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Without Prejudice
By E-mail

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission, New Brunswick
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island
Nova Scotia Securities Commission
Office of the Superintendent of Securities, Service Newfoundland and Labrador
Northwest Territories Office of the Superintendent of Securities
Office of the Yukon Superintendent of Securities
Nunavut Securities Office

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Dear Sirs/Mesdames:

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

We submit the following comments in response to the request for feedback on the proposed amendments and changes to the issuer bid, take-over bid and beneficial ownership reporting regimes (collectively, the "**Proposed Amendments**").

Thank you for the opportunity to provide feedback on the Proposed Amendments. This letter represents the comments of certain individual members of our Capital Markets and Public M&A practice group (and not those of the firm generally or any client of the firm) and are submitted without prejudice to any position taken or that may be taken by our firm on its own behalf or on behalf of any client.

We are generally supportive of the Canadian Securities Administrators' ("**CSA**") initiatives that are designed to support the competitiveness of Canadian capital markets and reduce unnecessary regulatory burden for issuers without compromising investor protection. Subject to our comments below, we welcome the introduction of a selective repurchase exemption from the Canadian issuer bid requirements (the "**Selective Repurchase Exemption**") and the codification of certain other routine exemptive relief. By eliminating the need to apply for formal exemptive relief, such proposals will provide issuers with greater certainty and flexibility when allocating capital, reduce costs and expedite transaction timelines. In the spirit of easing restrictions to enhance the competitiveness of Canadian capital markets, we encourage the CSA to use this opportunity to address other types of share repurchase transactions that have become common in the United States such as accelerated share repurchase ("**ASR**") programs and call spread arrangements in connection with convertible debt financings. Canadian issuers are showing increased interest in these structures and would benefit from clear guidance on how they can be completed under Canadian securities laws.

However, while we commend the CSA's efforts to enhance the integrity of the issuer bid, take-over bid and early warning reporting regimes through clarifying amendments and supplemental policy guidance, we have concerns that certain proposals, discussed in more detail below, could have a chilling effect on shareholder engagement and potentially dissuade legitimate activist strategies. We support a balanced approach where the regulatory burden is not disproportionate to the objective sought to be achieved.

SELECTIVE REPURCHASE EXEMPTION

ASR Programs

While the introduction of the Selective Repurchase Exemption is a welcome addition to the Canadian issuer bid regime, we encourage the CSA to use this opportunity to revise the rules to permit Canadian reporting issuers to implement ASR programs. ASR programs are an increasingly popular capital management strategy that U.S. issuers use to expedite share repurchases through direct collaboration with financial intermediaries such as investment banks. Many Canadian companies, particularly dual-listed issuers, have expressed interest in implementing ASR programs similar to their U.S. peers; however, restrictions in the Canadian issuer bid regime have prevented such transactions from proceeding. The current proposal in respect of the Selective Repurchase Exemption would also appear to impede ASR transactions, as proposed paragraph 4.6.1(2)(b) of National Instrument 62-104 *Take-over Bids and Issuer Bids* ("**NI 62-104**") states that if an issuer makes an offer to acquire securities from a person and the issuer knows or ought to know after reasonable enquiry that the person from whom the acquisition is being made is acting as an agent for other persons having direct beneficial interest in the securities, then each other person must be counted as one person in the determination of the number of persons to whom an offer to acquire has been made. Amendments and/or new guidance could provide that a financial intermediary would be treated as one person and the ASR program would be counted as one transaction for the purpose of the "five persons" and "five transactions" condition. The CSA would also need to revise the consideration condition to reference a discount to the average market price during the period of the program (versus the price at the date of the bid). Alternatively, ASR programs could be explicitly carved out from the Canadian issuer bid rules. We note that exemptive relief from the issuer bid requirements has previously been provided in connection with the grant of a put option to a Canadian financial institution that entitled it to sell securities to a reporting issuer as part of its normal course issuer bid ("**NCIB**").

