parties has been reached – that is,

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53 Proposal at Annex D, Part 3.3 (emphasis added).

54 *Lundin Mining Corp.* v Markowich, 2025 SCC 39 at para 59 [*Lundin*].

55 *Lundin* at para 60, citing *AiT Advanced Technologies Corporation et al., Re.*, 2008 ONSEC 3 at para 223 [*AiT*].

before a material change has occurred – can be premature and harmful to investors and the capital markets.[56] This is precisely why securities laws require timely disclosure of only material changes: "An issuer is obliged to disclose material changes. That enhances the fairness of the market. The definition of material change acts as a brake on premature and undesirable disclosure".[57] Premature disclosure of merger negotiations is not only harmful to investors and the capital markets because it prompts trading on incomplete, conditional and speculative information, but also because it can affect the share price of the negotiating parties, eroding the transaction economics that were based on the unaffected share price.

The existing, clear guidance for issuers regarding the disclosure of M&A negotiations stands in marked contrast to the vague instructions provided by the CSA to potential acquirors (and selling shareholders) in the proposed guidance in section 3.3 of NP 62-203. In effect, the CSA's guidance for early warning disclosure, with its opaque concepts of "significant steps" and "irrevocable steps" that may occur prior to the signing of a definitive agreement, threatens to subject potential acquirors (and selling shareholders) to a different, lower disclosure standard for merger negotiations than that applicable to issuers under existing law, dangerously courting "premature and undesirable" disclosure of proposed transactions. This inconsistency in disclosure obligations is simply unworkable and undermines the legislature's deliberate statutory framework for timely disclosure.

It is unclear precisely what the CSA's concerns are with existing market practices regarding early warning reporting. Ultimately, the CSA's guidance for early warning reporting cannot be conceived in isolation from the larger disclosure regime or divorced from considerations of premature disclosure and the practical reality of disclosure that would simply kill deals before they are even announced. We strongly encourage the CSA to abandon the proposed guidance set out in section 3.3 of NP 62-203.

4. EARLY WARNING REPORTING TRIGGERS AND THRESHOLDS

4.1 Deemed Acquisitions – Securities of A Previously Non-Reporting Issuer

Although we do not object to the CSA's reasons for proposing the addition of subsection 5.1(3) to NI 62-104, we think that in practice the rule creates an unnecessary and unfair compliance trap for securityholders who may in some cases not be aware of or monitoring the events giving rise to an issuer becoming a reporting issuer, such as the closing of an initial public offering. In this sense, Subsection 5.1(3) places an onerous filing burden on shareholders who may not be aware of their filing obligations and who may also not have all of the information in hand in a timely manner to comply with the deadline for filing an early warning report. The CSA should address these concerns in the Proposal. An example of how such concerns may be addressed is to require that, if the issuer has knowledge of such shareholders, the issuer must notify such shareholders of it becoming a reporting issuer and of

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56 *AiT* at para 251: "[Peter] Dey testified that a board can't wait until completion of the agreement is guaranteed (for example, when any remaining conditions to closing specified in a definitive agreement have been satisfied). There will be outstanding conditions at the time disclosure is usually made. The board must assess whether there is a reasonable prospect that those conditions will be satisfied so that the transaction can be completed. Disclosure before there is a reasonable prospect of the conditions being satisfied would be premature."

57 *YBM Magnex International Inc., Re.,* 26 OSCB 5285 at paras 29 and 518 (emphasis added).

the shareholders' obligation to file an early warning report. The rule should also provide for a reasonable period of time in which the shareholder must comply with its early warning report filing obligation upon receiving the required notice from the issuer.

4.2 Deemed Acquisitions – Securities of Joint Actors

The CSA has proposed the addition of subsection 5.1(4) to NI 62-104 to deem each person acting jointly or in concert with other persons in respect of an issuer to have acquired the securities of the issuer that are beneficially owned, or over which control or direction is exercised, by such other persons when they began acting jointly or in concert with each other. The CSA's stated reasons for this deeming rule is that one of the policy rationales for the early warning system – namely, to alert the market of the identity of holders of 10% or more a class of an issuer's outstanding voting or equity securities – is equally engaged when two or more securityholders who are acting jointly or in concert collectively hold 10% of a class of an issuer's outstanding voting or equity securities even where each is individually below the 10% threshold. In the same vein, the CSA has also proposed adding subsection 5.1(5) to NI 62-104 to deem each person that ceases acting jointly or in concert with other persons to have disposed of the subject securities held by such other persons when they cease acting jointly or in concert with each other.

