ELLIOTT®

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August 19, 2026

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***

Elliott Investment Management L.P. ("**Elliott**") submits this letter to the Canadian Securities Administrators (the "**CSA**") 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**").[1] Our comments are limited to the portions of the Proposal proposing amendments relating to cash-settled derivatives, as discussed further below.[2]

Elliott is a leading multi-strategy investment advisor and one of the oldest firms of its kind under continuous management. Elliott invests in a wide range of areas in order to protect and grow the assets of our investors, which include 105 educational endowments, more than 200 foundations and more than 100 private and public pension plans, among others, who are often advised by their own dedicated advisors. Elliott's activist investments in public equities have become one of our most significant and impactful efforts, resulting over the past decade in more than 180 public engagements with companies, and more in which our dialogue with the company remained private. Elliott invests in public equities in markets around the world, including in Canada where Elliott has made both activist and non-activist investments, including in Triple Flag Precious Metals Corp., Suncor Energy Inc. and Lululemon Athletica Inc.

We urge the CSA to consider our strong concerns with the Proposal that have been set out in this letter and to abandon or significantly amend the Proposal. A summary of our principal concerns is set out in below, which we discuss in more detail in Parts 1 through 5. In Part 6 we provide direct responses to Questions 12-16 of Part F of the Proposal.

SUMMARY OF ELLIOTT'S PRINCIPAL CONCERNS WITH THE PROPOSAL

- **The Proposal will discourage shareholder activism in Canada and thereby weaken the Canadian capital markets (Part 1).** Shareholder activism serves as an important accountability mechanism in our capital markets, to the benefit of all public shareholders. The use of cash-settled derivatives is fundamental to the economics of activism. The Proposal will discourage activism, and thereby weaken the Canadian public markets, through: (i) the adoption of vague public interest guidance that will create uncertainty in the regulation of the disclosure and use of cash-settled derivatives; and (ii) the imposition of a disproportionate defensive burden on

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1 This submission was prepared with the assistance of Davies Ward Phillips & Vineberg LLP and, as to matters of United States federal law, Covington & Burling LLP.

In 2022, Elliott submitted comments in respect of the U.S. Securities and Exchange Commission's ("**SEC**") (i) proposed Rule 10B-1 relating to position reporting of "large" security-based swap positions, which was published in the Federal Register as part of the SEC's Release No. 34-93784 on February 4, 2022, and (ii) proposed amendments to rules that govern beneficial ownership reporting, which were issued by the SEC on February 10, 2022 and published in the Federal Register on March 10, 2022 (Release Nos. 33-11030, 34-94211 (Feb. 10, 2022), 87 Fed. Reg. 13846 (March 10, 2022)) (collectively, the "**SEC's 2022 Proposals**"). Elliott's submissions are available online through the SEC's website (here and here). Although the SEC's 2022 Proposals were of a different nature from those contained in the Proposal, our submissions to the SEC raised arguments and concerns that are relevant to the Proposal. We note that proposed Rule 10B-1 was not adopted by the SEC, nor were the provisions of the beneficial ownership reporting proposal to which we objected.

2 We note that the CSA uses the term "equity equivalent derivatives" in the Proposal. We understand that term to encompass both physically-settled and cash-settled equity derivatives. Our comments focus on the CSA's stated concerns regarding the disclosure and use of cash-settled equity derivatives by soliciting shareholders. We therefore use the term "cash-settled derivatives" in this letter to refer to the subset of the broader definition of "equity equivalent derivatives" that is cash settled.

engaged investors through the increased likelihood of litigation and investigations at the impetus of issuers seeking to debilitate activism by impugning the legitimate use of ordinary cash-settled derivatives.

- **The CSA has not provided evidence of abusive use of derivatives (Part 2).** The Proposal does not demonstrate how a cash-settled derivative, which by definition does not result in beneficial ownership of or voting power over voting or equity shares, has in fact been used to influence control of an issuer. The enhanced disclosure rule is thus a solution in search of a problem, which will impose a heightened disclosure and defense burden on investors without any demonstrated enhancement in investor protection.

- **The enhanced counterparty disclosure requirements will have a chilling effect on the market for cash-settled derivatives in Canada (Part 3).** The Proposal's requirement to disclose the identity of derivative dealers threatens to expose such dealers to unfounded joint actor accusations and other unfounded public interest allegations, which in turn could have a chilling effect on the willingness of dealers to transact with shareholder activists. When the already limited universe of sophisticated derivatives dealers shrinks further, activists' access to a market they need in order to engage in activism will be impaired, reducing the level of shareholder activism in Canada and weakening the Canadian capital markets.

- **The CSA has proposed an unwarranted expansion of the beneficial ownership rules (Part 4)**. The proposal to deem a soliciting shareholder to beneficially own reference securities in respect of a cash-settled derivative during the pendency of a proxy contest is a dangerous legal fabrication that would not reflect the reality of an activist's beneficial ownership, and invite legislative expansion of this fiction over time.

- **The existing early warning reporting regime and public interest powers are sufficient to address any concerns (Part 5).** The concerns that the CSA has outlined regarding abusive use of derivatives are caught by the existing concept of beneficial ownership, as animated by the CSA's existing guidance in section 3.1 of National Policy 62-203 – *Take-Over Bids and Issuer Bids.*[3]

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[3] Section 3.1 of NP 62-203 already provides as follows: "An investor that is a party to an equity swap or similar derivative arrangement may under certain circumstances have deemed beneficial ownership, or control or direction, over the referenced voting or equity securities. This could occur where the investor has the ability, formally or informally, to obtain the voting or equity securities or to direct the voting of voting securities held by any counterparties to the transaction. This determination would be relevant for compliance with the early warning and take-over bid requirements under the Instrument." We note that the SEC has had virtually the same standard for swaps since 2011, which is in turn traceable back to a 2002 standard for futures. See Beneficial Ownership Reporting Requirements and Security-Based Swaps, Release No. 34-64628 (June 8, 2011); Sec. Exch. Comm'n, Commission Guidance on the Application of the Securities Act of 1933, the Securities Exchange Act of 1934, and Rules Thereunder to Trading in Security Futures Products (June 27, 2002).

1. **The Proposal Will Discourage Activism in Canada and Thereby Weaken the Canadian Capital Markets**

1.1 The Role of Shareholder Activism in the Capital Markets

Although we strongly urge the CSA to abandon or significantly amend the Proposal, we commend the CSA for its recognition in the Proposal that shareholder activism can serve as an accountability mechanism in the Canadian capital markets.[4] We agree. Engaged investors can ensure alignment among shareholders, management and boards of directors. The role of such investors has become more important over time as the rise of passive ownership, together with the sharp reduction in the number of unsolicited take-over bids in Canada in the last decade, have diminished the few remaining checks and balances on public company management. A wide body of academic literature supports the view that "activist interventions create long-term shareholder value" and that these benefits accrue to all public-market shareholders.[5] Activist investors play an essential role in the public markets by providing a check on underperforming, unresponsive or entrenched corporate management and boards in ways that passive investors (such as index funds) cannot.[6] As currently framed, the Proposal poses a direct threat to activism and risks undoing the progress engaged investors have made in holding corporations more accountable and catalyzing healthy debate in all sectors of the market.

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4 Proposal at Part C.2(b)(ii): "We recognize that take-over bids and shareholder activism can serve as accountability mechanisms in our capital markets, and are mindful that any new disclosure requirements could potentially have unintended impacts on bidders and activists".

