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Ontario Securities Commission
Autorité des marchés financiers
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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 and Mesdames:

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

This letter is provided to you 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 published on May 14, 2026 (the "**Request for Comment**"). We appreciate the opportunity to provide this comment letter and hope that our submissions will be of assistance. Following our preliminary comments, we respond to the specific questions set out in the Request for Comment. Following those responses, we also provide additional comments and suggestions for potential improvements to the beneficial ownership reporting regime beyond those which are proposed in the Request for Comment itself.

Preliminary Comments

We are generally supportive of the amendments proposed in the Request for Comment (the "**Proposed Changes**"). Having last implemented revisions to the Canadian take-over bid and issuer bid regimes more than a decade ago, the CSA's initiative is a welcome update of these regimes, reflecting important market and regulatory developments. We believe that, on balance, the Proposed Changes will provide greater flexibility to issuers and other market participants and promote the fairness and transparency of Canada's capital markets.

Selective Repurchase Exemption

We welcome the proposed Selective Repurchase Exemption described in the Proposed Changes. While we acknowledge and appreciate the policy rationale for the issuer bid regime in Canada, the lack of a mechanism allowing targeted repurchases without the need for formal exemptive relief has become more than a mere inconvenience for many Canadian issuers. Selective buybacks are common and permitted transactions in the United States and elsewhere. The need to seek and obtain formal exemptive relief in the case of selective repurchases from a Canadian holder, or "soft comfort" in the case of selective repurchases from offshore investors, imposes timing delays and unnecessary transaction costs that hamper the timely execution of a transaction and the efficiency of the capital markets. To that end, we strongly support the proposed new codified exemption permitting selective repurchases from holders in Canada. We also encourage the CSA to provide clear guidance with respect to the conduct of selective repurchases from holders outside of Canada. We understand that the proposed Selective Repurchase Exemption is not intended to replace the requirement to obtain exemptive relief for larger selective repurchase transactions that fall outside the specific and deliberately limited scope of the new Selective Repurchase Exemption. Notwithstanding that limitation, we encourage the CSA to consider providing greater flexibility within the proposed Selective Repurchase Exemption, in the interests of minimizing the need for discretionary relief or "soft comfort" to the greatest extent practicable.

Exemption conditions

While we are generally supportive of a number of the conditions proposed for the Selective Repurchase Exemption in the Proposed Changes, we favour providing issuers with greater deference to act in the best interests of their securityholders, as determined by their directors in compliance with their fiduciary duties, and greater flexibility in their capital allocation planning.

We certainly support the CSA moving away from its prior practice on discretionary exemptive relief for selective repurchases that required paying a purchase price per share at a discount to market price both at the time of signing a repurchase agreement and at the time of the closing of the repurchase. We believe that the requirement to repurchase at a discount to market at the date a repurchase agreement is signed is sufficient to protect the integrity of the capital markets. We recommend that the CSA clarify that the agreement date be the sole applicable date on which the discount condition must be satisfied, rather than referring to the "date of the bid", which is ambiguous in the context of a selective repurchase being made by way of an agreement rather than through a conventional bid.

In light of the fact that the private agreement exemption in respect of take-over bids does not reflect a maximum limit on the percentage of outstanding securities that can be acquired, we submit that the CSA should consider taking a similar approach for the Selective Repurchase Exemption. We would propose removing the proposed percentage limitation, again to provide maximum flexibility to issuers and deference to the ability of their boards of directors to act in the best interests of their shareholders, as determined by them in a manner consistent with their fiduciary duties. We submit that the requirement for a continuing liquid market will, by itself, be sufficient to satisfy whatever policy considerations may be motivating the proposed 5% limit, without adopting a "bright line" test of any kind. In the alternative, we would propose a higher limit of at least 10% of the issuer's outstanding securities within a 12-month period, to provide greater flexibility to issuers and boards of directors in making economic and commercial decisions in the best interests of their companies. This higher limit would also align more closely with the exemptive relief granted by the OSC in *GFL Environmental*. We believe the protections of the other conditions to the exemption are sufficient to protect the integrity of the capital markets and protect minority investors, especially in light of the requirement that there will continue to be a market for the securities that is not materially less liquid than before. At a minimum, we suggest the adoption of a higher limit when the repurchase transaction is paired with a corresponding arm's length transaction, such as a concurrent underwritten public secondary offering where the pricing is the same under the repurchase and the secondary offering. In these circumstances, we also believe that there should be an exception to the pricing condition within the Selective Repurchase Exemption made available, allowing the issuer to repurchase outstanding shares at the same price as the price at which shares are being sold, whether or not that is at a discount to market price as otherwise determined.

Further, we encourage the CSA to remove the five person and five transaction limits from the Selective Repurchase Exemption. We do not believe that limiting the number of selling shareholders is necessary in order to achieve any investor protection benefit when shares are being resold to the issuer at a discount to market price. An issuer bid confers a "reverse dilution" benefit on the issuer's remaining shareholders, all of whom will continue to be able to use the continuing liquid market to dispose of their shares at a higher price that reflects the benefit of this reverse dilution. In light of the other conditions specified in the Selective Repurchase Exemption, particularly the pricing restriction and the requirement for a continuing liquid market, imposing a limit on the number of selling securityholders does not appear to be necessary or beneficial.

We believe the rationale for limiting the number of vendors under the private agreement take-over bid exemption is not applicable in the context of an issuer bid exemption. In a take-over bid, a bidder's objective is to acquire issued and outstanding shares that are held by existing shareholders, and the bidder may do so at a premium to the current market price, so long as it does not exceed the 115% limitation. The shareholders who are party to the agreement with the bidder may therefore receive a benefit which will not be available to other shareholders. We believe that the five-vendor limit under the take-over bid private agreement exemption was intended to ensure that a bidder would not be able to confer a selective benefit on more than a reasonable, limited number of vendors without making a formal bid under which the benefits of any premium being paid to market price would potentially be available to all holders, equally and rateably, by tendering to the bid. In contrast, under the proposed Selective Repurchase Exemption, the issuer will only be permitted to repurchase its securities at a discount to market price, rather than at a premium. Shareholders who do not participate as vendors will nevertheless derive a benefit from the selective repurchase as a result of the anti-dilutive effect of the reduction in the number of outstanding shares following the cancellation of the shares being repurchased. The extent of the discount to market price paid by the issuer and the number of shares repurchased by the issuer will determine the extent of the benefit that the non-participating shareholders realize. The number of vendors who participate in a selective repurchase will not influence that outcome.

We note that a limit on the number of selling shareholders has not been included as a specified condition in recent repurchase exemptive relief decisions.

While we appreciate the concerns regarding the impact that a significant repurchase could have on the market price of the class of securities being repurchased, we do not believe it is necessary to require that the bid be made outside of regular trading hours, as proposed in Section 4.6.1(1)(d). For one thing, in the context of a selective repurchase, it is unclear precisely when the "bid" is actually being made. Is the relevant time the execution and delivery of a purchase agreement by the bidder and the issuer? Or is it the time of the closing of the agreed purchase transaction, when the shares are transferred to the issuer for cancellation and payment is made to the bidder by the issuer? None of those actions should have an impact on the trading price of the class of securities that would justify requiring them to occur outside of regular trading hours. Rather, what would be more likely to have an impact on trading price is the issuance of a news release by the issuer announcing the completion, or the intention to complete, a significant repurchase, such as the news release contemplated by Section 4.6.1(1)(h). We submit that the concern regarding impact on the trading price should be adequately addressed by existing stock exchange and Canadian Investment Regulatory Organization (CIRO) rules under which a trading halt may be imposed to allow for the dissemination and market absorption of material information during trading hours, if necessary. We acknowledge that the currently proposed Selective Repurchase Exemption incorporates a condition based on the security's closing price, although we believe that the market is sufficiently sophisticated to justify using the prevailing market price or a volume-weighted average trading price, rather than the closing price.

We also encourage the CSA to reconsider the condition set out in Section 4.6.1(1)(f) of the Proposed Changes. With respect to the liquid market requirement in subsection 4.6.1(1)(f)(i), we recognize that liquidity is an important element for CSA Staff in assessing exemptive relief applications today. However, often, as was the case in the *GFL Environmental* relief, assessments of liquidity are appropriately focused on the securities being "highly liquid" and ensuring that there will continue to be a "liquid market". We submit that an objective liquidity test would be preferable to requiring the Board to make the subjective post-repurchase determination proposed in the Proposed Changes. Such an objective test could simply require that "the securities subject to the Selective Repurchase Exemption are "highly liquid". Alternatively, we submit that the CSA consider aligning the liquid market requirement with the standards in the United States for repurchase transactions under Rule 13e-3, which do not result in the application of special investor protection requirements for going private transactions unless the transaction would result in there being no trading market at all, or would reduce the number of shareholders to a level that would permit the issuer to terminate its public company reporting obligations.

We further note that, in any event, the requirements of Part 3 of Multilateral Instrument 61-101 *Protection of Minority Securityholders in Special Transactions* will continue to apply to all issuer bids, including those exempt from the formal bid requirements of Part 2 of NI 62-104. As a result, a board determination regarding the market not being materially less liquid as a result of the bid will already apply, unless a formal valuation is obtained and publicly disclosed in a material change report.

Given that corporate law requirements will typically require Board approval for a repurchase transaction, including one made in reliance on the Selective Repurchase Exemption, we believe that the fiduciary duty requirements applicable to such decisions by the Board, and associated potential director liability, are sufficient safeguards to protect the interests of investors and the capital markets. We would therefore propose that the condition requiring both of the specified determinations by the Board of Directors in subsection 4.6.1(1)(f), including the determination that the bid would not reasonably be expected to have a significant negative effect on the market price or value of the class of securities, are unnecessary.