A joint actor allegation, whether made against shareholders or an unsolicited acquiror, is a tool available to incumbent management seeking to compel disclosure, enforce reporting compliance or strategically bog down unsolicited engagement. Whether parties are acting jointly or in concert is a question of fact, one which is often mired in complex, nuanced fact patterns that make joint actor determinations an exercise in expert judgment rather than an objective science. Of course, there can be objective markers of the formation of a joint actor relationship, such as a formal, written joint actor agreement entered into between two shareholders, but these situations do not make up the body of regulatory decisions on the topic. The opaque art of joint actor determinations, and the threat of unfounded allegations that it inherently encourages, means that subsections 5.1(4) and (5) will have an undesirable chilling effect on shareholder communications because these new provisions would create an invisible tripwire that will cause shareholders to stumble into even more scenarios in which they can be alleged to be acting jointly or in concert, whether or not that is in fact the case. Although the new deeming rule may have the benefit of uncovering some joint actor relationships that would have otherwise not been disclosed (or disclosed late), it must be weighed against the costs of discouraging shareholder communication – something that the Proposal does not do.

The interpretation of the early warning reporting rules put forward by the British Columbia Securities Commission ("**BCSC**") panel in *NorthWest Copper Corp.* (namely, that no filing is required by joint actors upon the formation of a joint actor relationship until, as a result of a subsequent acquisition by one of the joint actors, the joint actors collectively hold 10% or more of the relevant securities) provides the benefit of an objective marker – the acquisition of securities – to intermediate between the often murky point at which a joint actor group is formed and the subsequent early warning filing obligation and thus to forestall the making of unwarranted allegations of early warning violations.[58] The BCSC

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58 *NorthWest Copper Corp.*, 2023 BCSECCOM 602 [*NorthWest Copper*]

panel in *NorthWest Copper* was itself concerned with the possibility that the misapplication of the joint actor rules could frustrate salutary shareholder dialogue:

> We find that the bar for a finding that parties are acting jointly or in concert is appropriately set relatively high, as is reflected in the presumption and the deeming provision set out in section 1.9(1) of NI 62-104. Disclosure of shareholder blocks is important, but so is the free flow of information and opinion among shareholders of a public company. We conclude that it is better to insist on sufficiently clear, convincing and cogent evidence that parties are acting jointly or in concert and take the risk that by doing so, some groups will fly under the radar, than to allow reliance on speculation to create a climate that stifles discussion among shareholders.[59]

The panel's determination that early warning filing requirements are not triggered on the formation of a group may be derived from the same, justified concern with stifling shareholder dialogue through uncertainty and the overstretching of the joint actor rules. As the BCSC panel did in *NorthWest Copper*, the CSA is required to weigh the benefit of enlarging the circumstances in which joint actor groups must be disclosed (i.e., the CSA's seeming antipathy to any joint actor group "flying under the radar") against the cost of stifling shareholder discussion through that very enlargement. The CSA has not identified this cost in the Proposal, nor has it measured it.

Moreover, the CSA has not indicated in the Proposal whether it has considered any alternatives to the deeming rule in subsections 5.1(4) and (5) of NI 62-104. As a reasonable alternative to this deeming rule, the CSA could instead require some objective measure tied to the formation of a joint actor group in order to trigger the early warning requirements. This may include the execution by the parties of a written joint actor agreement or the public announcement by the parties of their group status. A deeming rule triggered on the happening of these events will bring a helpful degree of certainty that shareholders will not be further mired in baseless joint actor allegations simply for talking.

4.3 Early Warning Reporting Calculations

4.3.1 Partially-Diluted Calculations

The CSA's proposed guidance in section 3.7 of NP 62-203 states that "early warning reporting calculations are to be done on a partially diluted basis". It then goes on to provide for instances in which it may be appropriate to perform such calculations on a fully-diluted basis. We support the calculation of early warning thresholds on a partially-diluted basis and believe such calculation reflects the appropriate underlying principles and goals of the early warning regime and current market practice.

