mcmillan

Date: August 12, 2026

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission (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
Superintendent of Securities, Nunavut
New Self-Regulatory Organization of Canada

Me Philippe Lebel
Secrétaire et directeur général des affaires juridiques
Autorité des marchés financiers
Place de la Cité, tour Cominar
2640, boulevard Laurier, bureau 400, Québec, Québec G1V 5C1
consultation-en-cours@lautorite.qc.ca

The Secretary
Ontario Securities Commission
20 Queen Street West, 22nd floor, Toronto, Ontario M5H 3S8
comments@osc.gov.on.ca

Dear Sirs/Mesdames,

Re: Comments with respect to the Canadian Securities Administrators' (the "**CSA**") Notice and Request for Comment dated May 14, 2026 regarding the Proposed Amendments and Changes to the Issuer Bid, Take-Over Bid and Beneficial Ownership Reporting Regimes (the "**Notice**")

We are writing in response to the request for comments by the CSA with respect to the questions set out in the Notice.[1]

We begin by responding to each of the questions posed in the Notice. We also address some key guidance proposed for National Policy 62-203 *Take-Over Bids and Issuer Bids* ("**NP 62-203**") and Companion Policy 51-102CP *Continuous Disclosure Obligations* ("**51-102CP**").

[1] *CSA Notice and Request for Comment – Proposed Amendments and Changes to the Issuer Bid, Take-Over Bid and Beneficial Ownership Reporting Regimes*, OSC6 CSA Notice, (2026) 49 OSCB 4433 (14 May 2026).

While we are generally supportive of the CSA's objectives in modernizing the issuer bid, take-over bid and beneficial ownership reporting regimes, we wish to highlight certain areas where we think further consideration is warranted. In particular: (a) we believe the 5% threshold for the Selective Repurchase Exemption is too high and suggest a 2% threshold, with exemptive relief remaining available for larger repurchases on a case-by-case basis, in order to mitigate certain risks; (b) we have concerns with the liquid market condition for the Selective Repurchase Exemption and, if it is retained, recommend that an independent liquidity opinion backstop be incorporated; (c) we recommend that the news release required under the Selective Repurchase Exemption include disclosure of the board's review and approval process; (d) we recommend that the definition of "equity equivalent derivative" focus on the hedging behaviour of financial counterparties rather than the correlation to the return of the underlying equity security; (e) we believe that the proposed deeming provision in the proxy solicitation context is problematic as it may overstate actual voting influence, it conflicts with the CSA's own conclusions about the aggregation of beneficial ownership and economic interests, and it could create a structural asymmetry favouring one side of a contested situation; (f) we recommend that the obligation by offerors to report changes in related financial instrument positions be limited to significant or material changes; (g) we recommend that the circular disclosure obligation in the proxy solicitation context be limited to contests directed at significantly changing board composition or achieving corporate control; (h) we suggest that the CSA clarify with greater precision the parameters of the joint actor relationship outside of section 1.9(1)(a) of NI 62-104 before seeking to impose additional obligations on the existence of such a relationship; and (i) we understand that it is not operationally feasible to mandate payment within one business day of the take-up of deposited securities.

The views, opinions and recommendations expressed in this letter are solely those of the lawyers whose names are set out at the conclusion of this letter, and are not made on behalf of McMillan LLP or its clients. We would be pleased to provide further insight and additional details with respect to our submissions, and would welcome the opportunity to engage further with the CSA.

Unless otherwise defined herein, capitalized terms used in this letter have the meanings ascribed to them in the Notice, including the Proposed Amendments and the Proposed Changes referred to therein.

Selective Repurchase Exemption

1. **One of the conditions of the Selective Repurchase Exemption is that the aggregate number of securities or, in the case of convertible debt securities, the aggregate principal amount of securities acquired by the issuer within any period of 12 months in reliance on the Selective Repurchase Exemption does not exceed 5% of the securities of that class outstanding at the beginning of the 12-month period. Please comment on the appropriateness**

of this condition. If you are of the view that a different threshold would be more appropriate, please explain why.

Response: We are of the view that a threshold of 2% is more appropriate for the Selective Repurchase Exemption as proposed, with exemptive relief for larger repurchases remaining available on a case-by-case basis subject to more stringent conditions.

We note at the outset that 5% corresponds to the level at which a securityholder may requisition a meeting of securityholders. This raises concerns that the proposed exemption could be used to facilitate greenmail, a risk that does not disappear at 5% simply because it falls below the 10% early warning threshold. A 5% block is large enough to confer meaningful leverage in a contested vote or proxy fight. The pricing condition does not fully neutralize that risk since a repurchase at a discount to a market price, that may already be impacted by an activist campaign, could effectively reward the conduct it is meant to deter.

By contrast, we believe the Selective Repurchase Exemption is well-suited to repurchases at or below 2%, where the block is generally too small to confer that leverage and where the conditions of the exemption — in particular, the discount to closing price — should hopefully operate as the CSA intends: ensuring that non-participating securityholders are able to sell their securities on a stock exchange or other published market at a price equal or greater to the price received by the selling securityholders. Our review of the exemptive relief record for similar transactions showed that repurchases of this size were typically routine in nature, such as accommodating the exit of a single shareholder outside the context of a contested transaction, facilitating estate or tax planning, or settling claims or renegotiating commercial terms.

For repurchases above 2%, the transactions in the exemptive relief record are more varied in nature and are not, in our view, well-suited to a standardized automatic exemption. Our examination of the record identified principal conditions that securities regulators have considered across different categories of larger transactions, including arm's length negotiation, independent approval (e.g. special committee, fairness opinion), shareholder approval, no adverse change to the market, and no material change in control, among others. While certain conditions may have been applied with some consistency within specific transaction types, the record does not support a conclusion that one set of conditions is appropriate for a given transaction type or size range while a different set is appropriate for another. Absent a clear rationale for the selection of 5% as the appropriate threshold, we believe that repurchases above 2% should continue to be assessed on a case-by-case basis, with exemptive relief available subject to conditions tailored to the specific risks presented.

2. **One of the conditions of the Selective Repurchase Exemption is that securities must be acquired from not more than 5 persons in the aggregate and in not more than 5 transactions in the aggregate, within any period of 12 months. Please comment on the appropriateness of this condition. If you are of the**

view that a different threshold would be more appropriate, please explain why.

Response: We do not have substantive comments on the 5-person limit as proposed. It mirrors the corresponding threshold in the private agreement exemption for take-over bids under section 4.2(1)(a) of NI 62-104, and we see no policy reason to object to such established standard in the selective repurchase context.

Similarly, we do not have concerns with the 5-transaction limit within a 12-month period. While it is novel and has no direct parallel in the take-over bid regime, we accept it as a reasonable safeguard against the use of the exemption as a substitute for a NCIB program or in a manner contrary to the public interest.

3. **One of the conditions of the Selective Repurchase Exemption is that a liquid market in the class of securities that is the subject of the bid exists at the date of the bid, determined in accordance with proposed section 1.12 of NI 62-104, which is derived from section 1.2 of MI 61-101. Section 1.12 includes, among other things, a requirement that the aggregate value of the trades in securities of the class on the published market on which the class was principally traded was at least $15,000,000 and that the market value of the class of securities on the published market on which the class was principally traded was at least $75,000,000. Based on available data, approximately 75% of issuers listed on the Toronto Stock Exchange and less than 10% of issuers listed on the TSX Venture Exchange would satisfy the liquid market criteria. Does proposed section 1.12 of NI 62-104 strike an appropriate balance between ensuring that there is sufficient liquidity to enable securityholders who do not participate in the bid to dispose of their securities in the market without unduly limiting the availability of the Selective Repurchase Exemption? If not, what criteria and/or thresholds would be more appropriate?**

Response:

Historical Background

The "liquid market" concept has a long history in Canadian securities regulation that predates both NI 62-104 and MI 61-101.