Call Spread Arrangements in connection with Convertible Debt Financings

We also encourage the CSA to expressly clarify that conventional call spread arrangements entered into in connection with convertible debt financings are not subject to the issuer bid restrictions under NI 62-104.

Call spread overlays are standard market practice in the United States and are recognized as a legitimate financing feature that is distinct from an issuer tender offer. In a convertible debt offering, an issuer often simultaneously enters into a call spread overlay consisting of two linked derivative transactions with one or more dealer counterparties. The transactions involve: (i) the purchase of a call option (or "bond hedge") that provides an issuer with the right to acquire its own shares from a dealer at the conversion price of the convertible notes, offsetting the dilutive effect of conversion; and (ii) the sale of a warrant with a higher strike price to the dealer, which partially finances the cost of the purchased call. The call spread overlay is an integral part of the convertible debt financing and is not a standalone repurchase or acquisition program. Specifically, the U.S Securities and Exchange Commission ("**SEC**") has not treated a conventional call spread overlay as an issuer tender offer under Rule 13e-4 or Section 13(e) of the Securities Exchange Act of 1934 (the "**Exchange Act**"). The purchased call is viewed as a privately negotiated derivative transaction between the issuer and the dealer counterparty while the warrant sale is an equity related security issuance. Neither component is considered to constitute a bid for securities directed towards securityholders.

To the extent that call spread arrangements conducted in Canada are subject to the Canadian issuer bid regime, or if the treatment of such arrangements remains ambiguous, Canadian issuers and dealers will continue to be at a competitive disadvantage relative to their U.S. counterparts, who can offer these structures in the United States without regulatory impediment. This results in reduced optionality, higher debt financing costs and more convertible debt offerings being conducted entirely in the United States, including by Canadian issuers.

We recommend that the CSA provide guidance confirming that a call spread overlay entered into contemporaneously with a convertible debt offering, where the purpose of the transaction is to manage potential dilution from conversion of convertible notes, does not constitute an issuer bid. Such approach would be consistent with the SEC's treatment of these type of transactions and would reflect the economic reality that the issuer is not making an offer to acquire securities from its securityholders but is instead entering into privately negotiated derivative transactions as an integral part of a financing. Permitting Canadian reporting issuers to engage in call spread overlays in Canada would facilitate convertible debt financings and reduce the regulatory burden associated with applying for exemptive relief and/or pre-clearance of the transaction.

We also question whether the proposed guidance in section 2.21 of National Policy 62-203 *Take-Over Bids and Issuer Bids* ("**NP 62-203**") limits a Canadian issuer's ability to engage in call spread arrangements in the United States.

<u>Bid Price</u>

Satisfaction of the requirements in paragraphs 4.6.1(1)(d) and (e) of NI 62-104 may prove to be challenging from an administrative perspective. Conditions that create potential execution issues should be avoided. While we believe that it is important to provide certainty around pricing at the time a transaction is entered into, requiring the value of the consideration to be less than the volume-weighted average price ("**VWAP**") of the securities over a prescribed period would likely provide more flexibility than tying the condition to the closing price at the date of the bid (i.e., the consideration could potentially be at a premium to the closing price on the date of the bid provided that it was at a discount to the VWAP over a certain period).

<u>Board Determinations</u>

We believe that the CSA should remove the proposed condition in paragraph 4.6.1(1)(f) of NI 62-104 that requires the board of directors of the issuer to determine that: (i) following the completion of the bid, the market for the class of securities that is the subject of the bid would not reasonably be expected to be materially less liquid than the market that existed at the date of the bid; and (ii) the bid would not reasonably be expected to have a significant negative effect on the market price or value of the class of securities subject to the bid. The proposed board determinations go significantly beyond typical NCIB approvals and the related solvency determinations required under corporate law. A board would be required to evaluate future market conditions and there are no quantitative bright-line tests for "materially less liquid" and "significant negative effect". A board may not wish to make such determinations without the assistance of a financial advisor and obtaining a liquidity opinion to support the determinations could have cost and timing implications for repurchase transactions. Consultations with external advisors and the preparation of an opinion can place pressure on timelines and jeopardize transactions. Disproportionate costs and regulatory burden are inconsistent with the underlying policy rationale of the

Selective Repurchase Exemption. We do not believe that the conditions in paragraph 4.6.1(1)(f) are required as shareholders are adequately protected by the other conditions of the exemption (including the limited size, minimum market capitalization and discounted price, all of which should act as proxies for one or both of the board determinations), coupled with the directors' fiduciary duties.