Notwithstanding this guidance in favour of partial dilution calculations, the CSA's proposed guidance in Section 3.6 of NP 62-203 provides illustrative examples of early warning reporting calculations that are done on a non-diluted basis (or on an "incomplete" partially-diluted basis). The calculations include in the denominator only those convertible securities that result in the acquiror having deemed beneficial ownership of the underlying voting or equity security and exclude the other convertible securities that were added to the numerator in the calculation. There is no technical basis for distinguishing between

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59 *NorthWest Copper* at para 204.

the convertible securities in this manner and it does not fulfill any policy purpose of the early warning regime of which we are aware.

We are strongly of the view that early warning reporting calculations, including any illustrative examples provided by the CSA, should be amended to reflect “full” partially-diluted ownership calculations, in a manner consistent with the proposed guidance in section 3.7 of NP 62-203 – that is, if convertible securities are included in the numerator of the calculation, then the securities underlying such convertibles should be included in the denominator. Any calculation performed on a non-diluted basis (or that does not reflect a “full” partial dilution calculation) would be inappropriate as it would reflect an ownership percentage that could never be attained and would be divorced from any possible real-world ownership figures. This would result in disclosure that is both inaccurate and potentially misleading to investors.

4.3.2 Lack of Clarity in the Illustrative Examples

It appears to us that the illustrative examples the CSA has provided in section 3.6 of NP 62-203 do not clearly illustrate how early warning reporting calculations are to be done, including because the guidance appears to conflate the concepts of “acquiror’s securities” and “securityholding percentage” in a manner that renders the guidance more confusing than clarifying.

First, the illustrative examples appear to demonstrate the application of the definition of “acquiror’s securities”, a concept that is relevant for determining if and when a person has triggered an initial filing obligation under subsection 5.2(1) of NI 62-104. However, the examples expressly focus on determining the numerator and denominator for purposes of calculating the newly added concept of “securityholding percentage”, which is a concept that is not used in, and thus not relevant to the calculations required by, subsection 5.2(1). Indeed, the CSA has noted that it has added the term “securityholding percentage” to “clarify that the requirement to file a subsequent EWR is to be assessed on the basis of a 2% or more change in the acquiror’s post-event percentage ownership of the outstanding securities of the particular class relative to the percentage ownership that the acquiror reported in its most recent EWR”.[60] The CSA should amend its guidance and illustrative examples to demonstrate clearly how to calculate the initial early warning reporting threshold trigger under subsection 5.2(1) of NI 62-104. We think this level of clarity is critical to ensuring consistency and accuracy in early warning reporting in our capital markets. For example, in the case of an acquiror that has no “acquiror’s securities”, how does the acquiror calculate exactly how it has triggered the 10% threshold in subsection 5.2(1) when it acquires, in the same transaction, both outstanding equity securities and convertible securities that are not exercisable within 60 days. Is this ownership position to be calculated as a securityholding percentage? If so, then 5.2(1) should be revised to reflect that.

Second, the examples do not, to our mind, clearly adhere to the definition of “securityholding percentage”, and this appears to be the case because the examples focus on illustrating the calculation of “acquiror’s securities”, not “securityholding percentage”. The CSA has defined securityholding percentage as follows:

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60 Proposal at Part C.4(c).

> "securityholding percentage" means a person's beneficial ownership of, or control or direction over, a class of voting or equity securities of a reporting issuer, or securities convertible into the class of voting or equity securities, expressed as a percentage of the outstanding securities of the class, calculated in accordance with applicable securities legislation listed in Appendix D of NI 62-103 *The Early Warning System and Related Take- Over Bid and Insider Reporting Issues*.

Securityholding percentage by its definition includes all convertible securities held by an acquiror in the relevant calculations regardless of the time period in which such securities may be converted. In our view, the definition of "securityholding percentage" does not require that convertible securities not exercisable within 60 days be excluded from the numerator of an acquiror's securityholding percentage <u>at any time</u>, which is contrary to the CSA's application of the definition in the examples. Put differently, the construct of the proposed new subsection 5.2(2)(a) seems to work purposively only if securityholding percentage is conceived of as a store or aggregator of transactions in securities of the relevant class and securities convertible into the relevant class to determine whether the 2% trigger in subsection 5.2(2)(a) has been hit.