In its earliest form — under former Policy Statement 9.1 (the predecessor to OSC Rule 61-501 and ultimately to MI 61-101) — the concept was entirely principles-based: an issuer could dispense with a formal valuation if there was a liquid market for non-participating holders, supported by an independent dealer liquidity opinion and exchange concurrence. There were no numerical thresholds.[2]

The dollar-value thresholds — $15,000,000 in aggregate trading value and $75,000,000 in market value — were introduced in response to comments received on early drafts of what became OSC Rule 61-501 (prior to MI 61-101). At the time, the proposed "liquid market" definition relied solely on share-count and transaction-count metrics: minimum outstanding securities, minimum shares traded, and minimum number of trades over the relevant period. Commenters raised the concern that such a purely numerical test could be gamed through stock splits and failed to distinguish between low-priced and high-priced securities: a market trading 1,000,000 shares of a 20-cent stock would satisfy the test just as readily as one trading 1,000,000 shares of a $20 stock. They specifically proposed the $75,000,000 market value threshold as being consistent with the eligibility test for issuers qualified to use the Prompt Offering Qualification ("**POP**") system under National Policy No. 47.[3] The Commission accepted this feedback and revised the test to add the dollar-value components,[4] and the $75,000,000 market value threshold has remained unchanged since.

The resulting structure — a quantitative test or, for issuers that fall below the numerical thresholds, an independent liquidity opinion backstop — was carried forward into MI 61-101, where it has remained unchanged.[5] As noted, proposed section 1.12 of NI 62-104 is derived from section 1.2 of MI 61-101 and preserves the same $15,000,000 and $75,000,000 thresholds.

Assessment

The liquid market concept was designed for use under MI 61-101, specifically for exemptive relief from formal valuation requirements in formal issuer bids, and for the use of non-cash consideration (together with other conditions) in issuer/insider bids and business combinations. In providing for an exemption to the formal valuation requirements for substantial issuer bids, it ensured that there was equal treatment of shareholders in that liquidity of the stock would remain following the bid, thereby evidencing that the market price constituted a reliable indicator of value without the need for a formal valuation.

---

[2] Ontario Securities Commission, *Policy Statement 9.1: Disclosure, Valuation, Review and Approval Requirements and Recommendations for Insider Bids, Issuer Bids, Going Private Transactions and Related Party Transactions* (1992) 15 OSCB 2931 at page 13, s 9.2(2) [*Policy Statement 9.1*].

[3] Ontario Securities Commission, *Notice of Proposed Changes to Proposed Rule 61-501 and Proposed Companion Policy 61-501CP* at page 95, paras 56-57 [*Proposed Rule 61-501*].

[4] See comments and CSA response regarding the addition of the $15,000,000 aggregate trading value and $75,000,000 market value thresholds, and the explicit linkage to NP 47 / POP-eligible issuer eligibility criteria (*ibid* at page 32).

[5] The backstop, as set out in section 1.3 of OSC Rule 61-501 (the predecessor to MI 61-101), requires: (i) an opinion from an independent qualified person that a liquid market exists; (ii) inclusion of that opinion in the disclosure document; and (iii) a concurrence letter from the applicable exchange, promptly filed with the Director. (*ibid* at page 60).

The Selective Repurchase Exemption operates in a different context — a targeted, off-market acquisition at a discount to market price. The need for a liquid market to use this exemption is apparently to maintain a fair and efficient regime by limiting the availability of the exemption to classes of securities for which a liquid market exists. However, we would expect that the very limited nature of the proposed exemption (sales from no more than 5 persons and only 5 such transactions in a 12-month period) should make it unlikely that liquidity should be impacted. It is not clear how the liquidity condition in this scenario can serve to lessen equal-treatment concerns for an exemption specifically meant to limit the number of parties that can be subject to it. It would appear more reasonable to focus on the other conditions to the use of this proposed exemption in order to address the equal treatment concern. Accordingly, we would not support the liquid market condition.

Nevertheless, if the CSA proposes to pursue the liquid market condition, we note that proposed section 1.12, as drafted, does not carry forward the liquidity opinion backstop from section 1.3 of OSC Rule 61-501 and section 1.2 of MI 61-101, which allows an issuer to satisfy the liquid market condition through an independent qualified person's opinion where the quantitative thresholds are not met. Proposed section 4.6.1(1)(c) requires only that a liquid market in the class exist at the date of the bid, determined in accordance with proposed section 1.12, and proposed section 1.12(1) sets out a purely quantitative test — requiring that all specified conditions be satisfied — with no alternative pathway through an independent opinion. As a result, the Selective Repurchase Exemption would be categorically unavailable to a large number of listed issuers, with no alternative path to access it. This represents a significant and unexplained departure from the existing framework under MI 61-101. Accordingly, if the CSA wishes to keep the liquid market condition, we would recommend that an explicit opinion backstop equivalent to that in section 1.3 of OSC Rule 61-501 / MI 61-101 be incorporated into the new exemption.

4. **Should the news release that the issuer is required to issue and file following the making of the bid include any additional information, and if so, what?**

Response: Yes. The proposed news release disclosure, which addresses only the mechanics of the transaction and cumulative acquisition figures, does not require the board of directors to disclose either the approval process by which it agreed to pursue the transaction. This is a meaningful gap.

The Selective Repurchase Exemption involves a deliberate, targeted decision by a board to purchase securities from one or more specific identified sellers, and is a significant deviation from the underlying public interest concern of equal treatment of all shareholders. In such circumstances, particularly where there is a conflict of interest or a resolution to a contested transaction, non-participating securityholders and the market have a legitimate interest in understanding how the board arrived at its decision. Section 5.2(1)(e) of MI 61-101 addresses precisely this concern in the related-party transaction context, requiring disclosure of the review and approval process adopted by the board and any special committee, including any materially contrary view or abstention by a director and any material disagreement between the board and the special committee. While a selective repurchase may not constitute a related-party transaction subject to MI 61-101, the underlying policy rationale applies with equal force.

We recommend that the news release be required to include a discussion of the review and approval process adopted by the board and the special committee, if any, of the issuer for the transaction, including a discussion of any materially contrary view or abstention by a director and any material disagreement between the board and the special committee.

5. **Is it appropriate for the value of the consideration paid by the issuer for any securities repurchased to be determined with reference to an unaffected closing price, or should the consideration be determined on the basis of the closing price of the class of subject securities following an announcement of the bid?**

Response: The consideration should be determined with reference to the unaffected closing price. The exemptive relief record strongly supports this approach. In virtually every decision we reviewed, the pricing benchmark was set at or before the time of the trade, not after announcement.

Anchoring the benchmark to a pre-execution market price is consistent with the purpose of the pricing condition, which is to ensure that the repurchase price reflects the true market value of the securities before the transaction is announced, thereby protecting selling securityholders. We do not support the use of a post-announcement closing price as the relevant benchmark.