Liquidity Condition

As an issuer's securities can (and frequently do) trade across numerous venues, we recommend that the liquidity conditions be measured across all published markets on which the securities trade, not just the published market on which the class was principally traded, to provide a more accurate reflection of liquidity options. While outside the scope of the Proposed Amendments, we would suggest a similar change be made to section 1.2 of Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions*. To the extent that the published markets are not in Canada, the CSA should provide guidance on the manner in which an issuer should convert the foreign currency to Canadian dollars.

NCIB Exemption

We 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. The Selective Repurchase Exemption should be viewed as a distinct, complementary avenue for share buybacks rather than a replacement for existing issuer bid exemptions. The various exemptions allow issuers to address distinct objectives. NCIBs allow issuers to manage capital and support their share price more gradually over time while the Selective Repurchase Exemption would provide limited opportunities to repurchase a meaningful block of securities, which cannot be addressed by way of an NCIB. We expect that issuers will continue to use NCIBs as their primary repurchase mechanism for regular market buybacks.

We do not believe that the availability of the Selective Repurchase Exemption should be limited to issuers with operative NCIBs. An NCIB pre-condition will likely impose disproportionate regulatory burden on issuers compared to the resulting benefit provided to investors and would reduce the flexibility the exemption is intended to provide. An issuer may not intend to allocate capital to regular market repurchases but there may be a circumstance where a one-time block repurchase is in the best interests of the corporation. Requiring issuers to establish an NCIB could delay or deter selective repurchase transactions and result in NCIBs being implemented primarily to qualify for the Selective Repurchase Exemption. Minimum repurchase requirements under an NCIB would create an additional obstacle for issuers. The Selective Repurchase Exemption includes robust conditions to prevent selling shareholders from receiving preferential treatment and additional NCIB requirements are not warranted.

Guidance on Selective Offshore Repurchases

While we appreciate that the guidance to the effect that "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" is likely intended to assist issuers when considering off-shore repurchases, as framed we believe it implies that an offshore repurchase that is not made in the circumstances and manner described in the selective repurchase exemption set out in section 4.6.1 of NI 62-104 would necessarily raise public interest concerns. This implication may have unintended consequences and prevent transactions that should not be prevented. Accordingly, we urge the CSA to consider removing this part of the guidance on the basis that the assistive principle espoused is already plainly evident from the public interest case law.

To the extent such guidance is retained, the CSA should clarify whether selective offshore repurchases that are conducted in the manner set out in section 4.6.1 of NI 62-104 are to be included when calculating the various thresholds in the exemption or if such offshore purchases constitute additional repurchase options outside of the prescribed limits.

Other Comments

Separately, we recommend that the CSA consider whether to use this opportunity to clarify whether there are restrictions on the number of times an acquiror may rely on the private agreement exemption in section 4.2 of NI 62-104. While certain take-over bid and issuer bid exemptions including the Selective Repurchase Exemption specifically reference that thresholds are to be measured within a 12-month period, section 4.2 does not contain similar language. As the CSA specifically reference the private agreement exemption as part of the background rationale for the Selective Repurchase Exemption, the differences in the drafting of the two exemptions could increase uncertainty and impact future interpretation.