We further acknowledge that a selective repurchase transaction may result in the application of disclosure requirements under applicable securities laws or applicable stock exchange rules relating to material changes, material information or otherwise. However, we question the need for the news release condition proposed in Section 4.6.1(h), both in terms of the timing requirements and the mandated contents. We suggest that the CSA should instead allow issuers to determine whether a repurchase under the Selective Repurchase Exemption is sufficiently material to warrant disclosure under existing continuous or timely disclosure requirements and to determine the specific material facts to be included in any such disclosure. Alternatively, if the CSA considers specific mandatory disclosure to be necessary, it could consider a rule requiring that disclosure to be made on a quarterly basis in the issuer's management's discussion and analysis rather than through a mandatory immediate news release (absent a determination by the issuer that such disclosure must be made immediately under conventional timely disclosure requirements), consistent with reporting by some issuers under their normal course issuer bid. We note that in the United States, issuers are required to provide quarterly disclosure of equity security repurchases under Item 703 of Regulation S-K, one of the form requirements applicable to periodic reports under the U.S. Securities Exchange Act of 1934, as amended. The current reporting requirements of Form 8-K, which generally require a filing on Form 8-K to be made within four business days of a triggering event, are not triggered solely as a result of equity security repurchases made by the issuer. Accordingly, requiring only quarterly and not immediate disclosure of equity security repurchases would align the Canadian and U.S. disclosure regimes applicable to repurchases of equity securities.

Offshore repurchases

The Canadian take-over bid and issuer bid regimes require an offeror to make a formal bid that is open to all holders of the target class of securities to participate in. The purpose of this requirement is to protect those shareholders who would not otherwise be given the opportunity to participate. However, with the jurisdictional limitations of the take-over bid and issuer bid regimes, Canadian securities regulators are left with only their public interest jurisdiction to protect Canadian shareholders from the consequences of selective offshore transactions. CSA Staff have a history of providing guidance and comfort to issuers regarding offshore transactions and we welcome additional guidance regarding the application of public interest considerations to offshore transactions.

We note the inclusion of additional guidance in Section 2.21 of NP 62-203 regarding offshore repurchases. In our view, this guidance is not sufficient and should either be removed or expanded and clarified. The proposed guidance only provides comfort where the conditions to use of the Selective Repurchase Exemption are applied to offshore repurchases, which is more restrictive in a number of respects than existing comfort provided by Staff in many offshore buyback transactions. In our experience, CSA Staff has traditionally focused on a narrower set of factors in offshore purchase transactions than those enumerated in the Selective Repurchase Exemption. We would suggest the CSA should clearly and directly address the principles that it will apply in exercising its public interest jurisdiction in all transactions. Codifying the key factors the CSA expects to see addressed in a transaction for the transaction not to engage public interest concerns (without imposing a narrower, more restrictive set of affirmative conditions or requirements) would provide much needed certainty to market participants, serving as a welcome addition to the unpublished principles articulated through private consultations, and ideally eliminating the need for these consultations on a case-by-case basis.

At a minimum, we believe that proposed Section 2.21 of National Policy 62-203 *Take-Over Bids and Issuer Bids* must be clarified. The Request for Comments suggests that Section 2.21 is intended to clarify that the CSA retains public interest jurisdiction over offshore repurchases of securities. While this has not been in doubt, the wording of proposed Section 2.21 separately creates ambiguity in the application of the guidance it offers. In particular, the section proposes to add the following statement: "In general, offshore repurchases would not raise public interest concerns if an issuer conducts repurchases from a security holder who is not in Canada or a resident of Canada in the circumstances and manner described in the selective repurchase exemption set out in Section 4.6.1 of the Instrument." If the 5%, five person or five transaction limits were to remain, it is unclear how the guidance in Section 2.21 is intended to apply in practice. For example, could an issuer repurchase up to 5% of the securities of the class from holders in Canada under the Selective Repurchase Exemption, and then in the same 12-month period repurchase another 5% of the securities of the same class from shareholders outside Canada on a comparable basis? Or is the guidance intended to imply that the limits set forth under the Selective Repurchase Exemption apply to all share repurchases from all holders within the same 12-month period, despite the fact that the repurchases from holders outside Canada are not themselves an issuer bid? This would be an unwelcome development. Moreover, is this guidance intended to create the implication that an offshore repurchase in excess of 5% would raise public interest concerns? That would be inconsistent with prior comfort CSA Staff has given for repurchases in excess of 5%. To avoid this uncertainty, we encourage the CSA to, at a minimum, clarify the intention of this guidance. To that end, we encourage the CSA to modify the guidance to specify only the particular factors relevant to public interest considerations applicable to offshore repurchases without any reference to the Selective Repurchase Exemption, other than to perhaps expressly specify that the Selected Repurchase Exemption and the guidance in Section 2.21 relating to offshore repurchases exist separately from each other and do not integrate.

Additional areas for guidance

We further encourage the CSA to amend the Proposed Changes to address a broader scope of transactions (both domestic and offshore) to better facilitate issuer capital raising and market efficiency. Among other things, the proposals do not address other types of transactions involving potential repurchases of shares by issuers that have become popular, especially for cross-border issuers, including convertible securities offerings paired with derivatives that may include a related share repurchase by the issuer, such as capped call options or prepaid forwards. These transactions are common in the United States. Unfortunately, the existing issuer bid constraints have impeded the use of these structures in Canada given the need to pre-clear the arrangements with CSA Staff for offshore repurchases and the inability to use these structures for domestic repurchases. Amendments to clearly permit these structures domestically and put Canadian companies on an equal capital raising footing with their U.S. peers would be widely welcomed.

Subject to the above, we strongly support the adoption of the Selective Repurchase Exemption as an independently available exemption and agree that the conditions and limitations under the

Selective Repurchase Exemption should be independent of other issuer bid exemptions and the shares acquired by an issuer under such other exemptions or in formal bids.

Early Warning Reporting and Alternative Monthly Reporting

We are supportive of several elements of the Proposed Changes regarding the early warning and alternative monthly reporting system. However, as discussed below, we believe a number of the Proposed Changes require further consideration before adoption.

Equity equivalent derivatives

We support introducing additional disclosure requirements and modifying the calculation of beneficial ownership percentages for equity equivalent derivatives as proposed, but only in the limited circumstances proposed – that is, in the context of a take-over bid or a proxy contest. We believe limiting the requirements to these circumstances strikes a reasonable balance between the respective interests of issuers, shareholders, acquirors and activists.

In balancing competing interests of issuers, shareholders and activists, we believe it is appropriate for the CSA to strengthen its proposed approach to mandated disclosure of equity equivalent derivatives in the circumstances of a proxy contest. For example, in many cases an activist investor may engage in activities that can have an effect (sometimes a significant effect) on the market price of an issuer's securities without filing a dissident proxy circular. This can include disclosure made in reliance on the public broadcast exemption to the solicitation restrictions, the submission of a shareholder meeting requisition or a request for an issuer's registered and beneficial holder list. We submit that, at the time an activist first takes a positive action directed at the issuer or a public action with respect to its investment in an issuer (beyond mere compliance with the early warning regime or alternative monthly reporting regime), disclosure of the activist's holdings, whether as a result of a legal disclosure obligation or a strategic tactic, should necessitate full disclosure of the activist's holdings, including any equity equivalent derivatives. Issuers and shareholders should not be forced to speculate as to the true economic exposure of an activist investor in circumstances where the activist has made public forays or taken active steps directed at the issuer that can have an effect on the market price of the issuer's securities.

In that regard, we note that under the U.S. Securities Exchange Act of 1934, as amended, for the purposes of beneficial ownership reporting on Schedule 13D and Schedule 13G, a distinction is drawn between "active" and "passive" investors. An investor is considered to be "active" if it acquires or holds voting securities ***with the purpose or effect of changing or influencing control*** of the issuer. The CSA may wish to consider adopting a similar type of distinction between active and passive investors in Canada based on the same or a similar test, limiting the application of certain incremental requirements (whether relating to equity derivatives or otherwise) only to active investors.

In respect of the provisions of proposed Section 5.1(6) of NI 62-104, we believe that further explanation is required regarding the effect of the enhanced beneficial ownership calculation and resulting reporting obligations coming to an end upon the occurrence of one of the events specified in Section 5.1(6)(b). For example, would an acquiror be subject to an early warning report amendment filing requirement on the meeting date, if it has previously announced its solicitation had ceased, to report the "disposition" of the securities relating to the equity derivatives that it is no longer deemed to beneficially own? We would also propose that Section 5.1(6)(b) should terminate the expanded deemed beneficial ownership requirements relating to equity derivatives on the ***earlier*** of the meeting date and the date of an announcement the solicitation has ceased. As soon as either of those two things has occurred, the continuing application of the enhanced deemed beneficial ownership requirements would not seem to serve any purpose.

While we are generally supportive of the equity equivalent disclosure requirements, we do not support the proposed requirement to disclose the name of the counterparty. In our view, absent a determination that they are acting jointly and in concert with the bidder or activist, counterparties are merely economic actors engaging in a derivatives transaction and their identity is not pertinent to the bidder's or activist's actions with respect to the issuer. Requiring such disclosure is likely to have a significant chilling effect on the availability of derivative support to bidders or activists given the concern of counterparties (typically banks) of being unnecessarily involved in a potentially hostile situation in which they have no interest or involvement other than the economic terms of the derivative. The identity of the counterparty should not be material, or even relevant, information to the target's shareholders for the purpose of assessing the implications of the equity derivative for the bidder or activist.