Nevertheless, it may be helpful to address public interest concerns in NP 62-203, noting that if the seller and issuer seek to use the Selective Repurchase Exemption in circumstances where the stock price has been positively impacted in a significant way by one or both of them, that may raise public interest concerns.

6. **Do you agree that purchases made in reliance on the Selective Repurchase Exemption should not reduce the maximum number of securities that an issuer may acquire in reliance on the NCIB Exemption?**

Response: Yes, we agree since the two exemptions serve fundamentally different purposes. The NCIB Exemption is designed for anonymous, open-market repurchases conducted through the facilities of a designated exchange. The Selective Repurchase Exemption, by contrast, addresses targeted, off-market acquisitions from a specific, identified seller at a privately negotiated price below the closing market price — a tool designed to facilitate the orderly exit of a blockholder whose on-market sale may otherwise overhang the market. Because the two mechanisms address different market problems, likely involve different counterparties, and carry different pricing and disclosure requirements, reducing one's room on account of purchases made under the other would conflate two structurally and purposively distinct regimes and unnecessarily restrict an issuer's ability to manage its capital through both channels simultaneously.

7. **Do you expect that the Selective Repurchase Exemption will: (a) curtail repurchases by issuers pursuant to formal issuer bids or NCIBs; or (b) have any negative impact on liquidity in the relevant class of securities?**

Response:

(a) Curtailment of Formal Issuer Bids or NCIBs

As discussed in our response to Question 6, the Selective Repurchase Exemption and the NCIB Exemption appear to us to serve fundamentally different purposes and operate in distinct contexts. We do not expect the Selective Repurchase Exemption to curtail open-market repurchase activity under the NCIB Exemption, nor do we expect it to displace formal issuer bids, which are typically used as instruments for broad capital return programs rather than targeted block acquisitions from specific sellers. The Selective Repurchase Exemption fills a distinct gap in the existing toolkit and is not a functional substitute for either mechanism. Nevertheless, we do acknowledge that capital may be limited for certain issuers (or they may simply believe that only a limited amount of the issuer's resources should be used for share repurchases) and it is possible that an issuer that avails itself of the Selective Repurchase Exemption may then not have sufficient liquidity to utilize an NCIB or launch a formal issuer bid.

(b) Impact on Liquidity

As noted above, we are not certain that the Selective Repurchase Exemption would have a negative impact on current liquidity, but it may dampen future liquidity by preventing a blockholder from selling into the open market. By enabling an off-market acquisition of that block, the exemption removes volume that would otherwise have contributed to price discovery and trading activity — an effect that is more pronounced for smaller or less liquid issuers.

That said, an unmanaged on-market sale of a large block can itself be deeply disruptive to price. While a large on-market disposal may enhance trading volume and therefore liquidity in a narrow sense, it can simultaneously adversely affect price for remaining securityholders. An orderly off-market exit may on balance then be better for remaining securityholders.

On balance, we do not expect the Selective Repurchase Exemption to have a material negative impact on current liquidity in the relevant class of securities, but it may be appropriate for the CSA to collect data to evaluate this issue after the Selective Repurchase Exemption is available.

8. **Should the availability of the Selective Repurchase Exemption be limited to issuers with operative NCIBs? If so, should such issuers have repurchased a minimum number of securities under such NCIBs as at the date of the bid? If so, what minimum amount of repurchases would be appropriate and why?**

Response: No. As discussed in our response to Question 6, the Selective Repurchase Exemption and the NCIB Exemption serve fundamentally different purposes and are not meaningfully connected. An NCIB is used when a board believes its shares are undervalued and repurchases them incrementally in the open market. The Selective Repurchase Exemption addresses a different situation altogether: facilitating an orderly exit for a specific blockholder.

Conditioning access to the exemption on the existence of an operative NCIB — let alone a minimum repurchase threshold under one — would significantly negate the benefit of introducing the Selective Repurchase Exemption. The Selective Repurchase Exemption should stand as an independent mechanism, available to any issuer that satisfies the applicable conditions, without reference to whether a concurrent NCIB is in place.

9. **Are there foreseeable challenges, practical or otherwise, for issuers who may wish to rely on the Selective Repurchase Exemption? If so, please also explain whether and how they may be addressed or mitigated.**

Response: A primary practical challenge is the risk of greenmail (discussed in our response to Questions 1 and 11 below), which could create reputational exposure for issuers and raise significant public interest concerns.

We note however that it is difficult to predict the issues that may arise which is one more reason to start small (2% threshold). It may also be prudent for the CSA to collect data and monitor the use of the exemption.

10. **Are there foreseeable unintended consequences of the Selective Repurchase Exemption or ways in which the Selective Repurchase Exemption could be misused?**

Response: We are concerned with the use of selective repurchases where insiders could be in a conflict of interest situation in circumstances where the protections of MI 61-101 are not available. Although in such circumstances, boards will be subject to their fiduciary duties and possible claims for oppressive conduct, history has shown in limited circumstances that this may not be enough. See our response to Question 11 below.

11. Do you think that the Selective Repurchase Exemption may give rise to concerns related to "greenmail"? If so, do you think that the 5% repurchase limit helps to mitigate such concerns?

Response: Yes, the Selective Repurchase Exemption gives rise to genuine greenmail concerns or similar circumstances. Unlike the United States, we have had limited exemptions to issuer bids over concerns about equal treatment of shareholders and the informational advantage that an issuer or its insiders may have over other securityholders.

Greenmail occurs when an issuer repurchases shares from a specific shareholder — often at a premium — to remove a perceived threat and buy peace. The structure of the Selective Repurchase Exemption, which permits targeted, off-market repurchases from a single counterparty at a price that may have been impacted by a sustained contested transaction, is inherently susceptible to this dynamic.

The 5% repurchase limit provides some constraint, but we do not consider it sufficient to meaningfully mitigate greenmail risk as discussed in our response to Question 1. A 5% block can still represent significant leverage, particularly in a proxy fight context, and a repurchase at that level could represent a material premium payment to a disruptive shareholder. A lower threshold — in the range of 2% — would more meaningfully limit the potential for abuse by reducing the size of the position that could realistically be accumulated with a view to extraction. While no threshold will eliminate greenmail entirely, a lower cap would better calibrate the exemption to its intended purpose.

We also believe that additional disclosure as set out in our response to Question 4 will assist. However, it is ultimately the potential exercise of the public interest power that could dissuade problematic behaviour. We therefore recommend that NP 62-203 provides guidance as to circumstances in which the public interest power may be exercised with respect to the use of this exemption. For example, public interest concerns may arise where the effect of a repurchase made in reliance on the Selective Repurchase Exemption is to remove a securityholder that is acting in opposition to management or directors of the issuer, in proximity to a pending or anticipated vote. Where such a repurchase has the effect of altering the composition of the voting base, such conduct may warrant regulatory intervention.

Equity Equivalent Derivatives

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 agree with the proposed concept of an "equity equivalent derivative" and support its adoption as a distinct and narrower category within the broader definition of "related financial instrument". We respectfully recommend, however, that the accompanying guidance in NP

62-203 be revised. Rather than adopt a definition based on the correlation to the return of the underlying equity security, the definition should articulate the rationale which is rooted in the hedging behaviour of financial counterparties involved in such transactions. The primary concern being that the hedge of the financial counterparty can be a form of disguised beneficial ownership for the party entering into the derivative.