EQUITY EQUIVALENT DERIVATIVES

We have no objections to the targeted approach of only requiring disclosure of equity equivalent derivatives in the context of a take-over bid or proxy solicitation if the CSA believe that such disclosure is material information that will assist securityholders' tendering or voting decisions. What is not apparent is why the CSA would require such disclosure in the context of a proxy solicitation involving an information circular but not in circumstances where an activist is relying on the public broadcast, speech or publication exemption in subsection 9.2(4) of National Instrument 51-102 *Continuous Disclosure Obligations* as campaigns can be conducted without the preparation of a formal circular – for example, a "withhold" or "vote no" campaign. If the CSA believe that derivatives disclosure is material to a voting decision, we presume such disclosure would be beneficial to securityholders' understanding and evaluation of all types of proxy solicitations.

In terms of the specific disclosure requirements, we would encourage the CSA to remove the requirement to disclose any past or present relationship between an offeror or solicitating shareholder and a counterparty to a related financial instrument, or an affiliate of the counterparty, that a reasonable person could perceive to affect the counterparty's decision to acquire, dispose of, or vote securities in paragraphs 2.7.1(1)(c) and 2.7.1(2)(b) of NI 62-104, items 8.1(1)(d) and 8.1(2)(c) of Form 62-104F1 *Take-Over Bid Circular* ("**Form 62-104F1**") and items 6.7(d) and 6.8(c) of Form 51-102F5 *Information Circular* ("**Form 51-102F5**"). The requirement is overly broad, perception-based and unduly burdensome. We believe that such disclosure may result in unwarranted negative perceptions surrounding customary equity equivalent derivative arrangements (e.g., in instances where a counterparty and its affiliates have appropriate "walls" in place). To the extent any such perceptions are warranted, those relationships already must be considered when forming a view as to whether the securityholder controls or directs the applicable securities.

Drafting and Clarification Comments

(a) While we recognize that this is inferred, we would suggest adding the following language to proposed subsections 2.7.1(1) and (2) of NI 62-104 to confirm when the disclosure obligation commences:

"If, **after the commencement of and** before the expiry of a take-over bid, an offeror …"

(b) We also recommend that the reference in subsection 5.1(6) of NI 62-104 to "**has acquired**" be replaced with "**has beneficial ownership of**". The CSA should also clarify when a solicitation has commenced.

(c) The CSA should clarify and provide examples of what constitutes an "informal" ability to obtain voting or equity securities or to direct the voting of securities held by a counterparty to a related financial instrument, as referenced in paragraph 2.7.1(1)(b) of NI 62-104, item 8.1(1)(c) of Form 62-104F1 and item 6.7(c) of Form 51-102F5.

PLANS OR FUTURE INTENTIONS

We do not believe that the proposed guidance in section 3.3 of NP 62-203 clarifies the CSAs' expectations regarding disclosure of an acquiror's plans or future intentions and we are unclear on what issues are trying to be addressed. While the CSA note that a change in plans or future intentions will occur at the latest upon the execution of a definitive agreement to enter into a transaction, the commencement of a take-over bid or the public announcement of a proxy solicitation, it is not apparent what types of earlier conduct would trigger the filing of an updated EWR. The references to "irrevocable steps" and "significant steps" are subjective concepts that are open to interpretation. It would be helpful if the CSA provided examples of the types of actions that would constitute irrevocable and significant steps. We have concerns that premature disclosure (i.e., prior to executing a definitive agreement) could have adverse effects on transactions.

There is also an argument that the proposed guidance could be viewed as creating a higher threshold, as updated EWR filings would not be required until an acquiror has taken an action that is no longer reversible or subject to conditions (i.e., when there is no longer the ability to terminate an agreement). We believe the proposed language will lead to increased market uncertainty and differences in interpretation. We encourage the CSA to provide clear actionable guidance or confirm that the current market practice of filing updated EWRs upon entering a definitive agreement remains acceptable.

EARLY WARNING REPORTING

<u>New Reporting Issuers</u>

To the extent that proposed subsection 5.1(3) of NI 62-104 is adopted, we support the exclusion of the news release requirement and moratorium provisions in the context of deemed acquisitions. We also recommend that the CSA introduce a grandfathering provision that clarifies that subsection 5.1(3) only applies to new reporting issuers on a going forward basis (i.e., the requirement would not apply retroactively to securityholders that have not filed early warning reports ("**EWRs**") on the basis of the current rules). In the absence of a grandfathering provision, there is risk of immediate, widespread non-compliance.