However, the CSA's calculations suggest, contrary to the definition of securityholding percentage, that convertible securities that are not exercisable in 60 days are only relevant to determining the 2% trigger in subsection 5.2(2)(a) at the time such securities are acquired, and not thereafter. We question whether this is the CSA's intention because, if that is the case, an early warning reporter (for example, an acquiror that has beneficial ownership of 11% of the outstanding common shares of an issuer) could gradually acquire securities convertible into the issued and outstanding securities of the issuer (that are not exercisable within 60 days) in <2% increments until the acquiror has an aggregate ~19% convertible interest in the issuer without triggering a subsequent early warning report.[61] If the CSA intended that the gradual acquisition of a large, aggregated stake in convertible securities should go unreported in the foregoing manner, then it is not clear why such undisclosable stake building would be permissible under an "early warning" reporting regime that is otherwise focussed on the acquisition of convertible securities that are not exercisable within 60 days.

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[61] This conclusion is reached by repeating the same calculation methodology applied in the illustrative examples. Assume IssuerCo has 1000 common shares issued and outstanding and that, on day one, AcquireCo acquires beneficial ownership over 110 outstanding common shares of IssuerCo, resulting in beneficial ownership, and a securityholding percentage, of 11% of the common shares (110/1000). AcquireCo files an initial early warning report pursuant to 5.2(1) of NI 62-104 to reflect this acquisition and its 11% securityholding percentage. On day 10, AcquireCo then acquires 15 warrants in IssuerCo that are not exercisable for 365 days. In order to determine if this acquisition of warrants triggers an early warning filing obligation under the new subsection 5.2(2)(a) of NI 62-104, we must, according to the CSA's guidance, calculate AcquireCo's securityholding percentage by adding the 15 warrants and the 110 common shares to the numerator and setting the denominator as IssuerCo's outstanding 1000 common shares (or 125/1000). This would result in a securityholding percentage of 12.5%, which would be a change of only 1.5% from AcquireCo's initial report and not trigger a filing obligation under subsection 5.2(2)(a). On day 13, AcquireCo purchases another 15 warrants not exercisable within 60 days. Applying the CSA's guidance in the illustrative examples, AcquireCo's securityholding percentage upon completing this latest transaction would again be 12.5% (or 125/1000), as AcquireCo would not include in the numerator the 15 warrants that it acquired on day 10 because such warrants are not exerciseable within 60 days. Again, no reporting obligation would be triggered under the new section 5.2(2)(a). AcquireCo could repeatedly execute similar transactions in warrants until it acquired convertible securities convertible into common shares well in excess of the 2% trigger in subsection 5.2(2)(a)(ii).

In light of the foregoing, we suggest the CSA consider taking this opportunity to make the calculation of the reporting triggers clear for, and consistent across, the initial, subsequent and exit reports (regardless of the approach taken). There does not appear to be a principled reason why the initial early warning trigger threshold in subsection 5.2(1) of NI 62-104 should be calculated using a construct of “acquiror’s securities” while the remainder of the thresholds in the early warning regime are calculated using an acquiror’s “securityholding percentage” (which includes all convertible securities held by an acquiror in the relevant calculations regardless of the time period in which such securities may be converted). Any revisions to subsection 5.2(1) in light of the foregoing should, of course, be appropriately reflected in the other provisions of the early warning reporting rules that use “acquiror’s securities” with the same intent and effect, such as subsections 5.2(4) and 5.4(1) of NI 62-104.

4.3.3 Subsequent EWR: 2% Threshold

The CSA proposal does not address the ambiguity that currently exists in subsection 5.2(2)(a) of NI 62-104 and that remains in the proposed changes.

As drafted, subsection 5.2(a) may be interpreted to bifurcate the test between “securities” and “securities convertible into the class of securities…”. The drafting can be interpreted to suggest that each threshold is tested separately and one of the two tests must be satisfied in order to trigger a subsequent early warning filing. By way of example, if common shares of an issuer were acquired that resulted in an acquiror’s securityholding percentage increasing by 1.99% and convertible securities were subsequently acquired that resulted in an acquiror’s securityholding percentage in an issuer increasing by an additional 1.99%, then the subsequent EWR filing trigger would not be satisfied, notwithstanding that the acquiror’s securityholding percentage had increased by almost 4%.

If the CSA’s intent is for this test to function as set out in the example above, then we suggest providing guidance in NP 62-103 or amending subsection 5.2(2)(a) of NI 62-104 to clearly provide for this interpretation and result. If, instead, the intent is to have the acquisition of securities or convertible securities result, in the aggregate, in a 2% or greater change in securityholding percentage, then subsection 5.2(2)(a) of NI 62-104 should be revised to make this intent and result clear in order to ensure that market practice is consistent.