5 Edward P. Swanson et al., "Are All Activists Created Equal? The Effect of Intervention by Hedge Funds and Other Private Activists on Long-term Shareholder Value", Journal of Corporate Finance, Vol 72 (February 2022) (SSRN here), which found extensive evidence from its sample data that short- and long-window abnormal returns are positive and economically significant around ownership announcements for each activist, and that they do not reverse.). See also: Alon Brav et al., "Hedge Fund Activism, Corporate Finance, and Firm Performance," The Journal of Finance, Vol LXIII, No. 4 (August 2008) (SSRN here) ("[w]e find that the positive returns at the announcement are not reversed over time, as there is no evidence of a negative abnormal drift during the 1-year period subsequent to the announcement"); Lucian A. Bebchuk et al., "The Long-Term Effects of Hedge-Fund Activism," Columbia Law Review, Vol 115, No 5 (June 2015) (SSRN here) (finding from its sample data "no evidence supporting concerns that activist interventions are followed by short-term gains that come at the expense of subsequent long-term declines in operating performance"); Matthew Denes et al., "Thirty years of shareholder activism: a survey of empirical research," Journal of Corporate Finance, Vol 44, 405-424 (2017) (SSRN here) (summarizing data demonstrating abnormal positive returns from activism, measured across a 36-month period); Alon Brav et. al., "Governance by Persuasion: Hedge Fund Activism and Market-Based Shareholder Influence," Oxford Research Encyclopedias: Economics and Finance (November 2022) (SSRN here) ("The empirical evidence suggests that the previously-documented significant positive short-term average abnormal return around the arrival of activists, and the lack of any longer-term reversal of the short-term gain, remains robust in the extended and updated sample."); Rui A. Albuquerque et. al, "Value Creation in Shareholder Activism," Journal of Financial Economics, Vol. 145, No. 2 (2022) (SSRN here) (finding that average returns following activist intent announcements consist of "74.8% expected value creation, or treatment, 13.4% stock picking, and 11.8% sample selection effects").

6 Lucian A. Bebchuk & Scott Hirst, "Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy", Columbia Law Review, Vol 119, No 8 (December 2019) (SSRN here) ("Hedge fund managers closely follow the particular business circumstances of [their portfolio] companies and identify ways to remedy underperformance… [I]ndex fund stewardship cannot substitute for hedge fund activism, and especially not with respect to remedying the underperformance of portfolio companies.").

1.2 The Role of Cash-Settled Derivatives in Our Investment Strategy

Like many of our peer firms, we often use cash-settled derivatives, including cash-settled total return swaps, in structuring our positions and executing our trading in our activist investments. These strategies are sophisticated, proprietary and designed to provide our investors with competitive risk-managed returns earned from opportunities that we identify in the market. Our firm frequently acquires cash-settled derivatives as part of the overall mix of securities in a given position. This approach allows us to establish an economically meaningful position without notifying the market while we build our position, and in some cases privately engage with the company. This approach also avoids triggering the kind of "herding" behavior that often accompanies public disclosure, which materially drives up the price of establishing an investment, thus impairing the returns we are able to achieve for our investors and disincentivizing future investment.

By their terms, cash-settled derivatives do not convey beneficial ownership, control or direction over the underlying securities. By virtue of their structure, cash-settled derivatives are a particularly effective tool by which an investor can build a position in a company in an economically worthwhile manner. Cash-settled derivatives permit engaged investors (and others) to invest in the economic performance of a company at a lower cost than investing in the stock and without the disclosure obligations of investing in stock. Importantly cash-settled derivatives also do not convey any of the powers or legal protections of owning shares, including most importantly, the power to vote. This is a rational and efficient trade-off – no ownership, voting rights or legal standing and thus, under current Canadian securities law, more limited disclosure obligations.

Accordingly, we emphatically agree with the CSA's conclusion that, in view of how fundamental it is to the activist strategy not to have "real-time disclosure of accumulations of equity-equivalent derivatives during stake-building in anticipation of a … proxy solicitation", it is not "appropriate 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". Unfortunately, with its radical expansion of the concept of beneficial ownership for the purpose of aggregating a dissident's economic and beneficial ownership interest during a proxy contest, the Proposal does exactly what it says it is not doing: altering the early warning system. We discuss this concern further in Part 4.

1.3 The Proposal Will Discourage Activism in Canada

The CSA has proposed an enhanced disclosure rule that will discourage vitally important shareholder activism to the detriment of our public markets through: (i) the adoption of vague public interest guidance that will create uncertainty in the regulation of the disclosure and use of cash-settled derivatives; and (ii) the imposition of a disproportionate defensive burden on soliciting shareholders through the increased likelihood of litigation and investigations at the impetus of conflicted issuers seeking to impugn the legitimate use of ordinary cash-settled derivatives. With the Proposal, the CSA would effectively entrench ineffective management by disincentivizing and muzzling activists, who remain one of the few independent voices in the marketplace able to protect shareholder interests and enhance market efficiency.

1.3.1 The CSA's Proposed Public Interest Guidance is Unacceptably Vague and Open-ended

The Proposal includes the addition of guidance 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 proxy solicitation, the CSA notes that securities regulators 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.[7]

The CSA's guidance as to how its public interest jurisdiction will be exercised does not provide clarity; rather it engenders confusion. Premised on unsubstantiated suspicion, the Proposal fails to adequately illuminate the CSA's public interest concerns regarding the disclosure and use of derivative transactions by soliciting shareholders. This creates unwarranted regulatory uncertainty regarding the use of cash-settled derivatives by engaged investors, which will discourage activist campaigns in Canada.

First, it is entirely unclear in what circumstances there will be public interest concerns where investors do not differentiate between beneficial ownership and economic interest in their public disclosures.[8] Will this be considered abusive at all times; or only during a solicitation; or during a public engagement with a company that precedes a solicitation? This uncertainty subjects activists who are outside of the early warning regime to, in effect, accelerate their early warning disclosure in order to avoid the risk that their press releases will be found to have impermissibly omitted disclosure of their derivatives position. This accelerated disclosure obligation would undermine the ability of activists to continue to strategically build stakes in targeted issuers once their engagement has become public but before a solicitation commences because the details of the activist's economic position will encourage the kind of "herding" behavior that materially drives up the price of building a position, impairing the activist's returns and disincentivizing future investment.

Second, will the regulators' public interest concern that a shareholder with a substantial economic position may influence the outcome of a vote by pressuring the counterparty, or threatening

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7 Proposal, proposed Part 9.4 of Companion Policy 51-102CP.

8 Proposal at Part C.2(iii).

disincentives or offering incentives, be premised on actual proof of misconduct?[9] Or will it be inferred merely from the fact that the dealer is party to a transaction with an investor, with the further presumption that the dealer will in fact hedge its position by holding long positions in the issuer's securities? Since, by virtue of standard derivatives documentation of the International Swaps and Derivatives Association ("**ISDA**"), the investor agrees that it cannot and will not know of the dealer's hedging strategy or execution, how could the investor exert any pressure on the dealer, unless it were to violate both its swap transaction confirmation as well as Section 3.1 of NP 62-203?[10] As well, will misconduct be inferred from the fact that the dealer actually holds the reference securities as a hedge, or happens to vote the reference securities in a manner that is aligned with the shareholder?