<u>Joint Actors</u>

Provisions that would deem each person acting (or ceasing to act) jointly or in concert with other persons to have acquired (or disposed of) securities that are beneficially owned, or over which control or direction is exercised, by such other persons when they begin (or cease) acting jointly or in concert with each other would mark a significant shift in the EWR rules. Whether a person is acting jointly or in concert with another is a question of fact and, while NI 62-104 sets out certain circumstances in which persons will be deemed or presumed to be joint actors, there is generally no clear and measurable trigger. This has been an intentional legislative choice and is supported by Canadian case law. While we appreciate that, for example, two 7% holders that are joint actors should presumably be able to impact an issuer in the same manner as one 11% and one 3% holder that are joint actors, the addition of a new deeming provision in the context of the EWR filing triggers and related moratorium provisions (or, stated another way, the absence of a clear acquisition of securities trigger) will lead to increased instances of inadvertent non-compliance, an influx of overly cautious, premature EWR filings, a chilling of engagement amongst shareholders and tactical (rather than necessarily meritorious) issuer complaints to Canadian securities regulatory authorities regarding alleged joint actor relationships. The uncertainty of determining when a joint actor relationship has started or ended would also make compliance very difficult.

Any incremental disclosure benefit will not likely justify the potential impact on shareholder engagement and the significantly increased complexity and uncertainty in Canada's EWR regime. We encourage the CSA not to proceed with this requirement; however, to the extent this proposal is implemented: (i) the CSA should consider mechanisms to mitigate burden such as longer filing windows, exemptions for certain types of collective actions and not extending the moratorium provisions to this circumstance; and (ii) we would encourage the CSA to provide additional clear and (to the extent feasible) measurable guidance on what they believe constitutes acting jointly or in concert in the context of, for example, two sub-10% holders. Shareholders and their respective counsel may have different views (and different risk tolerances) on whether persons are acting jointly or in concert which can lead to uncertainty and/or disagreements about whether an EWR filing is required (which will chill engagement as noted above). Clear and measurable guidance could assist in mitigating certain of the identified issues.

Early Warning Reporting Calculations

In connection with the proposed guidance in sections 3.6 and 3.7 of NP 62-203 that addresses the treatment of convertible securities in early warning calculations, we encourage the CSA to clarify the treatment of warrants and convertible securities that contain beneficial ownership limitation provisions (commonly referred to as "blockers"). A blocker or beneficial ownership limitation provision is a contractual term that is included in warrants or convertible or exchangeable securities that provides that the holder may not exercise, convert, or exchange the security to the extent that such exercise, conversion, or exchange would cause the holder (together with its affiliates and joint actors) to beneficially own securities in excess of a specified threshold (typically 4.99% or 9.99%). Such terms are common in both Canadian and U.S. financings and serve the dual purpose of assisting the holder with managing its regulatory reporting obligations and preventing the unintended accumulation of voting control.

In the United States, the SEC has long accepted that conventional blocker provisions operate to exclude the underlying securities from the holder's beneficial ownership calculation for purposes of Sections 13(d) and 13(g) of the Exchange Act and SEC Rule 13d-3 where, similar to the deeming provisions under Canadian securities laws, a person is deemed the "beneficial owner" of a security if such person has the right to acquire that security within 60 days. Where a warrant or convertible security contains a blocker provision that prevents the holder from exercising or converting securities in excess of the specified threshold, the holder does not have the unqualified right to acquire the underlying securities within 60 days. The right is conditional on the holder's beneficial ownership remaining below the blocker threshold.

Section 3.6 of NP 62-203 (as currently drafted) would introduce a notable shift in market practice in calculating beneficial ownership where warrants or convertible securities contain blocker provisions. This would result in higher securityholder percentages and may require EWR filings where they were not previously made.