4.3.4 Exit Reports

Inconsistency with Insider Reporting

The proposed amendments to subsection 5.2(3) of NI 62-104 would materially alter the existing “exit report” test as a result of the trigger being changed from the existing “beneficial ownership” test to a 10% “securityholding percentage”, with the result that a person can exit the insider reporting regime before the person exits the early warning regime (based on the definition of “securityholding percentage” proposed by the CSA). We wanted to highlight this change as it will create a significant disparity between an acquiror’s obligations under the early warning regime and the insider reporting regime (where no material difference exists today).

We wanted to ensure that the CSA clearly intended for this change to be made, particularly given that these changes were not highlighted in the CSA's commentary in respect of the proposed amendments. If these proposed changes were intentional, then it would be helpful for market participants to understand why this change was proposed and the policy and/or practical reasons for this change.

Proposed Language is Ambiguous

The CSA has proposed replacing subsection 5.2(3) of NI 62-104 with language that, as drafted, serves no purpose and thus creates uncertainty. The new language provides that a news release and report must be filed if "…the acquiror's securityholding percentage, as reported in the most recent report required to be filed by the acquiror under this section, decreases to less than 10%". We think that this should be revised to refer to "… the acquiror's securityholding percentage in the class of securities that was the subject of the most recent report required to be filed by the acquiror under this section decreases to less than 10%".

As drafted, the securityholding percentage "as reported in the most recent report" may be interpreted as a static reference to such report. As a result, the only way to trigger the exit report would be for such report (which must be triggered by subsection 5.2(2)) to report a securityholding percentage that is less than 10%. This would result in subsection 5.2(3) being redundant and serving no purpose.

4.3.5 Definition of "Securityholding Percentage" in NI 62-103 and Lack of Clarity With Issuer Action Rules

The proposed definition of "securityholding percentage" is inconsistent with the definition currently contained in NI 62-103 and, by extension, National Instrument 55-104. The NI 62-103 definition is relevant not just to filers of alternative monthly reports (AMR) but is also relevant to early warning filers because the "Issuer Actions" provisions set out in Part 6 of NI 62-103 apply to both types of filers, as the CSA makes clear with its proposed guidance for issuer actions in Part 3.9 of NP 62-203. Accordingly, an inconsistency between the definitions in both instruments is unworkable and, for that reason, undermines the CSA's efforts to better align the early warning system to the construct of securityholding percentage that is used in Part 6 of NI 62-103.

We think that the language in Part 6.1 of NI 62-103 could be revised to further clarify its application to early warning filers (i.e., non-AMR filers). Both subsections 6.1(1) and (2) of NI 62-103 provide that an entity is exempt from the early warning filing obligations in the event of an issuer action. However, if the issuer action has not resulted in a change in material fact in the entity's report or the action has not resulted in a decrease in the entity's securityholding percentage below 10%, then the entity would not be subject to such obligations because it has not acquired or disposed, or ceased to have control or direction over, any securities within the meaning of either subsection 5.2(1) or 5.2(2)(a) NI 62-104. In this respect, the exemptions provided in subsections 6.1(1) and (2) are unnecessary, except to the extent they apply to filings under subsections 5.2(b) or 5.2(3) of NI 62-104. The CSA should consider making this clear in Part 6.1 of NI 62-103.

The confusion continues in subsection 6.1(3) of NI 62-103. First, subsection 6.1(3) is worded such that it applies where an entity is relying on the exemption in subsection 6.1(1) or (2) of NI 62-103. However, as we noted above, an entity is not relying on either of those exemptions where it has a hit a filing trigger under subsection 5.2(1) or 5.2(2)(a) of NI 62-104. It is thus not clear that 6.1(3) in fact applies to early warning obligations triggered under those subsections of NI 62-104. Second, subsection 6.1(3) does not actually conform with the guidance provided in the proposed Part 3.9 of NP 62-203. Subsection 6.1(3) provides that an entity must file an early warning obligation if, following any issuer action, it undertakes "any transaction that changes the securityholding percentage of the entity". In the second example offered in Part 3.9 of NP 62-203[62], the acquiror's securityholding percentage has in fact changed following the transaction that occurs subsequent to the issuer action, it just has not changed by 2% or more from the previously disclosed securityholding percentage. In this context, the CSA's guidance runs counter to the express wording in subsection 6.1(3). Now consider the wording in another context. What would happen if an issuer action (say a repurchase) causes an entity's securityholding percentage to increase from 8% to 11%. As currently drafted, subsection 6.1(3) would require that entity to file an initial early warning report upon its next acquisition of shares, even if the acquisition is for only one share – there is a logic to this result. The CSA's proposed guidance, however, which conflicts with the express wording of subsection 6.1(3), is based on changes in the entity's last reported securityholding percentage – the guidance simply does not apply in this context, creating uncertainty as to the CSA's expectations because the CSA's guidance conflicts with the actual wording of 6.1(3). The CSA should resolve these inconsistencies. It simply is not clear what the CSA's objectives are.