Finally, the CSA unhelpfully omits guidance in respect of the circumstances that gave rise to the exercise of the Alberta Securities Commission's ("**ASC**") public interest jurisdiction in *Re Bison Acquisition Corp*.[11] 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 ASC panel exercised its public interest jurisdiction on the basis that the bidder had "created a situation" in which the swap counterparty's own commercial interest would likely align with the bidder's – a conclusion we think is problematic, as we discuss further in Part 2.1.[12] By not addressing the ASC's concerns in *Bison* or speaking more generally to the public interest jurisdiction conclusion reached in that decision, the CSA has created uncertainty in the market regarding its public interest jurisdiction. This confusion, of course, imposes costs on the market by undermining the confidence needed to transact.

Activists' use of cash-settled derivatives in Canada will be impaired because of a lack of clarity regarding the public interest regulation of such instruments. The Proposal creates the risk of unwarranted prying by securities regulators into the relationship between an investor and dealers, which may lead them to avoid transactions with activists. This will create a disincentive for activists to participate in shareholder engagement in the Canadian markets.

1.3.2 The Proposal Will Disproportionately Subject Activists to Defense Costs

The Canadian securities law regime regulating proxy contests should be even-handed as between issuers and dissident shareholders.[13] The Proposal, however, is not neutral, but rather tips the scale in

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9 Proposal at Part C.2(iii).

10 See Note 3 above.

11 *Re Bison Acquisition Corp.*, 2021 ABASC 188 [*Bison*].

12 *Bison* at para 434.

13 National Policy 62-202 – *Take-Over Bids – Defensive Tactics* at Part 1.1(2): "The primary objective of the take-over bid provisions of Canadian securities legislation is the protection of the bona fide interests of the shareholders of the target company. A secondary objective is to provide a regulatory framework within which takeover bids may proceed in an open and even-handed environment. The take-over bid provisions should favour neither the offeror nor the management of the target company, and should leave the shareholders of the target company free to make a fully

favor of issuers and management insiders against shareholders. For one, the Proposal places a heavier derivative disclosure burden on shareholders than on management insiders in the context of a proxy contest. Existing insider reporting obligations in respect of the trading in related financial instruments do not require the level of derivative disclosure that the Proposal would require from shareholders, including details regarding past and present relationships between the shareholder and the counterparty. The CSA has correctly determined that there is no justification for imposing these draconian requirements on management insiders. That analysis applies equally to activists, and it is important to maintain this equality of regulatory structure in order to continue to meet the neutrality requirement of Canadian securities law.

In addition, the compelled disclosure of these relationships will inevitably, and seemingly by regulatory design, result in issuers seeking to impugn ordinary commercial contracts between shareholders and derivatives dealers as secretive and nefarious arrangements, bogging down engaged investors in investigations, litigation and costs in which the investors must prove a negative. Placing an arrow in the issuer's quiver, the CSA will make a target out of engaged shareholders through one-sided derivative disclosure, again without any evidence of misuse of such products.

What is more, the CSA is effectively encouraging and strengthening such attack strategies against activists by reviving the tired myths endorsed in 2013 of the use of cash-settled derivatives by investors to evade disclosure obligations or secretly influence contested situations.[14] Although the CSA

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informed decision"; NP 62-203 at Part 2.1: "The Bid Regime is designed to establish a clear and predictable framework for the conduct of bids in a manner that achieves three primary objectives: equal treatment of offeree issuer security holders, provision of adequate information to offeree issuer security holders, and an open and even-handed bid process"; and *Re Eco Oro Mineral Corp.*, 2017 ONSEC 23 at para 251: "The policy considerations underlying the fair treatment of shareholders in the Act and as reflected in National Policy 62-202 applicable to takeover bids are also applicable to proxy contests. The ability to craft terms and conditions to address inappropriate defensive tactics is necessary to fulfill the Commission's mandate to provide investor protection and to foster confidence in capital markets in connection with change of control transactions implemented through a bid or a vote".

[14] CSA Notice and Request for Comment - *Proposed Amendments to Multilateral Instrument 62-104 Take-Over Bids and Issuer Bids and National Instrument 62-103 Early Warning System and Related Take-Over Bid and Insider Reporting Issues and Proposed Changes to National Policy 62-203 Take-Over Bids and Issuer Bids*, dated March 13, 2013 at pg 6:

> "A sophisticated investor may be able, through the use of equity swaps or similar derivative arrangements, to accumulate a substantial economic interest in an issuer without public disclosure and then potentially convert this interest into voting securities in time to exercise a vote (this is referred to as 'hidden ownership').
>
> It is also possible for an investor, through derivatives or securities lending arrangements, to hold voting rights in an issuer and possibly influence the outcome of a shareholder vote, although it may not have an equivalent economic stake in the issuer (this is referred to as 'empty voting').
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> These types of arrangements may not be disclosed under current securities law requirements since these requirements are generally based on the concept of beneficial ownership of, or control or direction over, voting or equity securities. The disclosure of these arrangements would be helpful in maintaining transparency and market integrity."

acknowledges that it does not have evidence of abuse – despite over a decade of hypothesizing that there is abuse – it nonetheless notes in the Proposal that it is amending the disclosure rules relating to derivatives “in light of” “concerns about possible misuse of equity equivalent derivatives”. This effective promotion by the CSA of unfounded allegations as part of the rulemaking process is inappropriate and arbitrary. It will invite unfounded challenges by issuers looking for a way to thwart an activist’s efforts and impair the ability of activists to spark healthy debate and create long-term value for all shareholders.

Also, implicit in the Proposal is the belief that the public disclosure of cash-settled derivative trading information may enable issuers and other adverse parties to identify abusive trading and bring that information to the securities regulators for enforcement. In the absence of evidence of abusive behavior, the Proposal in effect deputizes conflicted issuers to bring public interest proceedings against disfavored shareholders. The Proposal is thus far from neutral. It reflects a regulatory bias against shareholders that is based on suspicion and divorced from legal and commercial realities. And it will exact a penalty on shareholders and their investors.

1.4 Conclusion: The Proposal Will Discourage Activism in Canada and Weaken the Canadian Capital Markets

In light of the vital accountability mechanism that shareholder activism serves in our capital markets, it is crucial that the CSA not impose unwarranted requirements that will discourage activism, and thereby weaken the Canadian public markets, through its targeting of the use of cash-settled derivatives by engaged investors. The Proposal would shortsightedly cause severe harm to one of the last sources of independent criticism of public companies and fortify the entrenchment of poorly performing corporate boards and management. As the level of investor activism declines due to adverse regulatory conditions, weaker corporate governance will go unchecked. This will negatively impact economic growth as companies become less accountable to investors and therefore less incentivized to act in an efficient manner, with returns to investors suffering accordingly. Ultimately this may lead to less job creation, higher prices and lower quality of goods and services; as well as lasting impacts on

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Also see Proposal at Part C.2(a) and 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:

> “[A] number of commenters submitted 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 the issuers or voting outcomes. Instead, these commenters contended that investors use derivatives for risk management purposes or as part of a trading strategy. Some commenters also expressed concern that the inclusion of ‘equity equivalent derivatives’ within the early warning threshold calculation would create a significant compliance burden. The commenters cautioned that this change may render the early warning threshold calculation unduly complex and onerous for investors and, moreover, would not provide relevant information to the market.
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> In light of the CSA’s consideration of these concerns, we have concluded that it is not appropriate at this time to proceed with this proposal. Instead, we have provided new guidance regarding certain derivative arrangements that may be captured under the early warning system.”

innovation, productivity, research and development resources and operating performance. Because engagement is mobile, burdensome Canadian requirements will divert engagement – and the liquidity, accountability and valuation benefits that the empirical literature associates with it – away from Canadian issuers and toward issuers in other jurisdictions without such targeted disclosure requirements. The predictable result is fewer campaigns and an enervated Canadian market.