Plans or future intentions disclosure

We acknowledge that sometimes plan or future intention disclosure in early warning reports may appear to be boilerplate. We also recognize that in prior amendments to the early warning reporting regime, the CSA enhanced the requirements for plan and future intention disclosure with a goal of improved disclosure.

There is an inherent tension between seeking higher quality and more current disclosure of plans and future intentions and inadvertently and inappropriately triggering premature disclosure of a potential material fact or material change with respect to an issuer. Premature disclosure of an M&A transaction before execution of a binding agreement raises serious risks to issuers, shareholders and other market participants and any requirement to make premature disclosure would be an unwelcome development inconsistent with current requirements and practice, would have the potential to prompt incomplete or erroneous information and would be likely to have a chilling effect on M&A activity in Canada.

The Proposed Changes regarding plan or future intention disclosure raise serious concerns for issuers and reporting investors. In particular, the guidance, as drafted, introduces even greater ambiguity than currently exists for determining an investor's disclosure obligations. On the one hand, the CSA is proposing to add new guidance, which suggests the CSA views current disclosure practices to be insufficient. However, the content of the proposed disclosure appears to suggest an approach consistent with the current practice of only reporting a change of intention when the circumstances have developed to a stage where the likelihood of the actual occurrence of a transaction has moved from being merely speculative to having at least a reasonable degree of possibility, if not probability or certainty. In particular, the wording of the Proposed Changes states that disclosure must be made "as soon as a change in plans or future intentions occurs or if the acquiror or any joint actor has taken *irrevocable steps* to effect a potential transaction" *[emphasis added]*. In our view, the reference to "irrevocable steps" will not result in any acceleration of disclosure relative to current practice. It is difficult to imagine any circumstances under which the steps taken by an acquiror to effect a potential transaction would be irrevocable unless and until the transaction has actually closed, even if a failure to complete the transaction could result in a claim against the acquiror for breach of contract.

Further, the guidance notes that it suggests that "*significant steps* by an acquiror or any joint actor with respect to a particular transaction or event may, individually or taken together, constitute a change in the plans or future intentions disclosed in the acquiror's most recent EWR".

We are concerned about the lack of clarity as to the meaning of the terms "irrevocable steps" or "significant steps". We are also concerned about how market participants are expected to interpret the proposed guidance and that the guidance will create greater uncertainty that may be even less desirable than the status quo, where disclosure is typically provided at the time a binding agreement is signed or a bid is announced. We submit that if there is a need to change the existing rules, guidance and market practices surrounding the initial disclosure of an acquiror's future plans and intentions, or the requirements for making future amendments to that disclosure, any change that is introduced should carefully weigh the competing considerations involved. A future plans and intentions disclosure regime that requires full disclosure of all potential transactions, no matter how preliminary or speculative, will likely lead to over-inclusive "boilerplate" disclosure that contemplates the broadest possible range of potential transactions, without actually providing any useful information to the market. It will also create the risk of premature disclosure of transactions before they have a sufficient degree of certainty to warrant having any influence on an investor's investment decisions, potentially prejudicing those who rely on the disclosure without fully understanding the risks and uncertainties involved. It would also potentially have a chilling effect on the market, discouraging parties from proposing transactions that would ultimately be beneficial to shareholders for fear of the embarrassment, or other adverse consequences, associated with having to disclose a transaction under consideration that does not ultimately proceed.

On the other hand, we appreciate the importance of timely and sufficiently detailed disclosure of future plans and intentions, or changes in previously stated plans and intentions, so as to permit investors to take appropriate action in respect to a potential transaction at the appropriate time.

A line must be drawn dividing premature, over-broad, unhelpful and potentially disruptive disclosure from timely and appropriate disclosure of material information that is necessary to satisfy appropriate investor protection objectives. We recognize this may be challenging, particularly where it is not necessarily the case that the line should be drawn in the same place in all contexts.

In the context of a friendly transaction involving an early warning report filer, we do not believe updated disclosure is merited prior to signing a definitive transaction agreement (whether an arrangement agreement, take-over bid support agreement or other similar agreement). We believe that is the most appropriate time for disclosure because investors can be informed with an appropriate degree of certainty as a transaction will have crystallized. In the context of a friendly transaction, any suggestion that disclosure must be made sooner than the signing of a definitive agreement has the potential to create significant market disruption and to create outcomes that are unfavourable to parties if a transaction under negotiation is forced to be announced but does not ultimately come to fruition.

We acknowledge that unsupported proposals, including activist activities, may warrant a different approach requiring disclosure earlier in the process, but we would not be supportive of vague guidance or rules that could inadvertently result in requiring premature disclosure.

As a result, we strongly encourage the CSA to either remove the proposed guidance entirely, or to give careful and deliberate consideration to the types of definitive crystallization events that should trigger a disclosure requirement in various different circumstances, and provide guidance in specific terms, including examples. In proposing any regime that could require disclosure of a potential transaction before definitive transaction agreements have been signed, we urge the CSA to exercise extreme caution in weighing any potential benefits of such disclosure against the potentially even more serious risks of creating a regime that may result in premature disclosure.

Joint actor reporting trigger

Just as we have concerns about the potential adverse effects of requiring premature disclosure of a change in future plans or intentions, we have concerns that the Proposed Changes relating to joint actor disclosure could lead to premature disclosure with similar adverse consequences.

While there may be some circumstances where disclosure of the creation of a joint actor relationship may be warranted prior to the parties entering into a definitive agreement to act jointly or in concert with respect to a target class of securities, there are at least as many circumstances where the proposed disclosure trigger would result in premature disclosure that could be more detrimental to the market and have a chilling effect on developing proposals for transactions that could deliver significant value to shareholders. We encourage the CSA to carefully consider the circumstances under which joint actor disclosure should be required, taking into account these concerns regarding the risks of premature disclosure and to consider more specifically what types of triggering events should lead to the conclusion that two parties are, in fact, acting jointly or in concert.

For example, consider the case of a supported transaction that involves two different insiders supporting the transaction, whether they are supporting a sale to a third party will be involved in the buyer group (through a rollover or otherwise), or have other involvement in the transaction not previously contemplated in any previously filed early warning report. To press the example even further, the two parties supporting the transaction may not independently be insiders, each holding less than 10% of any class of voting or equity securities, but both will be considered to be greater than 10% shareholders once their holdings are combined. To require disclosure that those two parties are acting as joint actors prior to the execution of a definitive agreement in respect of a transaction would, in our view, be premature and harmful to the capital markets, and could result in a transaction that would bring considerable value to shareholders not proceeding. We do not believe the early warning reporting regime should mandate premature disclosure in this situation.

We acknowledge that the context of a proxy contest, where two separate shareholders come together and seek to force change of the board of an issuer, may be a situation where disclosure of the creation of a joint actor relationship is warranted, particularly if neither of the shareholders is independently a greater than 10% shareholder subject to early warning reporting requirements. However, we submit that the event triggering a disclosure requirement in this example should be a concrete and objectively determinable event, such as making public disclosure of an intention to act jointly or jointly executing a requisition for a shareholder meeting. While we agree that there are circumstances in which the creation of a new joint actor relationship should result in market disclosure, we believe that there should also be a specific crystallizing event that triggers the disclosure requirement. Absent an additional requirement for a specific crystallizing event, we believe that the existing definition of acting "jointly or in concert" based on the existence of an "agreement, commitment or understanding" will be unworkable for market participants to use in determining when a reporting obligation has been triggered, without more detailed rules or specific guidance on the facts and circumstances short of a formal, written agreement that are indicative of that relationship.

We also note that in the United States, under the Securities Exchange Act of 1934, as amended, beneficial ownership reporting is required by any "group" of two or more persons who agree to work together, or coordinate their efforts in cooperation with each other, with respect to acquiring, holding, voting or disposing of securities. The "group" is treated as a separate entity with independent reporting obligations from those of its members. The concept of "group" reporting in the United States faces the same challenges as the determination of joint actor status in Canada, in terms of determining whether, and when, a "group" has been formed in circumstances short of an express formal agreement between the members. However, there may be advantages to the approach of treating a "group" as a separate reporting entity that the CSA should consider. Taking such an approach would eliminate the need to treat each person acting jointly or in concert with any other person as having acquired beneficial ownership of each other person's securities when the relationship is formed and having disposed of beneficial ownership of each other person's securities when the relationship is dissolved, which is clearly not actually what is occurring, and may be misleading to the market.

Calculation of early warning reporting

We respectfully submit that the proposed guidance regarding calculation of holdings for purposes of early warning reporting is confusing and does not reflect the application of the existing rules as they are interpreted and applied in practice. The Canadian approach to beneficial ownership disclosure is clearly and firmly grounded in requiring disclosure of beneficial ownership of, or direction or control over, classes of voting or equity securities. Convertible securities which are not, by themselves, either voting or equity securities are not subject to the existing Canadian disclosure regime, except to the extent that they may result in the holder being deemed to have beneficial ownership of additional securities of a class that are voting or equity securities. Under the existing deemed beneficial ownership rules, a holder of a convertible security is deemed to beneficially own any securities of a class of voting or equity securities that the convertible security gives the holder the right, or obligation, to acquire within 60 days.

The proposed guidance is not only unclear in how it is presented, but it is inconsistent with current legal interpretations of the reporting requirements and existing market practice.