We assume similar concerns are applicable to the AMR regime but have not considered these. We would be happy to make further submissions in this respect if the CSA would like.

4.3.6 "Blocker" Provisions

It is unclear to us whether the CSA intends the early warning amendments to more clearly capture "blocker" provisions than the current reporting rules do. A blocker provision is a restriction contained in a convertible security that prevents the holder from converting the security into shares if the holder would, after the conversion, hold in aggregate more than, for example, 9.9% of the shares of an issuer, whether through securities acquired on conversion or in combination with securities already owned. We have observed in practice the taking of the position that a convertible security containing a 9.9% blocker would not trigger an early warning filing – even if, without the blocker, the convertible security is convertible into more than 10% of the shares of the issuer – because the instrument could never be used to obtain beneficial ownership or control or direction over securities that would cross an early warning threshold. (Practically, in many cases the holder would convert a portion of the convertible security into shares, sell down, and then convert the balance.) The point we wish to make is that the

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62 "A person has, and has reported, a 12% ownership position in a class of voting or equity securities of a reporting issuer. The reporting issuer undertakes a private placement of securities of the class, in which the person does not participate, that causes the person's securityholding percentage to decrease to 11%. Pursuant to section 6.1 of NI 62-103, the person is not required to issue and file a news release or file a report at the time of the issuer action. Subsequent to the issuer action, the person acquires securities that amount to 2% of the class, increasing the person's securityholding percentage to 13%. As the person's securityholding percentage (i.e., 13%) represents only a 1% change in percentage ownership from the 12% that it most recently reported, the person is not required to issue and file a news release or file a report in accordance with section 5.2 of the Instrument."

CSA's views on these types of provisions is simply unclear: if the CSA intends to address the use of blocker provisions, it should do so clearly in the instrument or the companion policy.

5. EXPANSION OF THE NON-REPORTING ISSUER EXEMPTIONS FROM THE TAKE-OVER BID AND ISSUER BID REGIMES

We support the CSA's proposal to expand the categories of persons excluded from the Maximum Securityholder Condition for purposes of the NRI TOB Exemption and NRI Issuer Bid Exemption (each as defined in the Proposal) (the "**Qualified Person Exclusion**"). However, we are of the view that the proposed expansion of the Qualified Person Exclusion is not broad enough.

In recent years, we have observed a significant increase in the number of non-reporting issuers whose securities are not traded on published markets anywhere in the world ("**Non-Listed Private Companies**") that raise capital from a large number of sophisticated investors on a prospectus-exempt basis. We have also seen an increasing variety of corporate organizational structures being implemented for commercial, tax and (non-securities) regulatory reasons, in respect of which issuers wish to allow equity participation by persons associated with the business, or their family members, who do not qualify for the Qualified Person Exclusion, even with the expansion currently proposed by the CSA. We provide examples of these persons below. The potential application of the formal take-over bid and issuer bid regimes in such instances can be, in our view, unnecessarily burdensome and restrictive.

We are of the view that the Qualified Person Exclusion should be expanded beyond the CSA's proposed list of current and former employees, officers, directors and consultants of the issuer or its affiliate and their respective spouses. At a minimum, the Qualified Person Exclusion should include any person, entity or account that would be a "permitted assign" of the employee, officer, director or consultant within the meaning of section 2.22 of National Instrument 45-106 – *Prospectus Exemptions*, including trustees, administrators, holding entities and registered accounts. We would also suggest that the CSA broaden the scope of the Qualified Person Exclusion to cover the following scenarios that we have encountered:

- Close relatives of the employee, officer, director or consultant, such as children, parents and siblings and their descendants (and family trusts, TFSAs, RRSPs, RRIFs and RESPs for their benefit), in addition to spouses.[63]