A definition of equity equivalent derivative more responsive to the policy concern would be something similar to the following: "a derivative, the underlying of which is an equity security where a financial institution acting as the short counterparty to such derivatives, would in the ordinary course be required to hedge its position by holding a substantially static (non-dynamically hedged) position in the underlying equity". This would capture transactions where financial counterparties would use rates of return slightly below the lower bound to avoid being subject to the proposed definition of equity equivalent derivative (for instance, by entering into total return transactions with caps or floors that would be unlikely to arise but would result in correlations slightly lower than 90%).

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?**

Response: We generally support the proposed disclosure of equity equivalent derivatives in the take-over bid context. However, we have significant reservations about the proxy solicitation framework as currently proposed and respectfully submit that the two contexts require separate analysis. Before addressing each, we wish to highlight that the proposed framework engages two distinct issues that should not be conflated as they carry different policy justifications: the deeming provision (whether holding an equity equivalent derivative triggers early warning reporting obligations during a proxy solicitation campaign) and the disclosure obligation (whether holders of equity equivalent derivatives must disclose those positions in a circular).

Take-over bids

In the take-over bid context, the CSA proposes requiring disclosure in the bid circular of related financial instruments, including for greater certainty, equity equivalent derivatives, and other agreements or arrangements altering the bidder's economic exposure, over a 6-month look-back period. It is noted that insiders of reporting issuers are required to disclose their aggregate economic positions in accordance with insider reporting obligations, but offerors under formal take-over bids are not. We do understand the policy rationale for imposing this disclosure obligation on a person that is seeking control of a reporting issuer.

A prospective bidder who has established a substantial economic position in the offeree issuer through equity equivalent derivatives has likely, in effect, caused a corresponding block of securities to be held by a bank or financial intermediary as a hedge. That block may or may not be tendered into the bid, and that outcome is unknown in advance. Securityholders making tendering decisions are directly affected by this uncertainty, and disclosure of the derivative position gives them the information they need to understand the bidder's aggregate economic interest and the existence of the counterparty's corresponding position. The same reasoning supports disclosure of related financial instruments more broadly in the take-over bid context because a bidder's full economic exposure to the offeree issuer is relevant to securityholders' assessment of the bidder's incentives and leverage, regardless of whether the instrument compels the counterparty to hold a full position in the underlying securities.

Separately, we note that the proposed disclosure obligation in section 2.7.1(1) of NI 62-104 would require offerors to disclose *any* change in an interest in, or right or obligation associated with, the related financial instrument. There is no need for the change to be material or significant. This is unlike the requirement under the early warning regime to only make disclosures if there is a "*significant* change in a related financial instrument position" (emphasis our own).[6] We would therefore suggest that an obligation to <u>promptly</u> disclose a change in a position should be triggered upon a significant or material change, not *any* change. Nowhere else in securities legislation is such an obligation imposed unless the change has some significance.

Proxy solicitation

(a) Deeming provision

The CSA proposes that, during a proxy solicitation campaign, a soliciting securityholder or joint actor who is a counterparty to an equity equivalent derivative would be deemed to have acquired and to have control or direction over the reference securities for the purposes of the early warning reporting obligations in sections 5.2 and 5.4 of NI 62-104. We do not believe this is a "minimal intrusion" into shareholder activism and suggest that this provision be reconsidered for the following reasons:

(i) The actual voting influence is overstated.

In the context of a proxy solicitation, the accumulation of votes is important from a disclosure perspective; however, it is likely misleading to aggregate securities underlying equity equivalent derivatives on a one-to-one basis with shares beneficially owned. Generally, banks/counterparties do not vote securities they hold as a hedge to a derivative. Rather than conferring additional voting power on the derivative holder, this arrangement removes those securities from the effective voting pool. As an

[6] Per NI 62-103, a "significant change in a related financial instrument position" means, in relation to an entity and a related financial instrument that involves, directly or indirectly, a security of a reporting issuer, any change in the entity's interest in, or rights or obligations associated with, the related financial instrument if the change has a similar economic effect to an increase or decrease in the entity's securityholding percentage in a class of voting or equity securities of the reporting issuer by 2.5 percent or more.

example, a counterparty holding 10% of an issuer's outstanding securities as a hedge and not voting them reduces the effective voting universe from 100% to 90% of outstanding securities. A person holding such derivative and 4% of total outstanding securities would therefore hold approximately 4.4% of the votes that could actually be cast. The derivative would not bring the holder to 10% or more of effective voting influence in a proxy contest.

It is not analytically consistent to deem a derivative position equivalent to beneficial ownership for the purpose of triggering an early warning threshold when the practical reality is that the derivative does not bring the holder anywhere near that threshold in terms of actual voting influence in a proxy contest.

(ii) The proposed framework is inconsistent with the CSA's own conclusions.

We note that the CSA has concluded that they "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 early warning reporting triggers", noting that to do so "could impose a disproportionate burden relative to potential concerns, particularly in the absence of clear evidence to suggest that derivatives are being used in a manner contrary to the purposes of Canadian securities laws." Yet, notwithstanding that the CSA has presented no evidence that the use of equity equivalent derivatives in proxy solicitations by non-management persons have raised any public interest concerns, it proposes to expand the application of early warning obligations to non-management persons who solicit proxies by circulars. The reasoning is not clear to us.

(iii) The proposed framework creates a structural asymmetry.

The structural asymmetry in the proposed framework compounds the above concern. The obligation falls only on the party filing the non-management circular. Major shareholders who support the company's position but which are not required to file a circular bear no corresponding obligation. A disclosure regime that systematically benefits one side of a contested situation does not produce the transparency the CSA is seeking.

(b) Disclosure obligation

The disclosure question in the proxy solicitation context is nuanced.

The CSA proposes new disclosure items in the information circular requiring soliciting securityholders to disclose their beneficial ownership, related financial instruments including equity equivalent derivatives, and other arrangements altering their economic exposure. As noted above, the policy rationale is that insiders of reporting issuers are required to disclose their aggregate economic positions in accordance with insider reporting obligations and, in a "contest for control", soliciting shareholders should also be required to provide such disclosure. We acknowledge that there are proxy contests where this disclosure would be genuinely informative to securityholders. A proxy fight directed at replacing a majority of the directors is one example: knowing that the opposing party has a substantial economic interest through derivatives, and that a bank therefore holds a corresponding block of securities that will not be voted, is information that securityholders could reasonably use in assessing the dynamics of the contest and the opposing party's incentives.

However, the CSA's framework appears to proceed from an assumption that all proxy solicitation by information circular is directed at achieving a change in corporate control equivalent to a take-over bid. That assumption does not reflect the range of proxy contests that occur in practice. Many proxy fights conducted by non-management information circular are not for board control; they may be to oppose an M&A transaction or change the issuer's strategic direction, among others. A disclosure regime designed for a full-control context applied indiscriminately to all non-management information circulars is broader than the policy concern warrants.

As noted above, there is also a material structural asymmetry in the proposed framework. The disclosure obligation falls only on the person filing the non-management circular. Management and major shareholders supporting the company's position but not filing a circular have no corresponding obligation. This asymmetry is difficult to justify as a policy matter and may systematically benefit the company side in contested situations.

We also draw an important distinction between equity equivalent derivatives and related financial instruments more broadly in the proxy solicitation context. For equity equivalent derivatives, the policy rationale for disclosure is grounded in the counterparty hedging dynamic described above. For related financial instruments more broadly, there may be no counterparty holding any position in the underlying securities at all. Where that is the case, the specific concern that justifies disclosure in the proxy context — that a bank holds a material block of shares — is not present. The case for disclosing related financial instruments in the proxy context is therefore materially weaker, and the question of whether the disclosure obligation should extend to that broader category warrants careful consideration.