We strongly encourage the CSA to withdraw the proposed guidance from the Proposed Changes and to reassure the market that it is not reflective in any way of the CSA's actual interpretation of the requirements of the current reporting regime. We understand that a number of institutional investors and industry groups have voiced significant concerns regarding the proposed guidance as potentially disrupting longstanding advice previously received from prominent Canadian law firms and decades of market practice.

The Proposed Changes would also introduce an inconsistency with the manner in which beneficial ownership is currently determined in the United States under Rule 13d-3, for purposes of Schedule 13D and Schedule 13G reporting. Currently, Canadian rules and practice align fully with the beneficial ownership determinations made under Rule 13d-3, with the exception that only securities that a person has a ***right*** to acquire within 60 days are considered beneficially owned, unlike in Canada where securities that a person has either a ***right*** or ***obligation*** to acquire within 60 days are included.

In that regard, we submit that introducing any further inconsistency with the approach to beneficial ownership calculation in the United States would result in significant and unwarranted incremental compliance costs for those institutional investors whose portfolios contain securities of both U.S. and Canadian public companies, in addition to the significant and unwarranted costs that Canadian institutional investors would face in modifying their existing Canadian reporting compliance policies and procedures.

We have included in this comment letter a revised, clarified draft of the proposed guidance that we believe is reflective of a correct legal interpretation of the existing rules and consistent with current Canadian market practice.

<u>Other changes to the EWR and AMR regimes</u>

Aside from the guidance regarding calculations, we do support many of the proposed wording changes and additional guidance under the early warning reporting regime and alternative monthly reporting regime, including:

- The inclusion of a deemed acquisition provision in respect of an issuer that becomes a reporting issuer. While we generally believe CSA Staff has been addressing this issue through its IPO prospectus clearance process, having a disclosure requirement under a rule is a more appropriate means of introducing a regulatory requirement of this nature. We are supportive of providing an exemption from the press release obligation and moratorium purchase prohibitions in connection with this reporting trigger. However, we propose that this new reporting trigger should be limited in its application only to those circumstances where an issuer becomes a reporting issuer by **filing an IPO prospectus** or **listing its securities** on a Canadian stock exchange. If a non-Canadian issuer acquires all of the outstanding securities of a Canadian reporting issuer in an M&A transaction, it may become a reporting issuer in Canada, even if the acquisition was not material from the acquiror's perspective. Existing large shareholders of the non-Canadian acquiror that becomes a reporting issuer in such circumstances may not even learn that the issuer has become a reporting issuer in Canada until well after the acquisition has been completed. Although those large shareholders may, in many cases, be able to rely on the early warning reporting exemptions in National Instrument 71-101 or National Instrument 71-102, there are some circumstances where those exemptions will not be available. We submit that either the new reporting requirement should not apply to shareholders of a foreign issuer who becomes a reporting issuer in Canada under those circumstances or that there should be a reasonable grace period made available to them.

- The inclusion of the proposed guidance regarding "Securityholding percentage" and the associated clarifications regarding early warning reporting to be based on the 2% change relative to the prior early warning report – while we believe this methodology is commonly understood, the guidance confirming this approach is warranted.

- The proposed changes to clarify that AMR reporting obligations are fixed at 2.5% intervals. While we believe the intention was reasonably clear, the current wording is unclear in its intentions, creating a "trap for the unwary" that should be resolved through clearer explanation of the intended requirement. We do not, however, believe that the proposed wording change in the Proposed Changes achieves the desired level of additional clarity. In this comment letter we have included suggested alternative wording changes, including a proposed new definition of the term "Fixed Threshold", which would be defined as "…10%, 12.5%, 15%, 17.5%, 20% and each subsequent percentage that is 2.5 higher than the preceding percentage, up to but not including 100%".

<u>Take-over bid amendments</u>

We are supportive of the proposed removal of the 5% Market Purchase Exemption. While there are circumstances under which market purchases during the pendency of a take-over bid may have been appropriate, given the limited usage of take-over bids in the Canadian context in recent years and other regulatory changes, the exemption is more likely to result in market-harming purchases rather than to be beneficial to the market as a whole.

We support expanding the availability of the non-reporting issuer take-over bid exemption as proposed.

<u>Issuer bid modifications</u>

We support the codification of the "Dutch auction" mechanisms for issuer bids, particularly including the ability to extend the period of the bid without first taking up and paying for any of the securities already tendered. These are common transactions and the use of modified pricing regimes in these circumstances is well understood by the market.

We similarly support the proposed changes to permit securityholders to maintain their proportionate interest in connection with an issuer bid without the need for exemptive relief.

We support expanding the availability of the issuer bid exemption for non-reporting issuers as proposed.

Filing Obligations Under Certain Take-Over Bid and Issuer Bid Exemptions

Currently, the foreign take-over bid and issuer bid exemptions (Sections 4.4 and 4.10 of NI 62-104) and the de minimis take-over bid and issuer bid exemptions (Sections 4.5 and 4.11 of NI 62-104) require the "bid material" to be **filed** in the local jurisdiction as a condition of the availability of the exemption. This filing obligation results in significant and, we submit, unnecessary administrative burdens for foreign take-over bids and issuer bids that have minimal connection to Canada. In order to comply with this filing obligation, historically an offeror would be required to retain Canadian counsel to prepare, file and deliver a filing package to each of the thirteen Canadian securities regulatory authorities. Each such filing would require a customized cover letter to the regulator, referencing the applicable exemption being relied on, explaining the circumstances of the transaction and referencing the attached materials being filed. In some jurisdictions, a filing fee applies, so it would also be necessary to prepare and include a cheque for the applicable filing fees, payable in Canadian dollars. As the "filing" procedure evolved into submission by e-mail, it was still necessary to prepare materials to send to each of the thirteen regulators by e-mail, arranging for a supplemental courier package containing a cheque for the filing fee, where applicable. Currently, we understand that some provincial regulatory authorities will accept filings of these materials by e-mail, while others have requested that such filings be made through SEDAR+. In order to do so, the offeror would now be required to enter into a filer agreement and establish a SEDAR+ filer profile, except in the unlikely event that one already exists, in order to be able to make the filing through SEDAR+.

Aside from the complexity of the filing process, certain of the Canadian securities regulators have been following a practice of reviewing the materials that are filed and then issuing a comment letter to seek clarification of certain matters, including questioning the basis on which it had been concluded that the other conditions of the exemption were in fact satisfied.

All of this adds unjustified significant cost and complexity to exemptions that should be automatically available if all of the other conditions are satisfied, in order to allow shareholders in Canada to participate in the benefits of the transaction together with shareholders in other countries.

We are aware of a number of circumstances where the bidder has made the decision to exclude Canadian shareholders from having the opportunity to participate in a foreign take-over bid or issuer bid, once informed of the extent of the legal fees and regulatory filing fees that would be entailed. That result is clearly not in the best interests of Canadian investors, harming them rather than protecting them from harm.

We would therefore propose that the CSA consider making amendments to the foreign take-over bid and issuer bid exemptions, as well as the de minimis take-over bid and issuer bid exemption, to remove the obligation to file the bid material with all thirteen of the Canadian securities regulatory authorities in circumstances where Canadian investors will already have full access to that material through publicly available sources.

Settlement period

We understand from the Request for Comment that the basis for proposing a change to the three business day requirement to pay for securities taken up in a take-over bid or issuer bid to "promptly" is to align that requirement with the settlement period for secondary market securities trades in Canada.

We submit that this proposed change is misguided, as there is no reason that the timing requirement for payment for shares tendered in a take-over bid or issuer bid should align with the settlement period for secondary market trading. By removing the reference to three business days as an outside limit, it is possible that shareholders will have to wait longer for payment, as "promptly" could reasonably be interpreted to mean more than three business days given the logistical and administrative complexity of arranging payment to the tendering shareholders. In our experience, the delay in settlement and payment in a take-over bid or issuer bid is not a result of a purchaser failing to pay promptly at closing. In fact, generally payment of consideration to the depositary is a condition to completion of the transaction (in the case of a supported take-over bid, for example). Rather, the delay in payment arises from depositary service providers who, as a standard practice, take a full three business days to make payment to securityholders. Payment sooner is often resisted and, where it is accepted, is subject to excessive rush charges imposed by the service providers, which would in turn be passed along to the purchaser.

For these reasons, we submit that the change to "promptly" is unlikely to result in a change in practice that would be beneficial to tendering shareholders. If any change were to be made, the CSA might consider amending the requirement to say "promptly, and in any event within three business days".

Additional guidance

With respect to additional guidance proposed in NP 62-203, we have the following comments:

- In Section 2.4.1, we suggest that any guidance with respect to public interest concerns about bid conditions be more targeted and specific as to the nature of CSA Staff's concerns. As proposed, the guidance is overly broad and calls into question any conditions in an unsolicited take-over bid (which generally do require other party actions – such as providing due diligence access – and entitle the bidder to assess condition compliance in the bidder's sole discretion). This is often by necessity given the lack of a support agreement with meaningful covenant protection from the issuer in favour of the bidder. We do not believe that the general nature of unsolicited bids (i.e., those being made without the support of the issuer) should risk intervention by CSA Staff on public interest grounds, unless those public interest grounds have been spelled out in guidance that provides sufficient clarity and specificity to bidders.

- In Section 2.18, we acknowledge CSA Staff concerns raised with mini-tenders. However, we question the proposed drafting as the guidelines broadly suggest compliance with "certain principles" of the Bid Regime, without specificity as to which principles. Given that mini-tenders do not otherwise engage the requirements of the Bid

Regime, we believe that any guidance in this regard should be more specific in order to provide the market with clear guard rails regarding unacceptable elements of mini-tender transactions.