- Employee or management investment entities, where the principal activity of such entity is to hold securities of the employer entity or its affiliate. In many cases, these investment entities are established for tax or other reasons to aggregate ownership interests of employees, officers,

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63 Although beyond the scope of this comment letter, we would encourage the CSA to consider a similar expansion of the "permitted assign" definition in section 2.22 of NI 45-106.

directors or consultants but are not affiliates of the employer entity (i.e., not controlled or under common control through the ownership of securities).[64]

- Entities that are, or are affiliates of, management services organizations that provide long-term consulting or contracting services to the employer entity. This is a common structure in the healthcare or other professional services industries where the entity providing the professional services needs to be owned or controlled by one or more licenced individuals and therefore the management services entity would typically not be an affiliate of the employer entity. Equity securities in the management services organization or its affiliate will often be issued in connection with the acquisition of a professional practice and as investment or compensation opportunities to employees or consultants of the practice.[65]

In view of the increase in Non-Listed Private Companies, we urge the CSA to study whether the Maximum Securityholder Condition should be eliminated or increased significantly above the current 50 securityholder limit. For example, in some cases investors in a Non-Listed Private Company have made their investment decisions based on the terms of the constating documents and applicable shareholder, partnership or other investor agreements in respect of the Non-Listed Private Company (collectively, "**Governing Agreements**"). Governing Agreements for Non-Listed Private Companies typically address transfer restrictions and liquidity rights, such as drag-along rights, tag-along rights, put and call rights and rights of first offer or refusal, which are often inconsistent or incompatible with the requirements of the formal take-over bid and issuer bid regimes. It is not clear to us why the securityholders of Non-Listed Private Companies with such Governing Agreements require the protections afforded by the take-over bid and issuer bid regimes. We invite the CSA to consider whether Non-Listed Private Companies and their securityholders, who have invested in the securities pursuant to applicable prospectus exemptions, should be free to agree to transfer and liquidity regimes that do not require formal take-over bids or issuer bids with respect to those securities.

We also note that Non-Listed Private Companies that do not meet the Maximum Securityholder Condition and their significant securityholders can be in a worse position with respect to some of the bid rules than are listed reporting issuers and their significant securityholders because they cannot access exemptions available with respect to listed reporting issuers, such as the normal course purchase exemption from the take-over bid requirements, the normal course issuer bid exemption and the proposed new Selective Repurchase Exemption.

Although the foregoing considerations raise the question of whether the CSA should study the merit of eliminating the Maximum Securityholder Condition, the CSA should at least consider meaningfully

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64 See *CB Employees Corporation (Re),* 2011 ABASC 499 for an example of exemptive relief for this type of investment vehicle in the context of the employee, executive officer and consultant prospectus exemption in NI 45-106 and the issuer bid rules in NI 62-104. Although beyond the scope of this comment letter, we would encourage the CSA to consider a similar expansion of the "related entity" definition in section 2.22 of NI 45-106.

65 See *IPH Limited and Smart & Biggar LLP/Smart & Biggar S.E.N.C.R.L. (Re),* (2023) OSCB 46/201 for an example of exemptive relief for this type of investment vehicle in the context of the employee, executive officer and consultant prospectus exemption in NI 45-106. Although beyond the scope of this comment letter, we would encourage the CSA to consider a similar expansion of the "related entity" definition in section 2.22 of NI 45-106.

increasing the Maximum Securityholder Condition. Although there is no “magic number” of securityholders at which we believe the formal take-over bid and issuer bid rules should apply to Non-Listed Private Companies, we note that under U.S. securities laws the application of the bid rules are bifurcated between registered and non-registered issuers, which are differentiated on the basis of the number of shareholders.

6. Bid Conditions

The CSA has proposed adding Part 2.4.1 to NP 62-203, which would provide public interest guidance regarding bid conditions:

> While the Instrument does not expressly regulate conditions to take-over bids, except with respect to financing arrangements, there may be circumstances where bid conditions raise public interest concerns. That may be the case if a take-over bid includes conditions that require an offeree issuer to take actions for the benefit of the offeror where a refusal to do so would entitle the offeror not to consummate its bid, or where a bid contains conditions that grant an offeror unqualified judgment or discretion to determine whether the conditions have been satisfied, thereby providing the offeror with a degree of optionality that calls into question the credibility of the bid.