2. The CSA Has Not Provided Evidence of Abusive Use of Derivatives

2.1 The CSA Has Not Demonstrated that Cash-Settled Derivatives Are Used Abusively by Activists

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".[15] 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". The phrase "with any regularity" is generous since no evidence of abuse has in fact been offered. It would seem then that, in the absence of evidence of misuse, the CSA's willingness to propose new regulation regarding the use of cash-settled derivatives in connection with proxy solicitations is premised solely on an *a priori* regulatory suspicion of the use of derivative products by activist investors. This concern is, however, entirely detached from what can be measured empirically – namely, commercial and legal realties.

Market practice is consistent with the view that cash-settled derivatives by their terms do not convey beneficial ownership or voting power over the underlying securities, and do not permit investors to direct the acquisition or sale of securities held as hedges by counterparty derivatives dealers. In a typical transaction, an investor acquires the derivative from a dealer. In order to hedge its exposure to this transaction, the dealer may (but is not obligated to) enter into related transactions with other market participants designed to offset some or all of the dealer's obligations to its customer. Where the dealer does decide to hedge, it may hedge by offsetting its exposure to the securities underlying the swap by purchasing securities of the same class or other correlated assets (for example, a class of securities convertible or exchangeable into the reference securities or different assets with similar risk), 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 dealer's portfolio. It is uniformly accepted market practice that 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. These understandings and restrictions are memorialized in standard industry documentation, including a key reference guide published in 2002 by ISDA.[16]

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15 Proposal at Part C.2(b)(i) (emphasis added).

16 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 (in

The Proposal echoes the unsubstantiated belief that derivatives may be used improperly by investors to pressure dealers to make decisions regarding the voting and disposition of reference securities held as hedges, but is unable to provide evidence to establish that this is an actual problem in the marketplace. Nor is it our experience or understanding of how the marketplace works (whether in Canada or in other markets globally). The implication of the unfounded assertion is that cash-settled derivatives afford investors the ability, simply by transacting in the product, to attain influence or control over the issuer of the securities referenced in the cash-settled derivative.[17] However, the Proposal does not provide empirical data of how cash-settled derivatives could be used to achieve this outcome. Given the complete absence of supporting evidence, the purported basis for the CSA's proposed enhanced disclosure requirement is illusory.

Moreover, the Proposal implies that a investor's holding of cash-settled derivatives may result in the investor knowing that an equivalent number of shares will be removed from the market, thereby increasing the voting power of the investor and altering the likelihood of success of the proxy contest, and that this in turn translates into the investor gaining influence or leverage over the issuer. For the reasons outlined above, this is illusory. Any hedging activity is in the sole discretion of the dealer. The investor will not be privy to the specific aspects of the dealer's hedge position, including whether or not the dealer elected to hedge some, all or no portion of its exposure. Nor will those shares be removed from the market since they can still be voted as the dealer sees fit.

It is also simply incorrect to state that the proposed enhanced disclosure requirement will facilitate shareholders' ability to assess the "viability of success" of the proxy contest and potential alternative outcomes and enable shareholders to understand that the reference securities "are subject to counterparty…voting practices".[18] This justification for the enhanced disclosure rule betrays a misunderstanding of the hedging practices described above – namely, the misunderstanding that cash-settled derivatives impart knowledge to the investor of the dealer's hedging and confer on the investor direct or indirect beneficial ownership or voting control over the underlying securities – and perpetuates

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this case, the investor) has no ability to dictate whether the short party (in this case, the dealer) hedges its exposure to the swap transaction, and if such hedging does occur, the investor has no beneficial or other interest in the stock comprising that hedge, nor any ability to direct the voting of such stock. This provision is included, at the behest of the dealer, in all cash-settled security-based swap transactions to which Elliott is a party, in some cases along with additional contractual provisions to further support that conclusion. And, of course, it is the dealer's decision – not the investor's – whether it wants to acquire stock to hedge its exposure at all and, if it does, the extent to which it hedges, how it maintains the hedge, when it decides to unwind the hedge and how the unwind is effected.

17 Proposal at Part C.2(b)(ii): "Bidders and soliciting 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."

18 See footnote 17.

that misunderstanding among public shareholders, casting doubt unnecessarily on legitimate practices and the integrity of the market.

The CSA notes in the Proposal that the enhanced disclosure rule has been proposed “to enhance the quality of disclosure in respect of equity equivalent derivatives and agreements, arrangements, or understandings that alter economic exposure to an issuer in the particular circumstance of a take-over bid or proxy solicitation for which an information circular is required to be sent”.[19] The Proposal does not and cannot achieve this goal. The most an investor that is party to a cash-settled derivative could disclose in the proxy circular as to any underlying hedges held by the dealer is what the contract says, namely, that the dealer may – or may not – hedge and, if it hedges, that it may – or may not – do so by acquiring or borrowing the stock referenced in the derivative or may hedge in some other manner, and that that if the dealer hedges, it may unwind its hedges at any time, and that the contract does not give the investor any ability to vote or direct the voting, or to acquire or direct the acquisition or disposition of, the reference securities. This information, which simply recites the terms of a standard cash-settled derivatives contract, will not enhance shareholders’ understanding of the nature of hedging arrangements or give them any insight into dealers’ voting practices or the likelihood of success of a proxy solicitation. Even if the parties to the cash-settled derivative were to violate the terms of their documentation as well as the express provision of Section 3.1 of NP 62-203, the disclosure proposed by the CSA would not provide the information necessary to find that violation. Although the CSA is proposing to pair this disclosure with a description of the relationship between the counterparties, we think it is problematic to put forward a disclosure regime that is premised on the basis that investors can and should infer that something extra-contractual has been arranged between parties simply by virtue of their ordinary commercial arrangements. This suspicion-based disclosure model, seemingly designed to ferret out secret dealings through vigilante enforcement by conflicted issuers, will have a detrimental effect on the Canadian derivatives market.

The oft-repeated shibboleth of corporate management, directors and their advisors is that activists gain positions in a company’s shares through cash-settled derivatives in a secretive and somehow abusive way. This should be put to rest once and for all as self-interested myth. This concern with secrecy seems to underlie the Proposal, which is why we address it. An investor entering into cash settled derivatives obtains no voting power and no beneficial ownership of shares in any way, and it cannot direct the acquisition or sale of shares, or how they are voted. There is no secret amassing of a position capable of exerting control over the company and no secret attack in the making. The reason the accumulation of cash-settled derivatives is called “secretive” is because that is what issuers playing defense call it. Innumerable types and thresholds of investments are not publicly disclosed – yet they are not called “secretive”– because there is no group with an agenda to call it so, as there is here.

Although the Proposal does not provide empirical data for the abusive use of swap transactions, the CSA refers to the decision of the Alberta Securities Commission (the “**ASC**”) in *Re Bison Acquisition Corp*.[20] But it does so only by including a summary of that decision under the “Background” section to the enhanced derivative disclosure portion of the Proposal, thus presumably inviting the reader to infer

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19 Proposal at Part C.2.