- We believe that the guidance in Section 2.20 regarding the meaning of the term "date of the bid" should be revised and clarified to provide more broadly applicable guidance. As drafted, the reference to "date of the bid" being the date that an "offer to acquire" is made does not provide helpful guidance regarding when either is considered to have occurred, particularly in the circumstances of a bid that is exempt from the formal bid requirements. It does not, for example, assist in clarifying when the conditions of the Selective Repurchase Exemption must be satisfied (which is necessary to assess the availability of the exemption, and the precise beginning and ending dates of the rolling 12-month period during which its volume and number of vendor limitations apply).

  The CSA may wish to consider clearer and more helpful guidance, such as a statement to the effect that the "date of the bid" will normally be the date on which an offeror extends an offer to purchase securities to one or more offerees and provides them with the means of accepting that offer.

- We are generally supportive of the proposed guidance regarding an early warning report filer's ability to enter or re-enter the alternative monthly reporting system.

Specific Requests for Comment

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.

As noted above, we favour flexibility with respect to the proposed Selective Repurchase Exemption and would propose removing the size limitation. In the alternative, we would propose a limit of at least 10% to provide flexibility to issuers and boards of directors in making economic and commercial decisions in the best interests of the company. Should the CSA not be supportive of a general increase in the cap, we suggest the adoption of a higher limit when the repurchase transaction is paired with an arm's length transaction such as a concurrent underwritten public secondary offering where the pricing is the same under both the repurchase and the secondary offering. In these circumstances, we also believe that the pricing condition within the Selective Repurchase Exemption should be modified to tie the minimum pricing to the public offering price under the secondary offering.

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.

We generally favour providing issuers with greater flexibility and would encourage the CSA to consider removing this element of the exemption or providing for a higher limit. In our view, the other conditions specified in the Selective Repurchase Exemption are generally more relevant as to the effect of the proposed transaction on the liquidity of the issuer's securities (size of the repurchase, pricing of the transaction and pre-existing liquid market) rather than the number of selling securityholders. We do not believe the imposition of a 5 person or 5 transaction limit is necessary in the circumstances, as increasing the number of vendors or the number of separate transactions involved will not have any adverse effect on those shareholders who do not participate in the selective repurchase, given that all purchases made will be at a discount to market price and therefore will be anti-dilutive, and given that a liquid market will continue to exist, into which they may sell their shares at any time. We do not believe the circumstances of the Selective Repurchase Exemption are comparable to the private agreement exemption from the take-over bid regime in a manner that would require such a limit.

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. 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?

We believe that the liquid market condition is a reasonable inclusion striking an appropriate balance between sufficiency of liquidity and not unduly limiting the availability of the Selective Repurchase Exemption. However, as noted above, we do not believe this should be required to be an affirmative determination made by the board of directors, but rather a factual requirement conditioning the availability of the 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?

As noted above, we question the need for the proposed press release requirement, both with respect to the timing and mandated contents. We would suggest that the CSA instead defer to issuers regarding compliance with their timely disclosure obligations under existing Canadian securities laws and stock exchange rules. Alternatively, we suggest that the CSA consider limiting any mandated disclosure to one that applies only on a quarterly basis, in the issuer's management's discussion and analysis, rather than through an immediate press release with prescribed contents (absent a determination by the issuer of the repurchase being material, triggering existing timely disclosure obligations). We submit that the news release content requirements are generally appropriate, although question the need for the issuer to disclose the name of the selling securityholder. We do not believe this should be a requirement of the exemption, as the identity of the seller would not generally be material information affecting the market price or value of the issuer's securities.

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?

We believe the appropriate reference price to be the unaffected closing price. Shareholders generally have the ability to sell at the market price, which may fluctuate for any reason. We do not believe the Selective Repurchase Exemption should be conditioned on a post-announcement pricing or that there should be a related cooling off period necessitating a discount to the market price at the time of announcement and completion in the manner that CSA Staff has applied in providing comfort or exemptive relief.

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?

We agree that the limit under the Selective Repurchase Exemption should not affect the availability of other issuer bid exemptions.

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?

Given the nature of the conditions, we think it is unlikely that the Selective Repurchase Exemption will have a significant effect on formal issuer bids, NCIBs or liquidity in the relevant class of securities considering the conditions embedded within the proposed Selective Repurchase Exemption (including taking into account our proposed amendments described above).

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?

No. We do not believe the Selective Repurchase Exemption should be conditioned on the issuer having an operative NCIB. Doing so may adversely affect opportunistic targeted buybacks given the time needed to clear and implement an NCIB. We submit that the Selective Repurchase Exemption should stand entirely independently of any other exemptions and that the exemptions should provide flexibility to issuers to make determinations as to the most appropriate way to effect share buybacks.

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.

We do not foresee any such challenges, except with respect to those comments we have raised in this comment letter.

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

We do not foresee any unintended consequences associated with the Selective Repurchase Exemption, except with respect to those we have noted in this comment letter.

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?

No, we do not think the exemption should give rise to any meaningful concerns regarding greenmail.

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 support the concept of special disclosure requirements and expanded deemed beneficial ownership rules for equity equivalent derivatives that has been proposed, but only in the limited circumstances proposed – i.e., a take-over bid or a proxy contest. We believe limiting the requirements to these circumstances strikes a reasonable balance among the interests of issuers, shareholders, acquirors and activists.

In balancing competing priorities among issuers, shareholders and activists, we do believe the CSA should consider further expanding its approach to enhanced disclosure requirements in a proxy contest. For example, in many cases an activist investor may engage in activities that can have an effect (sometimes a significant effect) on the market price of an issuer's securities without filing a dissident proxy circular. This can include disclosure made in reliance on the public broadcast exemption to solicitation, the submission of a shareholder meeting requisition or a request for an issuer's registered and beneficial holder list. We submit that, at the time an activist first takes a positive action directed at the issuer or a public action with respect to its investment in an issuer (beyond mere compliance with the early warning regime or alternative monthly reporting regime), such actions, whether as a result of a legal obligation or a strategic tactic, should necessitate full disclosure of the activist's holdings, including any holdings in equity equivalent derivatives. Issuers and shareholders should not be forced to speculate as to the true economic exposure of an activist investor in circumstances where the activist has made public forays or taken active steps directed at the issuer that can have an effect on the market price of the issuer's securities.

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?

In general, yes. We refer you to our response to question 12.

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?

We do not believe the proposed new disclosure requirements are likely to affect the number or quality of take-over bids or proxy solicitation campaigns.

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?

Yes. As noted above, we do believe the CSA should consider amending its approach to disclosure in a proxy contest. For example, in many cases an activist investor may engage in activities that can have an effect (sometimes a significant effect) on the market price of an issuer's securities. This can include disclosure made in reliance on the public broadcast exemption to solicitation, the submission of a shareholder meeting requisition or a request for an issuer's registered and beneficial holder list. We submit that, at the time an activist first takes public action with respect to its investment in an issuer (beyond mere compliance with the early warning regime or alternative monthly reporting regime), disclosure of the activist's holdings, whether as a result of a legal obligation or a strategic tactic, should necessitate full disclosure of the shareholder's holdings, including any holdings in equity equivalent derivatives. Issuers and shareholders should not be forced to speculate as to the true economic exposure of an activist investor in circumstances where the activist has made public forays.

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?

Yes, we agree with the proposed requirement. There is merit to shareholders understanding the economic motivations of an acquiror and we believe that a short lookback period is appropriate. We would also be comfortable with a shorter period of 3 months.

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.

As noted above, we are generally supportive of a reporting requirement applying in respect of an issuer that becomes a reporting issuer. While we generally believe CSA Staff has been addressing this issue already through a prospectus clearance process, having a rule requiring reporting is the more appropriate way of addressing the issue than legislating through the comment letter process.

However, as discussed earlier in this comment letter, we would ask the CSA to consider making accommodation for large shareholders of non-Canadian issuers that become a reporting issuer in Canada otherwise than through filing a prospectus or listing on a Canadian stock exchange, such as through the acquisition of a Canadian reporting issuer in an M&A transaction. We would propose that those shareholders should either be exempted from this new requirement or be afforded additional time to make the required initial filing, as they will not necessarily even become aware that the issuer in which they are a shareholder has become a reporting issuer in Canada as a result of an acquisition which may not even be material to the acquiror.

We are supportive of not having an initiating press release obligation or moratorium in connection with this reporting trigger.

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.

We anticipate that this proposal may rightly face resistance. As noted in this letter, the deeming trigger has significant potential to inadvertently trigger premature disclosure of transactions, which could have the unintended consequence of precluding certain transactions from proceeding, or even being advanced. Depriving shareholders of the opportunity to participate in transactions that could generate significant value for them operates to their prejudice, rather than serving an investor protection benefit. Further, without additional guidance (including helpful examples), we are concerned that determination of what it means to be acting “jointly or in concert”, or to have any “agreement, commitment or understanding” in the context of assessing the exact time at which this new deemed beneficial ownership and resulting reporting obligation may be triggered will create significant additional confusion for market participants. Finally, there may be advantages to following the U.S. approach to “group” reporting, treating the group (when formed) as a separate reporting entity. Deeming each joint actor’s securities to be beneficially owned by each other joint actor does not accurately reflect the circumstances of their actual relationship, which is very different from each having true beneficial ownership of their combined holdings jointly, and may give rise to unintended consequences. We encourage CSA Staff to revisit this proposal.

Non-Reporting Issuer Exemptions from the Take-Over Bid and Issuer Bid Requirements

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

We do not believe there are clear categories of other persons.

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?