Harmonizing the Canadian approach with the well-established U.S. position would provide certainty to market participants and avoid unnecessary early warning filings in circumstances where the holder has no present ability to acquire the underlying securities.

We also have concerns that the new guidance that requires the calculation of early warning reporting thresholds each time that: (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, is a highly burdensome task that introduces a high risk of unintended defaults.

It also may be beneficial to provide guidance regarding convertible securities that are well out of the money.

<u>Early Warning Report</u>

We encourage the CSA to remove or limit the instruction (ii) under Item 2 of Form 62-103F1 *Required Disclosure under the Early Warning Requirements* that requires disclosure of the name of each person or company that controls the acquiror. The new requirement introduces regulatory burden for acquirors that is disproportionate to the benefit such disclosure would provide to investors. While an EWR alerts the market to the identity and trading activities of 10%+ securityholders, the names of upstream control persons are not necessarily material information that will assist shareholders and other market participants' understanding of the relevant acquisition or disposition. There does not appear to be any evidence of market abuse that would justify this disclosure expansion. This is particularly the case for acquirors that are private equity or hedge funds.

Separately, we do not believe that a post-closing EWR should be required to be filed in a privatization transaction where an issuer expects to cease to be a reporting issuer and recommend that the CSA clarify that an EWR is not required in this context.

BID CONDITIONS

The CSA have introduced guidance in section 2.4.1 of NP 62-203 that states that there may be public interest concerns if a take-over bid includes conditions that require a target to take actions for the benefit of the offeror where a refusal to do so would entitle the offeror not to consummate the bid. It would be helpful if the CSA provided examples of the types of conditions that they would view as problematic. For example, would this extend to an access condition where an offeror is to be provided with non-public information relating to the target for the purpose of considering whether to proceed with a transaction?

MANDATORY EXTENSION PERIOD

The proposed requirement in paragraph 2.31.1(c) of NI 62-104 requiring an offeror send a notice to each security holder in connection with the mandatory 10-day extension period will increase costs and regulatory burden for offerors without providing commensurate investor benefit. A news release announcing the mandatory extension period provides investors with sufficient notice.

MODIFIED DUTCH AUCTION ISSUER BIDS

Proposed paragraph 2.32(4.1)(c) of NI 62-104 provides that an offeror may extend an issuer bid for which all the terms and conditions have been complied with or waived without first taking up all securities deposited under the bid and not withdrawn if, at the time of the extension, the market price of the securities is not greater than the maximum price per security within a range of prices set out in the terms of the bid. We believe that this condition may be too rigid in volatile markets as the market price could potentially move below the maximum bid price during the extension period. If a price-based limitation is needed, an alternative approach would be to align the provision with the proposed mini-tender guidance in section 2.18 of NP 62-203 to provide that the bid price cannot be at such a substantial discount to the prevailing market price that no reasonable securityholder would tender except through mistake, inadvertence or misunderstanding.

ISSUER BID CIRCULAR

Item 19(1) of Form 62-104F1 provides that if the consideration for the target's securities in a take-over bid is to be "securities of the offeror <u>or another issuer</u>" (emphasis added), prospectus-level disclosure for the issuer whose securities are being offered must be included in the take-over bid circular. We note that Item 21 of Form 62-104F2 *Issuer Bid Circular* ("**Form 62-104F2**") requires prospectus-level disclosure if the consideration in an issuer bid is "different securities of the issuer". Form 62-104F2 does not, however, specifically refer to a requirement for prospectus-level disclosure if an issuer is distributing a third party's securities as consideration for the issuer bid. We suggest that this discrepancy be remedied if this is an unintentional gap in the rules.

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We once again thank you for the opportunity to provide feedback on the Proposed Amendments. Please do not hesitate to contact any of the undersigned should you wish to discuss any of the foregoing comments in greater detail.

Yours truly,

Tara Law

on my own behalf and on behalf of

Ramandeep K. Grewal
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