20 *Re Bison Acquisition Corp.*, 2021 ABASC 188 [*Bison*].

that *Bison* is indeed the catalytic regulatory event by which the CSA has been able to accelerate past the evidence collection that should otherwise underly a proposal such as this. The *Bison* decision ought not be a reason to propose this rule change. This is for one simple, but significant, reason – the ASC's determination was a highly controversial decision that was made in the absence of evidence of: how the derivative counterparty hedged the swap transaction; any arrangement or understanding between the bidder and counterparty beyond their contractual agreement; any exertion of pressure or of communication of commercial incentives or disincentives; and how the public interest had in fact been compromised.[21]

Bison is not a smoking gun. What is worse, by referring to the decision without any endorsement or gloss, the Proposal hesitantly proffers it as something much less than that – justificatory smoke through which we are expected to infer the existence of not only the gun, but the bullet and the victim as well. This is a weak basis on which the CSA has chosen to justify the proposed rule changes.

2.2 In the Absence of Evidence of Abuse, the CSA Has Unjustifiably Given Credence to Unsubstantiated Speculation of Abuse

The Ontario Securities Commission (the "**OSC**") notes in the Proposal, as it is required to do under the Ontario *Securities Act*, that it "is not relying on any unpublished, study, report or other written material in preparing the Proposed Amendments". On what then have the securities regulators based this Proposal? Armed merely with suspicion, the CSA has proposed a rule that would mandate previously unrequired levels of disclosure and subject activists and their derivatives counterparties to new attacks by public companies who will reflexively and instinctually impugn behaviour to obstruct shareholder engagement.

The dangers of this enduring suspicion are made evident in the *Bison* decision itself, which showcases how suspicions can lead to allegations and controversial regulatory decisions that foster uncertainty in the face of clear contractual arrangements between counterparties to a cash-settled derivative. The ASC had concluded that, notwithstanding what it could not demonstrate, the perception of conflict arising from the bidder's commercial relationship with the derivatives counterparty was sufficient to impugn the bidder's use of the swaps. We see in the ASC's decision in *Bison* clear warning signs of the dangers of the regulatory bias against cash-settled derivatives, which casts *a priori* suspicion on such instruments. That suspicion can be used to draw negative inferences regarding otherwise clear contractual arrangements. By promoting this suspicion, the Proposal threatens to grease the already slippery slope the *Bison* decision created.

2.3 Conclusion: The CSA Has Not Provided Evidence of Abuse and Has Instead Given Unwarranted Credence to Unsubstantiated Speculation of Abuse, To the Detriment of Activism and the Canadian Capital Markets

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21 *Bison* at para 513: "Whether through 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."

The Proposal imposes a heightened disclosure and defense burden on soliciting shareholders without any demonstrated enhancement in investor protection. The CSA should abandon the Proposal and retract its statements about misuse unless and until it can meaningfully substantiate those concerns. By adopting these suspicions and putting forward damaging legal fabrications as a basis for its rulemaking, the CSA has invited, and indeed given credence to, unfounded challenges by issuers looking for a way to bog down and resist activist engagement. To appreciate the danger inherent in this, one need only consider the way that issuers already frequently raise the specter of joint actor allegations against activists. The Proposal thus imposes a heightened disclosure and defense burden on soliciting shareholders and, in so doing, creates a regulatory regime that discourages activism, to the detriment of the Canadian capital markets. The CSA should refrain from setting a dangerous precedent of imposing an enhanced disclosure on the basis of unsubstantiated suspicion.

3. The Enhanced Counterparty Disclosure Requirement Will Have a Chilling Effect on the Market for Cash-Settled Derivatives in Canada

The Proposal requires that a soliciting shareholder that has an interest in an equity equivalent derivative provide a description of any past or present relationship with the dealer, including the name of the dealer, "that, to a reasonable person, could be perceived to affect that [dealer's] decision to acquire, dispose of or vote securities of the company". This is a broad disclosure standard, which is open to expansive interpretation. This requirement, including that the dealer must be publicly identified, combined with the expansive and uncorroborated accusations of misbehavior made by the CSA in the Proposal, creates a significant risk that cash-settled derivatives dealers will elect not to transact with activists for fear of being alleged to be acting jointly or in concert with the activist, or to be participating in an abusive scheme to influence the outcome of a vote, solely by entering into ordinary course cash-settled derivatives transactions with investors with whom they have ordinary commercial relationships. This risk is all the greater because large institutional derivatives dealers (which are the dealers most likely to be able to transact in cash-settled derivatives at scale) are reputation-risk averse and will simply not tolerate any risk of being drawn into the cut and thrust of contested situations, such as a public interest proceeding of the kind that occurred in *Bison*.

We note that the CSA turned its mind to the specific issue 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 states, that the naming of counterparties is expressly not required.[22] No justification is offered in the Proposal for the departure from this well-established rule; nor is any justification provided for imposing on soliciting shareholders a more onerous disclosure obligation than is by law imposed on a 10% (or more) shareholder under the early warning reporting regime.

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22 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".

The proposed disclosure requirement therefore threatens to have a chilling effect on the willingness of dealers to transact with activist (and other) shareholders and on the cash-settled derivatives market generally. This in turn, of course, would have a chilling effect on activism. Elliott's investment strategies benefit from having access to a broad range of derivatives dealers for the same reason it is beneficial to have multiple sources for commercial contracts generally – competition provides better results. The suggestion in *Bison* that commercial relationships with affiliates of derivatives dealers could render certain counterparties unavailable to an investor, notwithstanding the absence of any arrangement or understanding as to how the dealer will hedge the derivative or vote hedged securities, is thus deeply problematic, entirely unwarranted and dangerous. Indeed, it threatens to shrink the already limited universe of sophisticated dealers that is available to activists, which will in turn impair the ability of activists and other investors to access a market they need in order to actually engage in activism. Given the fundamental role that cash-settled derivatives play in activist stake-building, the securities regulators must avoid creating rules that would have adverse impacts on a shareholder's ability to trade legitimately in cash-settled derivatives, especially where those rules are not supported by any evidence to demonstrate their necessity.

The Proposal's cost-benefit analysis does not address the systemic cost of making cash-settled derivatives less available as a market tool. Cash-settled derivatives allow investors to build economic exposure efficiently and confidentially, a prerequisite to viable activist engagement with issuers as well as other market-supportive uses. The OSC asserts that the proposed amendments "will have no impact on the vast majority of stakeholders in the ordinary course". That assertion ignores what the proposed rule would actually do: shrink the supply side of the derivatives market and make cash-settled derivatives less available and riskier to use, resulting in fewer activist engagements, weaker shareholder accountability and the loss of a mechanism from which all shareholders of Canadian public companies benefit. The contraction in the derivatives market may also in turn result in a reduction in equity liquidity more generally and affect price discovery in the markets.