Given the cost and complexity of private take-over bids, we do favour having a higher threshold for purposes of the non-reporting issuer take-over bid exemption and would propose at least 100 shareholders.

Settlement Period

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?

As noted earlier in this comment letter, we do not see any logical reason that the timing requirements for paying for securities that have been taken up in a bid should be aligned with the settlement period for secondary market trading. Further, as a practical matter, we do not believe that the intermediaries responsible for effecting the payment arrangements will be able to do so more quickly than they currently do.

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.

Yes, as described above, initial payments are made to a depositary at closing (whether in a take-over bid, issuer bid or an arrangement transaction). Payment from the depositary to shareholders is typically on a three business-day cycle, and it is unlikely that timing could be accelerated due to the operational and procedural constraints the depositaries face, which are very different from the circumstances of brokers and dealers effecting transfers of securities against payment in trades effected on a marketplace through automated clearing and settlement systems.

Additional Related Comments

We believe that the Proposed Amendments and Proposed Changes presented for consideration in the Request for Comments presents an important opportunity to consider other important amendments and changes to related provisions of National Instrument 63-103 and National Instrument 62-104 which are long overdue for reform.

National Instrument 62-103

Eligible Institutional Investor Definition

The current definition of eligible institutional investor is unduly and unnecessarily limited, preventing the use of the alternative monthly reporting system in circumstances where its use should be appropriate.

One issue is that the term "eligible institutional investor" currently includes a mutual fund that is not a reporting issuer but does not also include a non-redeemable investment fund, or an account that is managed on a fully-discretionary basis. We do not see any logical reason for including only mutual funds, and not non-redeemable investment funds, within the scope of permitted eligible institutional investors, and we do not see any policy reason for precluding accounts which are neither, but which are managed on a fully-discretionary basis by an investment manager, from being eligible to use the alternative monthly reporting system.

Another issue is that currently the "investment managers" eligible to use the alternative monthly reporting system are limited to those in a jurisdiction of Canada, or those subject to the regulatory requirements of the United States or Japan. Subparagraph (b)(ii) of the definition also includes those investment managers in certain selected countries which are subject to European Union Directive 93/22 on investment services in the securities field. Directive 93/22 has not been in effect since October 2007, having been replaced by MiFID in the European Union, and later by MiFIR in the United Kingdom. We see no policy reason why investment managers subject to the MiFID or MiFIR regime in any country should not be entitled to use the Alternative Monthly Reporting System.

We have included, in our proposed drafting changes to National Instrument 62-103, revisions that would implement this proposal.

Those proposed drafting changes also suggest wording for a new "Fixed Threshold" definition that we believe would provide even greater clarity regarding the operation of the intended amendment filing triggers than the revised wording including in the Proposed Changes.

Insider Reporting Exemption

There is currently uncertainty regarding whether the alternative monthly reporting system requires an initial alternative monthly report to be filed on an accelerated basis in order to preserve the ability to rely on the exemption from SEDI insider reporting requirements in Part 9. It is a condition of that exemption that the eligible institutional investor "has filed the report required under the early warning requirements or Part 4". Some eligible institutional investors and their legal counsel interpret this as meaning that, in order to be exempt from having to file on SEDI, the initial alternative monthly report must be filed before the SEDI filing would otherwise be due – in other words, within ten days of the triggering transaction (to satisfy the condition of the exemption before the SEDI filing deadline), rather than ten days after the end of the month in which the triggering transaction occurs.

As the purpose of the alternative monthly reporting regime is to report month-end positions, we believe it would be appropriate to clarify that there is no accelerated filing deadline for initial reports necessary in order to be able to rely on the Part 9 SEDI filing exemption.

We have included proposed wording in our suggested drafting changes to give effect to this clarification.

National Instrument 62-104

Deemed Beneficial Ownership

A number of revisions to the deemed beneficial ownership provisions in Section 1.8 could benefit from clarification of their intended operation, to ensure that they are understood in conformity with what we believe to be the preponderance of current market practice.

We believe it would be helpful to clarify that the deemed beneficial ownership provisions apply throughout the NI 62-104, including with respect to the reporting and announcement provisions of Part 5, despite the additional definitions which are specific only to that Part of the instrument.

As a related matter, is our understanding that the purpose of the deemed beneficial ownership provision is to take into account securities that it is within the ability of the acquiror to "get its hands on" with short notice, within the following sixty days. It has always been somewhat anomalous, and inconsistent with the corresponding deemed beneficial ownership provisions under Rule 13d-3 in the United States, that the Canadian rules have included in deemed beneficial ownership securities that the acquiror has the right "or obligation" to acquire within 60 days. It is entirely beyond the acquiror's control to "get its hands on" securities that it only has the obligation, and not the right, to acquire. We suggest that this would be an appropriate time for the CSA to consider whether there continues to be an appropriate policy rationale for including both "right or obligation" in the deemed beneficial ownership provision and, if not, consider amending the rule to align with the approach taken in the United States.

We also believe that it would be helpful to clarify that if there are conditions outside the control of the holder of a right to acquire securities within 60 days, the deeming provision is not intended to apply, as again the acquiror would not be able to "get its hands on" those securities within 60 days if those conditions are not satisfied, and it is outside the acquiror's power to satisfy them.

It would seem helpful to clarify that "beneficial ownership" and "direction and control", or any combination of the two, have equivalent status for all purposes of NI 62-104 for the purposes of determining ownership percentages.

Finally, we believe that further clarification would be helpful of the circumstances in which securities not actually owned by the acquiror are deemed to be outstanding for the purposes of calculating ownership percentages.

We have included suggested wording changes to implement these recommendations in our proposed drafting changes.

Exemption from 5% Threshold Reporting Requirements for Certain Institutional Investors

Currently, the provisions of Section 5.4 of NI 62-104 require all investors to report acquisitions on the basis of a 5% reporting threshold during the currency of a take-over bid or issuer bid for the target class of securities. This special reporting requirement has proven very difficult for many institutional investors, particularly those outside of Canada, to institutionalize and comply with. That is particularly because there is no readily available list that can be consulted to determine which issuers in Canada are currently subject to a take-over bid or issuer bid.

With the advent of automated trading, portfolio balancing transactions, index tracking and similar investment strategies, many institutional investors routinely trade securities of issuers worldwide, without the ability to pause every trade potentially involving a Canadian reporting issuer to conduct a search of SEDAR+ to see if it is currently the target of a take-over bid or issuer bid. It is also likely unrealistic to expect that a portfolio manager would be able to conduct a daily (if not hourly) check of all publicly-announced take-over bids or issuer bids for Canadian reporting issuers, so that those companies could be added to a restricted trading list to ensure that purchases are not made which cause the 5% reporting threshold to be exceeded inadvertently.

We would therefore propose that there should be an exemption introduced to the "Acquisitions during bid" reporting requirements for Ordinary Course Institutional Purchasers, who are ordinarily eligible to report under the alternative monthly reporting system, and who exceed the 5% threshold without actual knowledge of a take-over bid or issuer bid, and not with the purpose or intention of profiting from trading during the bid.

Proposed wording changes to implement this exemption are included in our suggested drafting changes.

Proposed Changes to National Policy 62-203

We have added proposed wording changes to help clarify that eligibility for the alternative monthly reporting system does not, by itself, relief an acquiror from the "Acquisition during bid" reporting requirements at the 5% level, to operate together with our proposed new exemption from that requirement for Ordinary Course Institutional Purchasers in certain circumstances.

* * * * *

We would be happy to discuss our comments with you; please direct any inquiries to James R. Brown [redacted], Robert Lando [redacted], Jason Comerford [redacted] [redacted] [redacted] or Rosalind Hunter [redacted].

Yours very truly,

Osler, Hoskin & Harcourt LLP

Proposed Drafting Changes

Proposed Changes to National Instrument 62-103

Definitions

1.1 (1) In this Instrument

"eligible institutional investor" means

(c) ***a non-redeemable investment fund***, a mutual fund that is not a reporting issuer, ***or an account that is managed for the benefit of an investor on a fully-discretionary basis by an investment manager***;

"Fixed Threshold" means 10%, 12.5%, 15%, 17.5%, 20% and each subsequent percentage that is 2.5 higher than the preceding percentage, up to but not including 100%;

"investment manager" means an entity that

(a) either

(i) is registered or licensed to provide investment counselling, portfolio management or similar advisory services in respect of securities, or is exempt from the requirement to be so registered or licensed, under the securities laws of a jurisdiction ***or of a foreign jurisdiction*** ~~or of Japan or under the Investment Advisers Act of 1940 of the United States of America, as amended~~, or

(ii) is subject to the European Markets in Financial Instruments Directive (MiFID), the UK Markets in Financial Instruments Regulation (MiFIR) or any successor thereto ~~Union Directive 93/22 on investment services in the securities field~~, and provides the portfolio management services thereunder ~~referred to in Section A(3) of the Annex to that Directive, and whose home member state is France, Germany, Italy or the United Kingdom of Great Britain and Northern Ireland~~, and

(b) provides the services referred to in paragraph (a) for valuable consideration under a contractual arrangement;

Filing Obligations under this Part

4.5 In order to rely on the exemption provided by section 4.1, an eligible institutional investor shall file a report

(a) within 10 days after the end of the month in which the eligible institutional investor elected to begin to file reports for the reporting issuer under this Part, if the securityholding percentage of the eligible institutional investor in a class of voting or equity securities of the reporting issuer at the end of the month is 10 percent or more;

(b) within 10 days after the end of the month in which the securityholding percentage of the eligible institutional investor in a class of voting or equity securities of the reporting issuer, as at the end of the month, increased to 10 percent or more;

(c) within 10 days after the end of the month in which the securityholding percentage of the eligible institutional investor in a class of voting or equity securities of the reporting issuer, as at the end of the month, increased or decreased past ***a Fixed Threshold***; ~~thresholds that are products of whole numbers multiplied by 2.5 percent of the outstanding securities of the class and that are in excess of 10 percent of the outstanding securities of the class~~; and

(d) within 10 days after the end of the month in which the securityholding percentage of the eligible institutional investor in a class of voting or equity securities of the reporting issuer, as at the end of the month, decreased to less than 10 percent.