We recommend that the CSA:

- limit an offeror's obligation to promptly report on changes to its related financial instrument position to significant or material changes;
- eliminate the deeming provision as it applies to the proxy solicitation context for the reasons set out above;
- consider limiting the circular disclosure obligation in the proxy solicitation context to contests that are genuinely directed at significantly changing board composition or a

matter equivalent to corporate control, rather than applying it to all non-management information circulars; and

- consider whether, in the proxy solicitation context, the disclosure obligation should be limited to equity equivalent derivatives rather than extended to the broader category of related financial instruments, having regard to the different counterparty dynamics involved.

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?

Response: On balance, we do not believe the proposed disclosure requirements would have material unintended consequences in the take-over bid context. However, we have concerns that the proposed framework may deter legitimate proxy solicitation activity.

Take-over bids

We do not believe the proposed disclosure requirements would have a material impact on take-over bid activity. The proposed obligations are incremental in nature, and the CSA estimates the total compliance cost per bidder at approximately $9,800 — a figure that is modest relative to the overall costs of a take-over bid. We acknowledge, however, that it is difficult to assess this with confidence given the small number of bids that occur in any given period, with only 9 take-over bid circulars filed between January 1, 2021 and December 31, 2023.[7] The more significant concern is that take-over bid activity in Canada has been low since the regime was overhauled in 2016, and any additional layer of regulatory requirements should be considered carefully against that backdrop.

Proxy solicitation

In the proxy solicitation context, the risk of unintended consequences may be more pronounced.

The imposition of the early warning regime appears to be inconsistent with the policy rationale of the CSA with respect to the application of derivatives to that regime.

As discussed in our response to Question 13, the proposed disclosure framework applies to all proxy solicitation by non-management information circular, on the assumption that any such solicitation is directed at achieving corporate control. That assumption does not reflect the range of proxy contests that occur in practice. Proxy fights are conducted for a variety of purposes outside of corporate control, and applying disclosure requirements calibrated to a full-control context indiscriminately across all of these situations risks imposing a

[7] Page 57, Appendix 1 of the Notice.

disproportionate regulatory burden on forms of shareholder engagement where the underlying concern is not meaningfully present.

The structural asymmetry in the proposed framework compounds this concern. The disclosure obligation falls only on the party filing the non-management circular. Management and major shareholders who support the company's position but will never file a circular bear no corresponding obligation. A disclosure regime that systematically benefits one side of a contested situation does not produce the transparency the CSA is seeking and may, in practice, deter legitimate shareholder activism in circumstances that have nothing to do with the disguised beneficial ownership concern that the proposed rules are designed to address.

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?**

Response: No. The public broadcast exemption exists precisely to allow securityholders to communicate with other securityholders in connection with matters before a meeting in a cost-effective manner, without incurring the full regulatory burden of a formal proxy solicitation. Extending Items 6.7 and 6.8 to communications made in reliance on that exemption would undermine its primary purpose by imposing disclosure requirements drawn from the comprehensive circular framework onto a mechanism deliberately designed to sit outside it.

We acknowledge the concern that persons with derivative positions may seek to conduct their campaign through the public broadcast exemption to avoid circular-based disclosure. Nevertheless, we do not believe the benefit of such disclosure overrides the key purpose of the public broadcast exemption (or other exemptions for filing circulars by non-management persons), which is to lower barriers to legitimate shareholder engagement.

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?**

Response: We agree with the disclosure requirement in Item 8.1 in principle. We do not support extending the look-back period for economic exposure arrangements beyond the 6-month period that applies to securities trading disclosure under Item 7.

Early Warning Reporting Triggers

17. **Subsection 5.1(3) of NI 62-104 would deem securities beneficially owned, or over which control or direction is exercised, by a person at the time that an issuer becomes a reporting issuer to have been acquired by the person at that time for the purposes of Part 5 of NI 62-104. Please comment on the appropriateness and potential impact of this proposed provision.**

Response: We support the proposed provision. The requirement to file updated early warning reports under subsection 5.2(2) of NI 62-104 is premised upon the prior filing of an initial report. Under the current regime, a significant securityholder who has never filed an initial early warning report may avoid the obligation to disclose subsequent dispositions of securities, or changes in material facts on the basis that no initial report requires updating.

18. **Subsection 5.1(4) of NI 62-104 would 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. Relatedly, subsection 5.1(5) would deem each person that ceases acting jointly or in concert with other persons in respect of an issuer to have disposed of the securities of the issuer that are beneficially owned, or over which control or direction is exercised, by such other persons when they ceased acting jointly or in concert with each other. Please comment on the appropriateness of these proposed provisions and any foreseeable concerns with its interpretation and/or enforceability.**

Response: We have significant concerns regarding the proposed provisions, notwithstanding that we recognize the policy rationale underlying them.

The proposed deeming provisions in subsections 5.1(4) and 5.1(5) of NI 62-104 would, upon the formation or cessation of a joint actor relationship, immediately trigger the early warning reporting obligations in section 5.2, including the moratorium on further acquisitions in section 5.3, without any requirement that a subsequent acquisition have occurred. This represents a material departure from the current regime, as confirmed by the British Columbia Securities Commission in *NorthWest Copper Corp*.[8]

We recognize that similar obligations exist under section 13(d) of the U.S. Securities Exchange Act, in that the formation of a "group" — the functional equivalent of a joint actor relationship

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

— triggers a disclosure obligation once the group collectively holds more than 5% of the outstanding class of securities. However, filers are afforded five business days from that point to file a Schedule 13D. While the U.S. regime does deploy a 10-day acquisition and voting moratorium (cooling-off period) if an existing passive investor shifts to an active, control-seeking intent, it does not impose a moratorium on further acquisitions following group formation. The immediate moratorium and disclosure obligations together with the lack of a clear understanding of the application of the joint actor rules (other than the deeming rules under section 1.9(1)(a) of NI 62-104) in Canada raises significant concerns.

There remains a lack of specificity in Canadian jurisprudence regarding what constitutes “acting jointly or in concert” for the purposes of Part 5 of NI 62-104, other than with respect to the deeming provisions in section 1.9(1)(a). The *NorthWest Copper* decision, while providing useful guidance on the acquisition trigger, did not resolve the broader question of when a joint actor relationship crystallizes, nor did it establish a clear and predictable standard for determining whether parties are acting jointly or in concert in the context of a proxy solicitation. In fact, the panel in *NorthWest Copper* found that the bar for a finding that parties are acting jointly or in concert is appropriately set relatively high, and determining whether parties are acting jointly or in concert involves balancing the need for disclosure of shareholder blocks against the free flow of information and opinion among shareholders of a public company — the latter apparently being more important. In such circumstances, it is surprising that the CSA now wishes to impose additional disclosure obligations of joint actors merely through the formation of a group.

We would expect that the proposed deeming provisions, by attaching immediate and significant legal consequences to the formation of a joint actor relationship, will substantially increase the stakes of that determination, thereby generating further litigation in circumstances where the existence of a joint actor relationship is contested.

We would ask the CSA to clarify with greater precision the parameters of the joint actor relationship outside of section 1.9(1)(a) of NI 62-104 before seeking to impose additional obligations on the existence of such a relationship.