The number of financial institutions with the capabilities and market access to act as swap dealers for cash-settled derivatives at the scale relevant to activist investing is limited. Those institutions are prudentially regulated and reputation-risk averse. In *Bison*, the ASC's public interest determination turned on the bidder's commercial relationships with the swap dealer, in particular the bidder's engagement of the dealer's affiliate as the bidder's financial advisor for the acquisition of the target with a success fee – none of which involved evidence of an arrangement or the exertion of pressure. And, the success fee to which the dealer's affiliate was entitled was based on its investment banking role in the overall deal, which (as the CSA knows) is entirely common for financial advisors – it had nothing to do with the swap that the dealer entered into with the bidder. This could, of course, have been verified by reviewing the engagement letter that the bank signed in its role as financial advisor, as compared with the swap documentation to which the bank was a party.

If dealers (whether based in Canada or in another jurisdiction and active in Canada) perceive that ordinary commercial relationships with an activist may expose them to public interest proceedings of the kind that occurred in *Bison* and amplified by the Proposal's endorsement of the tired myth that investors and swap dealers conspire to manipulate the shares that the dealer may hold as a hedge, they will simply decline to transact. When the already limited universe of sophisticated dealers shrinks further, activists and other investors lose access to the full scope of a market they need. The Proposal does not account for this cost. The Proposal therefore risks impairing a market that serves the legitimate interests of investors and capital formation. Section 143.2(2) of the *Securities Act* (Ontario) requires the notice of any proposed rule to include a description of the anticipated costs and benefits of the proposed rule. The CSA has not satisfied this requirement.

4. <u>The CSA Has Proposed an Unwarranted Expansion of the Beneficial Ownership Rules</u>

The promotion of unfounded allegations against the use of cash-settled derivatives by activists, if unchecked (and not retracted by the CSA), unjustifiably threatens to form a policy bias that will be used to continue to erode through further unwarranted regulation the ability of activists to meaningfully engage with issuers. Indeed, the Proposal threatens to provide a regulatory basis on which further rulemaking will be justified without any empirical evidence of the need to do so. This is a precedent that is to be avoided. This concern applies not simply to the CSA's promotion of suspicion of the use of cash-settled derivatives by activists, but also to the CSA's proposal to add subsection 5.1(6) to National Instrument 62-104 – *Take-over Bids and Issuer Bids*. Subsection 5.1(6) of NI 62-104 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.

This deeming rule is a legislative fiction of acquisition and control of equity securities that promotes a continuing suspicion that cash-settled derivatives convey beneficial ownership. It is, simply put, untrue. If left unchecked, this construct may be used in time by securities regulators to expand the concept of beneficial ownership to capture purely economic interests in other circumstances. The concept also encourages issuers to make unfounded claims (whether to the regulators or to other shareholders) that the activist secretly controls the reference securities underlying its cash-settled derivatives. Moreover, because the soliciting shareholder will need to disclose that it "has acquired" the securities referenced in the cash-settled derivatives, investors are likely to form misunderstandings about the shareholder's true ownership position and incorrectly make the determination that the shareholder has control or direction over a greater number of voting of securities than it actually does. Because it is a fiction that promotes an inaccurate picture of a soliciting shareholder's influence, the deeming rule will promote misunderstanding and confusion, not clarity and transparency.

This is all the more concerning where the objective of this proposed approach – 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 and tying the disclosure to an early warning reporting form that is ill-suited to this purpose. We disagree with the policy concerns that are animating this objective for the reasons set out in this letter and merely highlight the CSA's failure to consider less draconian measures as concerning evidence of a creeping legislative tilt towards unwarranted regulation of cash-settled derivatives, seemingly based on a misunderstanding of how such instruments are used in practice.

Moreover, proposed subsection 5.1(6) of NI 62-104 will require a soliciting shareholder to disclose changes in its aggregate economic position in near real time during the pendency of a campaign, providing issuers and event-driven traders with a continuous feed of strategically valuable information about the shareholder's position and conviction, thereby raising the cost, and reducing the expected value, of every campaign. It also will lead to confusion in the market as parties try to interpret changes in the activist's aggregate position, which may or may not reflect its views on the issuer.

Although the CSA expressly claims in the Proposal that it does 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 early warning reporting triggers", the deeming rule does precisely that. 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 otherwise not be required in the absence of the proxy contest. Notwithstanding strong resistance to its 2013 proposal to aggregate beneficial and economic interest for the purposes of early warning reporting, and with no evidence to suggest that derivatives are being used to evade ownership disclosure obligations, the CSA has nonetheless proposed to aggregate beneficial and economic interests. The deeming rule is thus unjustified and unfounded, representing a fundamental contradiction within the Proposal that cannot, by virtue of that very contradiction, survive this consultation.

5. <u>The Existing Early Warning Regime and Public Interest Powers Are Sufficient to Address Any Concerns</u>

The CSA has not demonstrated how the existing beneficial ownership reporting rules, including the purposive intent that animates them, are insufficient to address the concerns with equity equivalent derivatives that the Proposal seeks to address. Before the CSA proposes increasing regulatory burden, it should first demonstrate how the enforcement of the existing reporting rules would not address its concerns.

In 2016, the CSA added 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.

Added to this are extant statements regarding the abusive use of derivatives in securities regulatory decisions. More than twenty years ago, a panel of the OSC in *Sears Canada Inc. et al.* communicated to market participants its authority to sanction 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.[23]

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[23] *Sears Canada Inc. et al.*, 2006 ONSEC 13, at para 111.

The ASC panel in *Bison* grounded its decision on the basis that the bidder or its advisors "would have been aware of" the OSC's statement in *Sears*.[24]

Thus, under the existing regime, if a long party and a short party to a cash-settled derivative were foolish enough to agree, contrary to market practice and standard documentation, to conspire as to whether the short party were to hold shares to hedge the trade and also as to how those shares were to be voted, the long party should be deemed to be the beneficial owner of the underlying shares, and the securities regulators would have clear public interest jurisdiction to sanction such abuse. If parties are in fact behaving in this manner, which the CSA has not demonstrated, then the CSA should enforce its existing authority to curtail this behaviour rather than piling on further, one-sided regulation. In the absence of any evidence of abuse, and in the absence of demonstrating the insufficiency of its existing rules, the CSA has provided no meaningful basis to justify the proposed rule.

With all of this in mind, the CSA's remarks regarding the policy rationale for the proposed rule change are confounding:

> We recognize 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". <u>In general, concerns that could arise in connection with those activities are substantially mitigated through compliance with the existing early warning system and related guidance concerning deemed beneficial ownership of, or control or direction over, the reference voting or equity securities</u>. We also do not have evidence that derivatives are being used inappropriately or abusively with any regularity in our capital markets.[25]

If the CSA's concerns with the use of swaps by soliciting shareholders are substantially mitigated through the existing regime, then why has the CSA proposed additional disclosure rules when there is no evidence of abuse? By failing to address this fundamental question, the Proposal appears to be the product of arbitrary and capricious rule making.

We strongly suggest that the CSA consider the recent Corporation Finance Interpretations ("**CFIs**") issued by the SEC's staff on July 9, 2026.[26] We have reproduced these new CFIs (being new Questions 105.08, 105.09 and 105.10) here.

> **Question 105.08**
>
> **Question**: In connection with a standard total return equity swap that settles exclusively in cash, only refers to a class of equity securities (as described in Rule 13d-1(i)(1)) for purposes of identifying a reference security, and otherwise does not confer any voting or investment power with respect to—or any right to acquire—such class (a "TRS"), would the purchaser of the TRS

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24 *Bison* at para 443.