Insider Reporting Exemption

9.1 (1) Subject to subsections (3.1) and (4), an eligible institutional investor is exempt from the insider reporting requirement for a reporting issuer if

(a) the eligible institutional investor has filed the report required under the early warning requirements or Part 4 for the reporting issuer in connection with the current securityholding percentage of the eligible institutional investor in the classes of voting and equity securities of the reporting issuer ***or will, in the case of an initial report under Part 4 for the reporting issuer, file such report within 10 days after the end of the month in which the securityholding percentage first increased to 10 percent or more***;

Proposed Changes to National Instrument 62-104

Definitions

Deemed beneficial ownership

1.8 (1) In this Instrument, in determining the beneficial ownership of securities of an offeror, of an acquiror or of any person acting jointly or in concert with the offeror or the acquiror ***including the reporting and announcement requirements under Part 5***, at any given date, the offeror, the acquiror or the person is deemed to have acquired and to be the beneficial owner of a security, including an unissued security, if the offeror, the acquiror or the person

(a) is the beneficial owner of a security convertible into the security within 60 days following that date, or

(b) has a right ~~or obligation~~ permitting ~~or requiring~~ the offeror, the acquiror or the person, whether or not on conditions ***within the control of the holder of such right***, to acquire beneficial ownership of the security within 60 days by a single transaction or a series of linked transactions.

(2) The number of outstanding securities of a class in respect of an offer to acquire includes ***the number of securities that are actually issued and outstanding at the given date, plus the number of any unissued*** securities that are beneficially owned ***by the offeror, acquiror or of any person acting jointly or in concert with the offeror or the acquiror,*** as determined in accordance with subsection (1)***, but not any other unissued securities***.

(2.1) For the purpose of determining a beneficial ownership percentage under this Section 1.8, an offeror, an acquiror or any person acting jointly or in concert with the offeror or acquiror shall be deemed to beneficially own any securities over which it has control or direction, actual beneficial ownership, or any combination of control or direction and beneficial ownership.

Ordinary Course Institutional Purchaser

1.12 (1) In this Instrument, the term "Ordinary Course Institutional Purchaser" means an eligible institutional investor that is eligible to file reports under [Part 4 of NI 62-103] that does not have actual knowledge of a take-over bid or issuer bid referred to in Section 5.4, and is trading in securities of the reporting issuer in the ordinary course of its trading activities, and not for the purpose of, or with the intention of, deriving any profit or avoiding any loss by trading securities of the reporting issuer prior to the expiry of the take-over bid or issuer bid.

Foreign take-over bid exemption

4.4 A take-over bid is exempt from Part 2 if all of the following conditions are satisfied:

(e) at the same time as material relating to the bid is sent by or on behalf of the offeror to security holders of the class that is subject to the bid, the material is ***either*** filed ***or made publicly available on a website maintained by the offeror, or by a foreign regulator or stock exchange,*** and sent to security holders whose last address as shown on the books of the offeree issuer is in the local jurisdiction;

De minimis exemption

4.5 A take-over bid is exempt from Part 2 if all of the following conditions are satisfied:

(d) at the same time as material relating to the bid is sent by or on behalf of the offeror to security holders of the class that is subject to the bid, the material is ***either*** filed ***or made publicly available on a website maintained by the offeror, or by a foreign regulator or stock exchange,*** and sent to security holders whose last address as shown on the books of the offeree issuer is in the local jurisdiction.

Foreign issuer bid exemption

4.10 An issuer bid is exempt from Part 2 if all of the following conditions are satisfied:

(e) at the same time as material relating to the bid is sent by or on behalf of the offeror to security holders of the class that is subject to the bid, the material is ***either*** filed ***or made publicly available on a website maintained by the offeror, or by a foreign regulator or stock exchange,*** and sent to security holders whose last address as shown on the books of the offeree issuer is in the local jurisdiction;

De minimis exemption (Issuer bid)

4.11 An issuer bid is exempt from the requirements of Part 2 if all of the following conditions are satisfied:

(d) at the same time as material relating to the bid is sent by or on behalf of the offeror to security holders of the class that is subject to the bid, the material is ***either*** filed ***or made publicly available on a website maintained by the offeror, or by a foreign regulator or stock exchange,*** and sent to security holders whose last address as shown on the books of the offeree issuer is in the local jurisdiction.

Acquisitions during bid

5.4(1) If, after a take-over bid or an issuer bid has been made under Part 2 for voting or equity securities of a reporting issuer and before the expiry of the bid, an acquiror ***other than an Ordinary Course Institutional Purchaser*** acquires beneficial ownership of, or control or direction over, securities of the class subject to the bid which, when added to the acquiror's securities of that class, constitute 5% or more of the outstanding securities of that class, the acquiror must, before the opening of trading on the next business day, issue and file a news release containing the information required by subsection (3).

(2) An acquiror, ***other than an Ordinary Course Institutional Purchaser***, must issue and file an additional news release in accordance with subsection (3) before the opening of trading on the next business day each time the acquiror, or any person acting jointly or in concert with the acquiror, acquires beneficial ownership of, or control or direction over, in aggregate, an additional 2% or more of the outstanding securities of the class of securities that was the subject of the most recent news release required to be filed by the acquiror under this section.

Proposed Changes to National Policy 62-203

3.4 **Reporting of acquisitions during bid** – ***All acquirors, including*** ~~E~~eligible institutional investors who are exempt from the early warning requirements under section 4.1 of NI 62-103, ~~cannot continue to rely on the alternative monthly reporting system and~~ must make disclosure in accordance with section 5.4 of the Instrument ***if they are subject to and not otherwise exempt from that requirement and*** if, during the pendency of a non-exempt take-over bid or issuer bid, they acquire beneficial ownership of, or control or direction over, securities of the class subject to the bid that, when added to their securities of that class, constitute 5% or more of the outstanding securities of that class. The exemption in section 4.1 of NI 62-103 ~~is in respect of~~ ***applies only to*** the early warning requirements in section 5.2 of the Instrument***, even if those requirements are satisfied through the filing of alternative monthly reports,*** and does not extend to the requirements in section 5.4 of the Instrument.

3.6 Calculation of early warning reporting thresholds – Section 5.2 of the Instrument ~~is a transactional requirement and~~ requires that an acquiror conduct an analysis and calculation each time that the acquiror acquires one of the categories of securities referred to in that provision (i.e., a voting or equity security of a reporting issuer, or a security convertible into voting or equity securities of a reporting issuer) ***to determine whether or not a filing obligation has been triggered as a result of the change in the acquiror's ownership percentage following the acquisition.*** ~~The securities that are the subject of the transaction at hand form the first part of the calculation.~~ ***That calculation will include all securities over which the acquiror has either beneficial ownership of the securities, or control and direction over the securities, or any combination thereof, as determined in accordance with Section 1.8 of the Instrument.*** Convertible securities ~~that are not exercisable within 60 days~~ are one of the categories of securities ***the acquisition of which may trigger a reporting obligation*** under ~~subject to~~ section 5.2 of the Instrument, as they are "securities convertible into voting or equity securities of any class of a reporting issuer." ***However, the early warning reporting system only requires reporting ownership (including deemed beneficial ownership under Section 1.8 of [the Instrument] of a class of voting or equity securities, and many types of convertible securities are not, in and of themselves, either voting or equity securities. For convertible securities that are not a separate class of voting or equity securities, the acquisition of securities of that class is only relevant to a determination of whether a reporting obligation has been triggered with respect to the common shares of the issuer, or another class of voting or equity securities of the issuer.***

The acquisition of more than 10% of a class of convertible securities which are neither voting or equity securities does not trigger any independent reporting obligation with respect to that class of convertible securities itself. For example, if an issuer grants a warrant to an acquiror, that warrant may constitute 100% of the warrants of that class, unless other warrants with the same expiry date and exercise price are also issued to other recipients. As a warrant is typically neither a voting or equity security itself, there is no obligation triggered to report having beneficial ownership of more than 10% of that class of warrants.

However, the acquisition of the warrant may result in a change to the beneficial ownership percentage of common shares or other voting or equity securities issuable upon exercise of the warrant, as determined in accordance with Section 1.8 of [the Instrument]. If the warrant is a warrant to acquire common shares, and the warrant is either immediately exercisable or may be exercised within 60 days, the acquisition of the warrant will result in an increase in the deemed ownership percentage of common shares for the warrantholder. That increase may, in turn, trigger a reporting obligation with respect to the common shares, which are a class of securities that are both voting and equity securities.