<u>Non-Reporting Issuer Exemptions from the Take-Over Bid and Issuer Bid Requirements</u>

19. **Are there are any other categories of persons that should be excluded for the purposes of calculating the Maximum Securityholder Condition?**

<u>Response:</u> We submit that consideration should be given to excluding the following additional categories of persons for the purposes of calculating the Maximum Securityholder Condition:

(a) Regulated professionals barred from employee status

We support the codification of excluded categories for Employee Adjacent Persons; however, we submit that it does not go far enough to address regulated professionals who devote a substantial amount of their time to the issuer's business under a professional services agreement but are barred from employee status by professional regulatory requirements. These persons have the same degree of access to information about the issuer as full-time employees and are akin to employees in all material respects. As such, the concern of information asymmetry that the formal bid rules seek to protect against will not be present for regulated professionals. The legal form of the engagement is dictated by professional regulatory statute, not by any difference in the substance of the relationship or the securityholder's access to information.

This issue has arisen repeatedly in the exemptive relief record. In *Corus Orthodontists Inc.*,[9] *Aryeh Topco Holding Ltd.*,[10] and *Dental Corporation of Canada Holdings Inc.*,[11] orthodontist and dental principals were barred from employee status due to legal requirements governing the professional practice of orthodontics and dentistry in Canada. In each case, the principals operated as independent contractors, devoted a substantial amount of their time to the issuer's business, and were treated as akin to employees for the purposes of the exemptive relief to exclude them from the securityholder count. Continuing to require case-by-case relief for these persons is inconsistent with the stated objective of reducing regulatory burden.

(b) Wholly owned holding companies of any excluded person

The proposed amendments exclude spouses of Qualifying Persons or Employee Adjacent Persons where the Qualifying Person or Employee Adjacent Person has control or direction over the securities beneficially owned by the spouse. We submit that this exclusion should extend to wholly owned holding companies of any person who qualifies for exclusion, where the excluded person retains control or direction over the securities held through the holding company. Accordingly, when a person who would otherwise qualify for an exclusion (such as an employee or director) holds securities through a wholly owned holding company, they appear on the ledger as a separate registered securityholder. In practice, this artificially inflates the headcount of registered holders. It fails to look through the corporate structure to the underlying beneficial securityholder, whose qualitative role and investor protection needs remain identical to those of an individual insider.

In *Prairie Lithium Corporation*,[12] 10 shareholders of record were holding companies wholly owned by Qualifying Persons. *In Cascadia Acquisition Company Inc.*,[13] 12 of 91 shareholders

---

[9] *Re Corus Orthodontists Inc.*, 2026 ABASC 39.
[10] *Re Aryeh Topco Holding Ltd.*, (2026) 49 OSCB 1360.
[11] *Dental Corporation of Canada Holdings Inc*, (2016) 39 OSCB 5052.
[12] *Prairie Lithium Corporation*, 2023 FCAA 2 [*Prairie Lithium*].
[13] *Cascadia Acquisition Company Inc*, 2025 BCSECCOM 427 [*Cascadia*].

were personal holding companies, spouses, other family members, and permitted related party transferees of current or former employees. In both cases, the regulator treated the wholly owned holding companies and their beneficial owners as one securityholder because the issuer was fundamentally closely held and the interposed holders did not represent distinct economic interests from the underlying excluded persons. Where the underlying person is already excluded, their wholly owned holding company should be excluded as well.

20. After the inclusion of the additional categories proposed, should the Maximum Securityholder Condition be further increased beyond 50? If so, what should it be increased to and why?

Response: We do not have a strong view on increasing the Maximum Securityholder Condition beyond 50 and are not proposing a specific number at this time. We observe, however, that the current 50-holder threshold is derived from, and aligned with, the private issuer definition, and that both the historical trajectory of the concept and the exemptive relief record suggest a trend toward a higher or undefined threshold:

- *Historical significance of 50.* The 50-holder limit traces back to early twentieth century English company law with the first statutory definition of private company in section 121 of the Companies (Consolidation) Act 1908, being a company by which its articles (a) restricts the right to transfer its shares; (b) limits the number of its members to 50 (excluding employees); and (c) prohibits any invitation to the public to subscribe for any shares or debentures of the company.[14] The 50-holder limit was carried forward largely unchanged through successive legislative transplants into Multilateral Instrument 45-103 – *Capital Raising* Exemptions[15] which has since been largely replaced by National Instrument 45-106 – *Prospectus Exemptions*,[16] and the Corporations Act, R.S.O. 1990, c. C.38.[17] Notably, the United Kingdom abandoned the numerical ceiling entirely with the Companies Act 1980, which defined a private company simply as a company that is not a public company,[18] with no member limit. This remains true in the Companies Act 2006.

- *Exemptive relief record.* Issuers that are closely held in substance can exceed the threshold even after all appropriate exclusions are applied, forcing case-by-case relief

[14] "For the purposes of this Act the expression "private company" means a company which by its articles … (b) limits the number of its members (exclusive of persons who are in the employment of the company) to fifty; …"
[15] ""private issuer" means an issuer … (b) whose designated securities … (ii) are beneficially owned, directly or indirectly, by not more than 50 persons or companies, counting any 2 or more joint registered owners as one beneficial owner, and not counting employees and former employees of the issuer or its affiliates, …"
[16] ""private issuer" means an issuer … (b) the securities of which, other than non-convertible debt securities, … (ii) are beneficially owned by not more than 50 persons, not including employees and former employees of the issuer or its affiliates …"
[17] ""private company" means a company as to which by its special Act, letters patent or supplementary letters patent, … (b) the number of its shareholders, exclusive of persons who are in the employment of the company, is limited to fifty, two or more persons holding one or more shares jointly being counted as a single shareholder, …"
[18] ""private company", unless the context otherwise requires, means a company that is not a public company."

applications. Our review of the exemptive relief record indicates that regulators have consistently looked to the qualitative character of the securityholder base rather than to headcount alone, and have in several cases, granted relief at operative counts well above 50 without imposing a numerical ceiling as a condition. For example, in *Prairie Lithium*, the target had 54 beneficial shareholders after the broadest set of exclusions, and relief was granted on the basis that all shareholders were persons to whom a private issuer is permitted to distribute securities under section 2.4 of NI 45-106. In *Cascadia*, the issuer had 91 total shareholders — the overwhelming majority of whom were current or former employees of closely connected entities — and relief was granted on the basis that the issuer was fundamentally closely held. In *The Colt Companies et al*,[19] 277 of 279 shareholders of a special-purpose profit-sharing entity were current or former employees of, or consultants to, the filer, and relief was granted notwithstanding that the shareholder count substantially exceeded the threshold.

<u>Settlement Period</u>

21. Should the tendering process payment period be changed from a maximum of 3 business days to a maximum of one business day to align with the settlement cycle for securities trades?

<u>Response:</u> No. In our experience and based on feedback received from transfer agents and depositary agents, we do not consider it operationally feasible to mandate payment within one business day of the take-up of deposited securities. The trade settlement cycle is not an appropriate comparator: the trade settlement timeline does not account for key processing factors applicable to depositary agents that cannot reliably be completed within a single business day. We believe the current 3 business days maximum appropriately balances the interest in prompt payment with the operational realities of the depositary process. Accordingly, we have concerns with the changes in NI 62-104 requiring payment to be made "promptly", and question the guidance in NP 62-203 that payment is expected to be within 1 business day.