25 Proposal at Part C.2(b)(i) (emphasis added).

26 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). We note that CFIs were formerly known as Compliance and Disclosure Interpretations ("**C&DIs**"). References to C&DIs in prior correspondence and guidance relate to the same body of SEC staff interpretive guidance.

be deemed to acquire beneficial ownership (as determined under Section 13(d) and Rule 13d-3), of the reference securities, including any equity securities the counterparty may hold for hedging purposes, solely as a result of entering into the TRS?

Answer: No. A person who simply enters into a TRS, as defined above, does not acquire beneficial ownership of the reference securities, including any equity securities the counterparty may hold to hedge its risk. In addition, entry into a TRS, absent any arrangement that confers such power or rights outside of the terms of the TRS, is not, by itself, evidence of a plan or scheme to evade the Section 13(d) or 13(g) beneficial ownership reporting obligations as described in Rule 13d-3(b). [July 9, 2026]

Question 105.09

Question: Under what circumstances would a person who enters into a TRS (as defined in CFI 105.08) be "deemed" a beneficial owner of the reference securities, including any equity securities held by a counterparty to hedge its risk, pursuant to Rule 13d-3(b)?

Answer: <u>A person may be "deemed" a beneficial owner of equity securities pursuant to Rule 13d-3(b) if the person uses an arrangement with the purpose or effect of preventing the vesting of beneficial ownership as part of a plan or scheme to evade the reporting requirements of Section 13(d) or 13(g). Given that a standard TRS confers no voting or investment power or right to acquire the reference securities, the TRS would need to be directly or indirectly used in connection with an "arrangement" to prevent the vesting of beneficial ownership by the purchaser of the TRS in order to be part of a plan or scheme to evade reporting obligations. For example, if a person uses a TRS as a means to direct the counterparty how to vote any equity securities used in the counterparty's hedge or to pre-arrange the acquisition of such securities, the person may be deemed a beneficial owner under Rule 13d-3(b). Entry into a TRS solely for economic exposure to the reference security, without more, does not prevent the vesting of, or create a false appearance regarding, beneficial ownership as part of a plan or scheme to evade the reporting requirements of Section 13(d) or 13(g) for purposes of Rule 13d-3(b)</u>. [July 9, 2026]

Question 105.10

Question: What mental state, if any, is contemplated by the term "plan or scheme to evade" as used in Rule 13d-3(b) and, in particular, with respect to entry into a TRS (as defined in CFI 105.08)?

Answer: The mental state contemplated by the words "plan or scheme to evade" is generally the intent to enter into an arrangement that creates a false appearance or an illusion contrary to the actual facts. See Letter from Brian V. Breheny, Deputy Dir., Div. of Corp. Fin., SEC, to Hon. Lewis A. Kaplan, U.S. Dist. Judge, S.D.N.Y. (June 4, 2008), in CSX Corp. v. Children's Inv. Fund Mgmt, L.L.P., et al., No. 08-Civ. 2764. Therefore, with respect to a TRS, the relevant inquiry under Rule 13d-3(b) would focus on whether the person knew or was reckless in not knowing that use of the TRS would create a false appearance or illusion that the person's interest is economic alone. For example, entry into a TRS for the purpose or effect of indirectly acquiring the power to vote or a future right to acquire the reference equity security may be viewed as part of a "plan or scheme to evade" as that term is used in Rule 13d-3(b). [July 9, 2026]

(emphasis added)

These new CFIs illustrate how the existing construct of beneficial ownership can be construed purposively to capture the use of swap transactions to evade reporting obligations or to otherwise influence the control or voting of securities. This is certainly not foreign to Canadian securities laws. Indeed, as described above, NP 62-203 already contains similar guidance from the CSA regarding circumstances in which it would deem a person to have beneficial ownership of, or control or direction over, the securities held by the derivative counterparty.

The CSA should consider how the spirit of the public interest concerns outlined in the new proposed guidance in Companion Policy 51-102CP are already reflected in its existing guidance on beneficial ownership in NP 62-203. Instead of introducing further regulation, the CSA should simply revisit its guidance and enforce the existing beneficial ownership reporting obligations.

6. Responses to Questions in Part F of the Proposal

12. Do you agree with the proposed "equity equivalent derivative" concept, as set out in the definition and its associated guidance? If not, what changes would you suggest?

We do not. As a threshold matter, we disagree with the premise embedded in the term itself: a cash-settled derivative that conveys no voting power, no right to acquire the reference securities and no power to direct their disposition is not "equivalent" to ownership of the underlying security in the respects that matter to the early warning system or the bid regime.

The proposed definition is also imprecise in ways that will generate significant uncertainty.

First, the operative quantitative standard – that a derivative or combination of derivatives will generally be considered to substantially replicate the economic consequences of ownership if it provides a rate of return between 90% and 110% of the rate of return of the reference security – appears only in proposed guidance in NP 62-203, while the definition in NI 62-104 turns on the undefined phrase "substantially equivalent".[27]

Second, the treatment of combinations of derivatives is unclear: the definition and guidance do not address whether or how offsetting positions are to be netted, the period over which rate-of-return equivalence is to be measured, or how the standard applies to instruments, such as options, whose sensitivity to the reference security changes continuously with market conditions.

Third, the definition draws no distinction between cash-settled and physically-settled instruments, although the policy considerations differ fundamentally: instruments that are physically settled, or that otherwise confer a right to acquire the reference securities, are already comprehensively addressed by section 1.8 of NI 62-104 and the existing guidance in section 3.1 of NP 62-203.

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[27] Proposed section 3.1 of NP 62-203 (Annex D to the Proposal); proposed definition of "equity equivalent derivative", section 1.1 of NI 62-104 (Annex A to the Proposal).

Accordingly, the definition of “equity equivalent derivative” should expressly exclude derivatives that may be settled only in cash and that confer no right or ability, formal or informal, to acquire the reference securities or to direct their voting or disposition, and should be revised to expressly reflect the economic features of derivative transactions outlined above.[28]

13. Do you agree with the proposal to require disclosure of equity equivalent derivatives during a take-over bid and proxy solicitation for which an information circular is required? Why or why not?

We do not, for the reasons set out in Parts 2 through 5 of this letter. The CSA itself acknowledges that it has no evidence that derivatives are being used inappropriately or abusively in the Canadian capital markets, and that the concerns it identifies are substantially mitigated through compliance with the existing early warning system and the existing deemed beneficial ownership guidance.[29] We believe the current regulatory framework – with its focus on instruments that confer beneficial ownership, voting and control – is sufficient to address the CSA’s stated concerns, and that the proposed enhanced disclosure requirements are unnecessary. The existing regime already provides robust tools to address abusive use of derivatives. No case has been made for the proposed regime, and its predictable practical effects – arming issuers with a new defensive tactic and chilling the willingness of derivatives dealers to transact with engaged shareholders – will harm the shareholders that securities regulation exists to protect.

Although we urge the CSA to abandon the Proposal for the reasons set out in this letter, if the CSA nonetheless proceeds, then the rule should, at a minimum, be revised to: (i) eliminate the requirement to identify derivative counterparties and to describe relationships with them, consistent with the position the CSA adopted in 2016; and (ii) withdraw proposed subsection 5.1(6) of NI 62-104, which aggregates economic interests into the early warning system during the pendency of a solicitation notwithstanding the CSA’s stated determination not to alter that system.

14. Would the proposed new disclosure requirements referenced in question 13 have unintended consequences, such as impacting the number or quality of take-over bids or proxy solicitation campaigns?