We are concerned that Part 2.4.1 creates confusion regarding the public interest considerations for bid conditions, not clarity. For one, the suggestion that a bid condition that requires “an offeree issuer to take actions” may raise public interest considerations strikes us as too broad, as there are good faith conditions that nonetheless require the offeree issuer to take some form of action to facilitate completion of the bid, such as due diligence access or obtaining third-party consents. The guidance suggests that a credible bid is one that imposes no obligations on an offeree issuer. We do not think this reflective of the spirit of the take-over bid regime and may contribute to defensive efforts that could impair the ability of shareholders to freely make a fully informed decision whether to tender to a bid.

As to the CSA’s concerns regarding a bidder’s discretion to determine whether the bid conditions have been satisfied, we note that the CSA previously published guidance that does not impugn a bidder’s use of its “unqualified discretion” but instead communicates securities regulators’ expectations that discretion will be exercised reasonably in all cases, a concept that largely adheres to the legal doctrine that contractual discretion must be exercised in good faith[66]:

> In CSA staff’s view, the offeror’s conditions to a formal take-over bid should be bona fide, and should be interpreted in good faith and on a reasonable basis. If they are not, staff may take the position that reliance on a condition undermines the statutory requirement that shares be taken up under an offer where the terms and conditions have been satisfied. Where the failure of a condition is being relied upon to vary a bid or where a condition is expressed such that the offeror has sole judgment or discretion as to whether the condition has been satisfied, staff may intervene where necessary to ensure that such judgment or discretion is exercised in a reasonable manner. This is irrespective of whether it is stated in the bid circular that the offeror has sole discretion as to whether conditions are satisfied. In CSA staff’s view, an offeror reserving

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66 *Wastech Services Ltd. v Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7.

> "sole discretion" with respect to a condition should act honestly, in good faith and on reasonable grounds such that the exercise of such discretion is not capricious or arbitrary.[67]

More importantly, we believe the regulation of bid conditions by the CSA is both unnecessary and potentially harmful to the capital markets. Reasons for this include:

- A highly conditional bid is not inherently "bad" as long as the conditions are clearly identified and explained. This can be regulated through disclosure requirements and real-time review. In fact, a conditional bid may well motivate competing bidders to enter the fray at a higher price knowing that the initial bid is likely to fail due to its conditionality.

- In our experience, the market provides powerful discipline on the choice of bid conditions. Most bidders will be very cautious about the degree of conditionality to which their bid is subject, knowing that the target, the analysts, the proxy advisors and competing bidders will immediately seek to discredit the bid on the basis of its conditionality.

- Take-over bids are acknowledged to play an important role in the capital markets as a check on underperforming companies and management. Regulatory changes over the last decade have made hostile bids more difficult and have no doubt contributed in some measure to the decline in the number of hostile bids in Canada. Further regulating this rare event by limiting the conditions on which such bids can be made will inevitably lead to a further reduction in the number of hostile bids, to the detriment of the capital markets, as bid conditions serve the purpose of limiting the bidder's risk.

- We note that this very issue was considered in the *Report to the Committee to Review the Provisions of the Securities Act (Ontario) Relating to Take-Over Bids and Issuer Bids*. That report concluded that:

  > [t]he Draft does not restrict the nature or type of conditions that an offeror may attach to its bid. While this may lead to an offeror attaching specific or unique conditions to its take-over bid, we believe that offeree security holders and the marketplace will recognize arbitrary or one-sided conditions as such and respond accordingly. The marketplace will determine the type of conditions that an offeror will be able to place on its bid.[68]

  We would suggest that nothing has happened in the intervening decades to undermine the wisdom of this recommendation. In fact, as noted above, we have in fact seen a decline in the number of hostile bids.

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67 CSA Staff Notice 62-305 – *Varying the Terms of Take-Over Bids*.

68 Gordon Coleman et al., *Report of the Committee to Review the Provisions of the Securities Act (Ontario) Relating to Take-Over Bids and Issuer Bids*, September 23, 1983 at 8.15.

In light of the volume of proposed changes in the Proposal, we are concerned that this proposed guidance would benefit from more dedicated focus from market participants regarding the concerns of the CSA and how best to address them than is available at this time. Moreover, we are not aware of an instance in which the securities regulators have been unable to address bid conditions that are not *bona fide* and which are abusive to offeree shareholders or the capital markets. For these reasons, we urge the CSA to abandon the guidance at this time or to revise it for further clarity.

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Any of the following lawyers may be contacted directly should you have any questions regarding our submissions.

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