On the other hand, if the warrant is not exercisable for more than 60 days, the acquisition of the warrant will not be deemed to result in any change in the warrantholder's beneficial ownership

of common shares at the time the warrant is acquired, and accordingly could not result in triggering any reporting obligation with respect to the common shares, because there is no change in actual or deemed beneficial ownership of common shares, nor with respect to the warrants themselves, because the warrants are neither voting nor equity securities. ~~Accordingly, where the subject transaction involves convertible securities, those convertible securities should be included in the first part of the calculation, irrespective of whether or not they are convertible within 60 days and irrespective of any conditions attached to them.~~

The purpose of the early warning reporting system is to alert the market to an acquiror's acquisition of, or changes in, holdings in voting or equity securities of the issuer, including any right [or obligation] of the acquiror to acquire additional securities of that class of voting or equity securities within 60 days. 60 days was historically considered to be the relevant period for the deeming provision to apply, as the ability [or obligation] of the shareholder to acquire additional voting or equity securities within 60 days could be a relevant factor in determining the outcome of a take-over bid, a vote on a plan of arrangement or another type of change of control transaction. Beyond that 60-day window, deemed beneficial ownership does not apply, nor should it be relevant for beneficial ownership reporting purposes because the delay involved would be too long to permit the shareholder to influence the outcome of such a transaction. We note that the deemed ownership provisions of Section 1.8 of NI 62-104, and the 60-day window contemplated by it, are consistent with the approach taken to beneficial ownership reporting on Schedule 13D and Schedule 13G under the U.S. Securities Exchange Act of 1934, as amended (the "Exchange Act"), as Rule 13d-3 deems a person to beneficially own securities that person has a right (but not an obligation) to acquire within 60 days pursuant to, among other things, the exercise of options, warrants and conversion rights.

~~The securities that are the subject of the transaction at hand then need to be added to the second part of the calculation, being the "acquiror's securities" (determined in accordance with the provisions of the Instrument) to arrive at the numerator to be used for the securityholding percentage calculation.~~

The term "acquiror's securities" is defined as "securities of an issuer beneficially owned, or over which control or direction is exercised, on the date of the acquisition or disposition, by an acquiror or any person acting jointly or in concert with the acquiror." As the reference is to those securities "beneficially owned", whether convertible securities will be included as part of the "acquiror's securities" is to be determined with reference to section 1.8 of the Instrument. ***Newly-added Section 1.8(2.1) clarifies that the deemed beneficial ownership provisions of Section 1.8 are intended to operate in the same manner as the definition of "acquiror's securities", including both securities currently beneficially owned or which may become beneficially owned within 60 days, and securities over which direction or control is currently exercised, or may become exercisable within 60 days.***

An acquiror's ownership percentage is calculated by a fraction, with the numerator being any securities that the acquiror is deemed to beneficially own under Section 1.8, and the denominator being the number of securities of the class that are issued and outstanding at that time. The denominator is adjusted in a specific manner for this purpose. If any of the securities that were included in the calculation made under Section 1.8 are not already issued and outstanding, that

same number of securities is added to the denominator. This would include shares issuable upon the exercise of warrants and securities held by the acquiror (including any person acting jointly or in concert with the acquiror), but not any other unissued securities such as those issuable upon the exercise of conversion or exchange rights held by any other party, except in the circumstances discussed in Section 3.7. So, for example, if an acquiror holds 100 warrants allowing it to purchase one newly-issued share per warrant from the issuer within 60 days, then those 100 shares are added to both the numerator and the denominator. If the warrants may not be exercised within a 60 day period, no reporting of the warrants is required. However, the acquiror must assess its beneficial ownership once the acquiror's warrants become exercisable within a 60 day period. On the other hand, if the acquiror holds 100 warrants allowing it to purchase 100 shares which are already issued and outstanding from an existing shareholder within 60 days, then 100 shares are added to the numerator but not the denominator. This method of calculation is referred to as a "partially diluted" basis, and is also consistent with the calculation methodology used under Rule 13d-3 of the Exchange Act in the United States. This calculation methodology is to be distinguished from the "fully diluted" basis which would include, in the denominator, the number of shares that would be outstanding if all options, warrants, convertible securities and other conversion or exchange rights of all kinds, held by all holders, were exercised. Ownership percentages for beneficial ownership reporting purposes are never to be calculated on a "fully diluted" basis.

The following are illustrative examples of the early warning reporting calculation:

> An acquiror has 2,000 common shares **of IssuerCo** and 1,000 options ~~of~~ ***to acquire common shares of*** IssuerCo***, each option entitling the holder to acquire one common share upon payment of the specified exercise price, immediately exercisable at any time.*** The acquiror ***then*** acquires ~~500~~ ***3,000*** warrants ~~in~~ ***of*** IssuerCo***, from an existing shareholder of IssuerCo,*** ~~in a trade~~ ***each warrant entitling the holder to acquire one already issued and outstanding common share from that shareholder, upon payment of the specified exercise price to that shareholder, commencing on a date that is 90 days following the date of the acquisition of the warrant from that shareholder***. ~~As of~~ ***On*** the ~~trade~~ date ***the warrants are acquired, all of the options are exercisable within 60 days but*** none of the warrants are exercisable within 60 days~~and none of the options are exercisable within 60 days~~. ***On the date the warrants are acquired, there are 35,000 common shares of IssuerCo actually issued and outstanding.*** The numerator, for the purposes of calculating the acquiror's securityholding percentage, would be ***3,000, consisting of the 2,000 common shares actually held by the acquiror, plus the 1,000 common shares issuable on exercise of the immediate-exercisable options, as the acquiror is deemed to own those additional 1,000 common shares as a result of its right to acquire them within 60 days under the terms of the options. The 3,000 common shares which may be acquired on exercise of the warrants are not included in the numerator, because the acquiror does not have the right [or obligation] to acquire those common shares*** ~~2,500 (consisting of the 500 warrants acquired that are not exercisable~~ within 60 days. ~~and the 2,000 common shares comprising the "acquiror's securities"), and the~~***The*** denominator would be IssuerCo's ~~number of~~ ***35,000*** common shares ***that are then actually issued and*** outstanding ~~,unadjusted by any of the convertible securities held by the acquiror~~. ***plus the 1,000 common shares that the acquiror has the right to acquire within 60 days under the terms***

of the options, which are added to the denominator because they were added to the numerator and not already included in the number of outstanding shares. The result is that the acquiror is deemed to beneficially own 3,000 shares (2,000 shares actually owned plus 1,000 shares deemed to be owned) out of 36,000 total shares (35,000 actually outstanding plus 1,000 deemed to be outstanding), for an ownership percentage of approximately 8.33%. No reporting obligation is immediately triggered as a result of having acquired the warrants, as the acquiror's deemed ownership percentage remains below 10% on the date the warrants are acquired.

~~If the acquiror subsequently purchases an additional 200 warrants, the analytical exercise is repeated. As of this subsequent trade date, assume that none of the newly acquired warrants are exercisable within 60 days, that 250 of the 1,000 options held by the acquiror have vested (or will vest within 60 days) and that 300 of the 500 previously acquired warrants are now exercisable (or will be exercisable within 60 days). The numerator, for the purposes of the acquiror's securityholding percentage, would be 2,750 (consisting of the 200 newly acquired warrants that are not exercisable within 60 days and the "acquiror's securities", which would include the 2,000 common shares, the 250 vested options and the 300 currently exercisable warrants). The 250 vested options and 300 currently exercisable warrants forming part of the "acquiror's securities" would be added to IssuerCo's outstanding common shares to form the denominator of the securityholding percentage calculation.~~

The acquiror will, however, become subject to a reporting obligation 30 days later, on the date that the warrants first become exercisable within the following 60 days (that is, 30 days into the 90 day period during which the warrants are not yet exercisable). At that time, the acquiror will, pursuant to the deeming provisions of Section 1.8, be deemed to have acquired the 3,000 common shares that the acquiror then has the right to acquire within 60 days pursuant to the exercise of the warrants. For the purpose of calculating the acquiror's ownership percentage, the numerator will be 6,000, consisting of the 2,000 common shares the acquiror actually holds, plus the 1,000 unissued common shares the holder has the right to acquire from the issuer upon exercise of the immediately exercisable options, plus the 3,000 already issued and outstanding common shares the acquiror then has the right to acquire within 60 days from the shareholder pursuant to the exercise of the warrant. The denominator will remain 36,000, representing the 35,000 shares actually issued and outstanding, plus the 1,000 previously unissued shares that are issuable on the exercise of the options. The 3,000 common shares that the acquiror has the right to acquire within 60 days from an existing shareholder pursuant to the exercise of the warrant are not added to the denominator because those common shares are already issued and outstanding and already included in the number of shares that are actually outstanding. As a result, 30 days after the acquisition of the warrants, the acquiror is deemed to hold 6,000 common shares out of a deemed 36,000 common shares outstanding, or approximately 16.67% of the outstanding common shares, triggering a reporting obligation.

Section 1.8 of the Instrument deems an acquiror to have acquired and to be the beneficial owner of a security, including an unissued security, if the acquiror is the beneficial owner of a security convertible into the security within 60 days following that date. Accordingly, the calculation of ***ownership for the purpose of determining whether an*** early warning reporting ~~thresholds~~ ***obligation has been triggered*** should be undertaken each time (a) a convertible security that is not exercisable within 60 days becomes exercisable within 60 days as a result of the passage of time, and (b) a convertible security that is exercisable within 60 days expires, lapses or terminates in accordance with its terms.

3.7 **Calculating beneficial ownership on a fully diluted basis in limited circumstances** – The early warning reporting calculations are to be done on a partially diluted basis***, as described in Section 3.6***. However, in circumstances where the acquiror is acquiring convertible securities as part of a treasury offering and the terms of the convertible securities provide that either all of the convertible securities issued pursuant to such offering convert into the underlying voting or equity securities, or none of them do (for example, in a subscription receipt offering, or a fully backstopped rights offering), beneficial ownership may be calculated on a fully diluted basis as, in those circumstances, it would not be possible for only some (but not all) of the underlying securities in respect of that offering to be issued.