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28 See Part 5 of this letter for a discussion of recent CFIs that are directly relevant to the Proposal.

29 Proposal, Part C.2(b)(i): “[W]e also do not have evidence that derivatives are being used inappropriately or abusively with any regularity in our capital markets”; ibid: concerns that could arise “are substantially mitigated through compliance with the existing early warning system and related guidance concerning deemed beneficial ownership of, or control or direction over, the reference voting or equity securities”.

Yes. We anticipate at least four such consequences, each as discussed in this letter.

First, the requirement to identify counterparties and to describe past and present relationships with them likely will cause derivatives dealers – prudentially regulated institutions that are acutely averse to being drawn into contested situations – to decline to transact with shareholders that may engage with issuers, shrinking an already limited universe of dealers (Part 3). Second, proposed subsection 5.1(6) of NI 62-104 will require a soliciting shareholder to disclose changes in its aggregate economic position in near real time during the pendency of a campaign, providing issuers and event-driven traders with a continuous feed of strategically valuable information about the shareholder's position and conviction, thereby raising the cost, and reducing the expected value, of every campaign. Third, these burdens fall asymmetrically: no comparable disclosure is required of management or of an issuer's other allies in a contested matter, and the relationship disclosure demanded of soliciting shareholders exceeds what insider reporting requires of management (Part 1.3.2). Fourth, because engagement is mobile, disproportionate Canadian requirements will divert engagement – and the liquidity, accountability and valuation benefits that the empirical literature associates with it[30] – away from Canadian issuers and toward issuers in other jurisdictions without such targeted disclosure requirements. The predictable result is fewer campaigns and fewer credible unsolicited bids, in a market that has already experienced a sharp decline in the latter.

15. **While the proposed new disclosure requirements referenced in question 13 would not be triggered until a person or company is required to prepare and send a take-over bid or information circular, prospective bidders or activists may enter into equity equivalent derivative transactions prior to that time. Should a person or company soliciting proxies in reliance on the public broadcast, speech, or publication exemption in subsection 9.2(4) of NI 51-102 be required to provide the disclosure contemplated by proposed new Items 6.7 and 6.8 of Form 51-102F5?**

No. The public broadcast exemption exists to facilitate low-cost communication among shareholders, and its adoption reflected the CSA's recognition that requiring circular-level disclosure as the price of dialogue chills legitimate shareholder-to-shareholder communication.[31] In that sense, the exemption is not a solicitation tool so much as it is a safe harbour to ensure shareholder communication is not inhibited.[32] Extending Items 6.7 and 6.8 to exempt solicitations would contradict the limiting principle on

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30 See footnote 5.

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

32 The importance of not chilling shareholder dialogue was most recently affirmed in *NorthWest Copper Corp.*, 2023 BCSECCOM 602 at para 204: "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."

which the Proposal itself relies – that the new requirements apply “only when there is a formal, public overture for control”[33] – and would resurrect precisely the chill the exemption was designed to eliminate. Accordingly, to the extent the CSA is concerned with the use and disclosure of derivatives 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 an exempt solicitation. It would also be unworkable in practice: a shareholder speaking publicly about a company cannot always know, at the time of speaking, whether its communication will later be characterized as a solicitation, and conditioning the availability of the exemption on standing derivative disclosure would convert every public statement of views into a potential disclosure trigger. We note that the Proposal already extends new ownership disclosure to the public broadcast exemption through the proposed amendment to subparagraph 9.2(4)(c)(ii) of NI 51-102; no further extension is warranted, although we think that even this new ownership disclosure requirement is unwarranted.

The proposed amendment to subparagraph 9.2(4)(c)(ii) of NI 51-102 would require ownership disclosure in circumstances where the securityholder would otherwise not be subject to early warning reporting. In view of the purpose of the solicitation exemption to facilitate shareholder communication, the CSA has not offered any basis or justification to propose that a soliciting securityholder’s use of such an exemption should, in and of itself, mandate the disclosure of its ownership interest. The CSA should abandon this requirement.

16. **Given that Item 7 of Form 62-104F1 requires that a take-over bid circular include disclosure about any securities of the offeree issuer purchased or sold by certain persons during the 6-month period preceding the date of the take-over bid, do you agree with the proposed requirement in Item 8.1 of Form 62-104F1 that a take-over bid circular include disclosure about related financial instruments and other agreements, arrangements or understandings that have or had the effect of altering economic exposure to the offeree issuer during the 6-month period preceding the date of the bid? Why or why not?**

We oppose the enhanced derivative disclosure requirements for the reasons set out in our responses to Questions 12 through 14 above. However, if such requirements are adopted notwithstanding our objections, we submit that a 6-month lookback is unnecessarily burdensome and produces disclosure of marginal utility, at best, to shareholders.

Derivative positions that have been closed prior to the bid have no ongoing economic exposure and no bearing on the bidder’s current incentives or alignment with any dealer. Requiring their disclosure serves no apparent investor protection purpose. It does, however, impose substantial costs: bidders and their counsel would need to reconstruct historical positions, a compliance exercise that is both expensive and complex. It would also compel the disclosure of proprietary trading strategies that are

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[33] Proposal, Part C.2(b)(ii): “[T]he proposed new disclosure requirements related to equity equivalent derivatives would apply only when there is a formal, public overture for control.”

unrelated to the bid, raising confidentiality concerns that are not justified by any corresponding benefit to shareholders.

We note that Item 7 of Form 62-104F1 already requires disclosure of securities purchased or sold during the 6-month period preceding the bid. That requirement is tied to actual transactions in securities of the offeree issuer and serves a clear purpose (identifying pre-bid accumulation). Extending a parallel lookback to derivative instruments, which do not confer ownership or voting rights, conflates economic exposure with beneficial ownership in a manner that is inconsistent with the CSA's own determination not to aggregate the two for early warning purposes. The lookback is premised on the false assumption that cash-settled derivatives confer on the investor control over the derivatives dealer's hedging, including whether the dealer hedges and how it hedges, and that such control can be exercised to effectively manipulate the price of the offeree issuer's securities in advance of the bid by inducing the dealer to purchase and sell securities. Not only is this incorrect, it ignores that securities laws already contain anti-fraud provisions designed to capture market manipulation. Existing investigative and enforcement powers would be better suited to address manipulative trading.

The suggestion in the Proposal that counterparty hedging of a prospective offeror's derivative positions may have improperly impacted the price of the offeree issuer's securities is, once again, conjecture unsupported by any evidence.[34] If Item 8.1 is retained, it should be confined to positions outstanding as at the date of the bid and should require disclosure of material terms only, without counterparty identification, consistent with the approach the CSA adopted in 2016. If a look-back is nonetheless imposed, it should not apply to ordinary cash-settled derivatives for the simple reason that they do not confer on the investor any control over the hedging activities of the dealer.

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34 Proposal, Part C.2(b)(ii)(A) and note 16 (positing that a prospective offeror's repeated accumulation or disposition of substantial economic positions via equity equivalent derivatives "could have a distortive impact on the market price" through counterparty hedging, and referring to "trading activities that may have improperly impacted the price of the offeree issuer's securities in the period preceding a take-over bid").

We appreciate this opportunity to provide comments on this important matter and would be pleased to meet with you to answer any questions and elaborate upon our concerns.

Sincerely,

(*signed*) *Richard Zabel*

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