22. Are there any practical impediments or challenges to shortening the tendering process payment period from the current 3 business day maximum? If so, please explain.

<u>Response:</u> Based on our experience and feedback received from transfer agents and depositary agents, we have identified the following practical impediments to shortening the tendering process payment period from 3 business days to 1 business day:

First, deposits to take-over bids and issuer bids take the form of both electronic submissions through CDS and/or DTC and physical submissions of certificates and letters of transmittal by

---

[19] *The Colt Companies et al,* 2007 ABASC 78.

registered securityholders. Physical deposits must be processed manually by depositary agents, and depending on the nature of the offer, the agent may be required to issue consideration cheques, wire transfers, return certificates, return DRS statements, and cash-in-lieu payments in unpredictable volumes. Processing these deposits involves sequential operational steps — including payment setup, audit processes, tax withholding and remittance preparation, reconciliation, printing and delivery of payments (including bank cutoff times for wire dispatch) — each of which is dependent on the timing of receipt of funding from the offeror. All such payments require reconciliation against funds or consideration securities received from the offeror. These steps cannot reasonably be compressed into a single business day.

Second, in certain circumstances, the depositary agent must complete additional steps before payment can be made, including the sale of securities for securityholders in ineligible jurisdictions, tax withholding calculations, processing of fractional entitlements, and currency conversions where the transaction includes a currency election component. In particular, currency conversions can only take place after the depositary agent has been funded, typically on the business day following receipt of funds, which precludes next-day payment.

Third, where the depositary is not the transfer agent for the target security, all share certificates received by the depositary must be delivered to the transfer agent for verification, reconciliation and cancellation before payment can be made. Because deposits are accepted up to the expiry time, certificates cannot be forwarded to the transfer agent until after that time, and the depositary can only pay after the transfer agent has confirmed that all securities taken up have been cancelled. In this scenario, the payment timeline is dependent on a third party's actions and cannot practicably be mandated by regulation.

Fourth, clearing agencies such as CDS and DTC manage corporate actions through sub-systems that rely on rigid batch-processing windows. Critical variables, including proration results, foreign exchange rates, and strike prices, must be applied to these systems to trigger automated payment programs within fixed daily processing deadlines. A T+1 settlement timeline leaves no margin for error and restricts depositary agents from aligning with their own internal batch-processing schedules. Essential tasks such as processing late tenders, managing cross-border transfers, and completing systemic reconciliations routinely extend past the formal expiry date and cannot reliably be completed within a single business day.

Fifth, where the consideration payable under a bid is funded through credit facilities or dedicated corporate treasury drawdowns rather than cash on hand, the offeror's treasury team requires a reasonable window to execute facility drawdowns, coordinate with lending syndicates, and transfer large-scale funding blocks to the depositary account. In the case of a Dutch auction issuer bid, final pricing and proration metrics are only determined after the bid expires, and funds do not always arrive early in the business day. A T+1 requirement creates material risk that the depositary agent will not receive funding in sufficient time to deliver the entire consideration within 24 hours.

Sixth, compressing the payment window to a single business day risks creating a structural disparity between institutional securityholders trading in street name, who benefit from automated electronic processing, and registered securityholders holding physical certificates or DRS positions, who require manual verification and reconciliation. A T+1 mandate may in practice result in institutional clearing channels being prioritized over registered securityholder processing, undermining the principle that all securityholders should be treated equitably and simultaneously.

Seventh, the consequences of a settlement failure in the context of a take-over bid or issuer bid are qualitatively different from those arising in standard daily market trading. In the ordinary course, a settlement failure on T+1 is a minor operational issue resolved through standard buy-in procedures between two counterparties. In the context of a bid, a failure to settle large positions due to a minor data mismatch or system error can create far greater risk where hundreds of millions or billions of dollars in consideration are involved and the offeror's or issuer's obligations to all depositing securityholders are engaged simultaneously. The risk profile of a bid settlement is not comparable to that of an open-market trade.

Eighth, the foregoing concerns reflect a baseline perspective involving large-scale transfer agents and depositary agents that possess robust, dedicated corporate action infrastructure. Smaller transfer agents and registry providers with fewer resources would face even more severe operational strain under an accelerated one-business-day mandate, introducing heightened operational risk to the wider Canadian capital markets.

Additional Comments on the Proposed Changes to NP 62-203

In addition to our responses to the specific questions posed in the Notice, we wish to provide the following additional comments on certain aspects of the Proposed Changes to NP 62-203 that are not addressed by those questions but that we consider to be of significance to market participants.

(1) *Section 2.18 of the Proposed Changes to NP 62-203 — Mini-Tender Offers*

We have concerns regarding the guidance set out in proposed section 2.18 of NP 62-203 with respect to mini-tender offers. In particular, the proposed guidance states that, as a guideline, NI 62-104 contemplates a minimum deposit period of 35 days for take-over bids, and that Form 62-104F1 sets out the information that securities regulatory authorities have determined is relevant to a securityholder's tendering decision. The intended effect of that statement is unclear. If the CSA intends to signal that mini-tender offers should be open for a minimum of 35 days and should provide disclosure equivalent to that required by Form 62-104F1, we respectfully submit that such a requirement cannot be introduced through policy guidance and would have to be enacted through legislation.

Mini-tender offers are, by definition, transactions that fall below the 20% threshold that triggers the take-over bid requirements under Part 2 of NI 62-104. The legislature has made a deliberate choice not to subject mini-tender offers to those requirements. It is not open to the CSA to impose, through a policy statement, substantive obligations that are equivalent to those applicable to formal take-over bids. While we acknowledge that the proposed guidance does not expressly require compliance with the 35-day deposit period or Form 62-104F1, the use of those requirements as "guidelines" for assessing whether a mini-tender offeror has provided "sufficient time and information" — coupled with the warning that securities regulatory authorities may intervene where those elements are absent — creates significant regulatory uncertainty.

We recommend removal of the second sentence of the second paragraph of the proposed guidance in section 2.18 of NP 62-203.

(2) *Section 3.3 of the Proposed Changes to NP 62-203 — Change in Plans or Future Intentions*

We have certain reservations regarding the guidance set out in proposed section 3.3 of NP 62-203 with respect to the disclosure of changes in an acquiror's plans or future intentions. First, we do not believe that the guidance is sufficiently specific to actually alter or improve current market practice. Second, to the extent that it does alter market practice, we believe it may have a negative impact on the occurrence of take-over bids, which would further damage the capital markets in Canada.

The proposed guidance would require an acquiror to update its early warning report as soon as a change in plans or future intentions with respect to a particular action "actually occurs" — including, potentially, at a stage well in advance of the execution of a definitive agreement, the commencement of a take-over bid, or the public announcement of a proxy solicitation. While the CSA acknowledges that a change in plans or future intentions will generally occur at the latest upon one of those events, the guidance expressly contemplates that the obligation may arise at an earlier stage where an acquiror or joint actor has taken "irrevocable steps" to effect a potential transaction or has publicly announced information that differs from previously disclosed intentions.

We do not believe that this guidance is workable in practice, and we are concerned that, to the extent it does alter market practice, it will have a chilling effect on take-over bid activity and shareholder engagement more broadly. The determination of when a change in plans or future intentions has "actually occurred" is inherently subjective and fact-specific, and the proposed guidance does not provide market participants with a sufficiently clear or predictable standard by which to assess their disclosure obligations in real time. Acquirors and their advisors will be required to make difficult judgment calls at early and uncertain stages of a transaction, with the risk of regulatory sanction if their assessment is subsequently found to have been incorrect. This uncertainty is likely to discourage the pursuit of transactions that would otherwise be in the interests of securityholders. We note that the CSA's own data indicates that only 9 take-over bid circulars were filed in Canada between January 1, 2021 and December 31, 2023 — a notably low level of activity that underscores the need for caution in imposing additional regulatory burdens on prospective acquirors. The proposed guidance, if it has any practical effect on market behaviour, would compound that problem by adding a further layer of disclosure risk to the early stages of transaction planning. We would encourage the CSA to reconsider this aspect of the proposed guidance and to adopt a clearer, more objective standard that provides market participants with a workable and predictable framework for assessing their disclosure obligations.

(3) Section 3.6 of the Proposed Changes to NP 62-203 — Calculation of Early Warning Reporting Thresholds in Respect of Convertible Securities

We have concerns regarding the guidance set out in proposed section 3.6 of NP 62-203 with respect to the treatment of convertible securities in the calculation of early warning reporting thresholds. The proposed guidance states that, where the subject transaction involves convertible securities, those convertible securities are to be included in the numerator of the securityholding percentage calculation irrespective of whether they are convertible within 60 days and irrespective of any conditions attached to them. We do not believe this approach is consistent with market practice and believe it will lead to inconsistent disclosure and confusion in the market. If the CSA intends to enforce the approach outlined in the Proposed Changes, it should formally amend the Instrument itself to clarify the language.

We understand the interpretation of section 5.2 of NI 62-104 being put forward by the CSA in the Proposed Changes, but it is not one that has been commonly adopted in practice. The reason is simple: it is not intuitive or logical. The proposed guidance would create an asymmetry whereby convertible securities that are already held by an acquiror are excluded from the numerator unless they are exercisable within 60 days, while convertible securities acquired in the subject transaction are included regardless of their conversion timeline. Moreover, the securities underlying the convertible securities acquired in the subject transaction would be included in the numerator but not the denominator. This inconsistency is difficult to justify and would produce anomalous results in circumstances where an acquiror acquires convertible securities with a long-dated or conditional conversion feature. We recommend that the CSA revise sections 1.8 and 5.2 of NI 62-104 to clarify this point and ensure that shares outstanding for purposes of inclusion in the numerator are also included for purposes of the denominator (or the total issued and outstanding shares).

(4) Section 3.1 of NP 62-203 Section 9.4 of Companion Policy 51-102CP — Public Interest Guidance in Respect of Equity Equivalent Derivatives

We have concerns with the proposed guidance in section 3.1 of NP 62-203 and section 9.4 of 51-102CP on when the use of equity equivalent derivatives may trigger the exercise of public interest jurisdiction.

It is noted that there may be 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. It is unnecessary for a policy statement to warn market participants that misleading disclosure about derivatives may engage the public interest jurisdiction. That jurisdiction already exists and is well understood. Including such a warning in NP 62-203 adds nothing to the law and risks creating confusion about whether the CSA is seeking to expand the scope of public interest jurisdiction beyond what existing case law supports.

The proposed guidance also warns that public interest concerns may arise where derivatives are used to build up large economic positions in an issuer if the holder "seeks to influence the outcome of a potential take-over bid or matter subject to securityholder approval by either exerting pressure on a counterparty or communicating expectations of commercial incentives or disincentives"[20] for the counterparty or its affiliates. We note that the Notice references the Alberta Securities Commission's ("**ASC**") decision in *Re Bison Acquisition Corp*[21] as part of the factual background to the Proposed Changes. The CSA does not expressly adopt the reasoning in that decision, and we do not suggest otherwise. However, the applicability of the *Bison* decision is unclear because the ASC's finding of abuse depended on two key assumptions that were not established by direct evidence. The ASC acknowledged that the

[20] Proposed s. 3.1 of NP 62-203.
[21] *Re Bison Acquisition Corp*, 2021 ABASC 188 [*Bison*].

bidder had complied with the early warning reporting regime and had no contractual right to influence the swap counterparty's voting decisions. Nevertheless, the ASC assumed that the counterparty had fully hedged its swap exposure by acquiring the underlying shares — notwithstanding evidence that the counterparty had hedged at least part of its position through swaps with other dealers — and further assumed that those shares would be tendered to the bidder's offer, on the basis that the counterparty's commercial relationship with the bidder made it "highly unlikely" that it would refuse to do so. The ASC relied on those assumptions to conclude that the shares had the potential to unfairly distort the outcome of the bid, whether by being voted against the competing transaction or not being voted at all. Further, the ASC used its public interest power to impose what was, in substance, a regulatory amendment that the CSA itself had considered and rejected only a few years earlier.

Second, and more importantly, the proposed guidance frames the test for exercising public interest jurisdiction around the holder's subjective intention, being whether the holder "seeks to influence" the outcome of a bid by pressuring a counterparty. That is not the right test. Public interest jurisdiction under Canadian securities law is concerned with the impact of conduct on the capital markets and on investors, not with the actor's subjective purpose.[22] While motive may be a relevant factor, it is not a precondition to the exercise of public interest jurisdiction, and framing the test around subjective intent would undercut the CSA's own ability to intervene in circumstances where conduct undermines the animating principles of securities law in a real and substantial way but the actor did not subjectively intend that result. If the CSA's concern is with conduct that actually affects, or would reasonably be expected to affect, how a counterparty deals with the underlying securities, the guidance should say so directly. As currently drafted, the guidance conflates intent with impact, exposing market participants to regulatory risk based on their purposes rather than the consequences of their actions. Moreover, even if the guidance were properly reframed around impact, the conduct it describes — the accumulation of substantial economic positions through equity equivalent derivatives — is not conduct that the CSA has chosen to make subject to disclosure under the early warning system. The Proposed Amendments expressly decline to require aggregation of equity equivalent derivatives with beneficial ownership for the purposes of calculating the early warning reporting thresholds, on the basis that there is insufficient evidence that derivatives are being used inappropriately or abusively with any regularity in Canadian capital markets. It is difficult to reconcile that position with guidance that simultaneously warns that the very same conduct may engage the public interest power. The CSA cannot deliberately decline to regulate the accumulation of economic positions through equity equivalent derivatives through the rulemaking process and simultaneously threaten to sanction that conduct through the exercise of public interest jurisdiction. To the extent the conduct described in the proposed guidance actually influences, or would reasonably be expected to influence, how a counterparty deals with the underlying securities, the appropriate response is to regulate that conduct through clear, prospective rules — not to reserve the right to intervene on an ad hoc basis through the public interest power in circumstances where the CSA has repeatedly considered such regulations and refused to

[22] *Riot Platforms, Inc v. Bitfarms Ltd*, 2024 ONCMT 27.

move forward with it. We recommend that the CSA revise the proposed guidance to anchor the exercise of public interest jurisdiction to the actual or reasonably anticipated impact of the relevant conduct on the capital markets, rather than to the holder's subjective intentions, with a focus on the real concern. If the CSA is focused on a market participant seeking to manipulate votes or ownership positions without appropriate disclosure, then this should be clearly articulated with examples.

If you wish to discuss any aspect of this letter, we would encourage you to contact any one of the following lawyers who would be pleased to speak to you at your convenience:

Paul D. Davis [redacted]

Shahen A. Mirakian [redacted]

Sandra Zhao [redacted]

Vincent Maltais [redacted]

Michelle C. Wong [redacted]