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British Columbia Securities Commission  
Alberta Securities Commission  
Saskatchewan Financial Services Commission  
Manitoba Securities Commission  
Ontario Securities Commission  
Autorité des marchés financiers  
New Brunswick Securities Commission  
Registrar of Securities, Prince Edward Island  
Nova Scotia Securities Commission  
Superintendent of Securities, Newfoundland and Labrador  
Superintendent of Securities, Northwest Territories  
Superintendent of Securities, Yukon  
Superintendent of Securities, Nunavut

**To the attention of:**

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Ladies and Gentlemen:

**CSA Notice and Request for Comment on Proposed Amendments to Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids* and National Instrument 62-103 *Early Warning System and Related Take-Over Bid and Insider Reporting Issues* and Proposed Changes to National Policy 62-203 *Take-Over Bids and Issuer Bids* (the “Draft Amendments to the Early Warning Requirements”)**

This submission is made by the Public Sector Pension Investment Board (PSP Investments) in response to the CSA Notice and Request for Comment on the Draft Amendments to the Early Warning Requirements published on March 13, 2013.

By way of background, PSP Investments is a Canadian Crown corporation established to invest the amounts transferred by the Government of Canada since April 1, 2000, for the pension plans of the Public

Service, the Canadian Forces and the Royal Canadian Mounted Police, and since March 1, 2007, for the Reserve Force Pension Plan. To achieve its investment mandate, PSP Investments makes investments in public and private assets. As at March 31, 2012, PSP Investments' assets under management were worth over \$64.5 billion. As at June 30, 2013, PSP Investments was an investor in over 2,800 public companies including over 300 companies listed on the Toronto Stock Exchange.

## 1 GENERAL

PSP Investments is supportive of the Draft Amendments to the Early Warning Requirements proposed by the CSA and believes the reduction of the early warning reporting threshold (the "**Early Warning Threshold**") from 10% to 5% and enhanced scope of the disclosure obligations will provide greater transparency for all market participants including issuers, investors and other stakeholders.

In particular, PSP Investments encourages initiatives that permit issuers to engage in meaningful dialogue with their shareholder base and these proposals enhance the ability of an issuer to better know its shareholder base.

However, PSP Investments is concerned with certain elements of the proposals that relate to reporting of equity equivalent derivatives. As noted in the proposals, derivatives play an important role in encouraging efficiency in the capital markets. In general, institutional investors, such as PSP Investments, use derivative products as an important component of its investment strategy and in certain cases to manage financial risk. We believe that only in exceptional cases are derivative financial instruments used for the purpose of engaging in behaviour that the early warning system is intended to address, *i.e.* alerting the market to a possible change of control transaction or other matters that relate to control of the subject issuer (*e.g.* having sufficient equity to convene a shareholders meeting or affect corporate policy). Although PSP Investments understands that an issuer may be interested in the economic exposure of an institutional investor to that issuer, we are of the view that the early warning system is probably not the appropriate mechanism for this. PSP Investments believes that given the complexity of modern derivative instruments, it would be appropriate for the CSA to engage in a dialogue with Canadian institutional investors before imposing significant reporting requirements relating to derivative instruments so as to permit the CSA to fully understand the types of derivative products used by institutional investors and the rights and obligations relating to such products. This dialogue could occur in the context of the current review of the early warning regime or at a later time (but before any coming into force of early warning reporting requirements relating to derivatives) so as to ensure unintended consequences are averted and that an appropriately focussed and narrow definition of "equity equivalent derivative" can be developed. Although PSP Investments is conscious of recent situations where the use of derivative products has resulted in difficult situations for certain Canadian issuers, PSP Investments believes such cases are exceptional and should not drive the CSA to adopt rules that could cause more harm than good.

PSP Investments is also concerned with certain elements of the proposals that relate to securities lending arrangements and, as discussed below, believes that further thought should be given to the proposed reporting requirements and exemptions where the securities lending arrangement relates to borrowing securities for the purpose of covering a short position.

## 2 SPECIFIC QUESTIONS

1. *Do you agree with our proposal to maintain the requirement for further reporting at 2% or should we require further reporting at 1%? Please explain why or why not.*

PSP Investments is in favour of maintaining the 2% further reporting threshold in order to minimize increasing the compliance burden while balancing the interests of issuers, investors and the marketplace.

2. *A person cannot acquire further securities for a period beginning at the date of acquisition until one business day after the filing of the report. This trading moratorium is not applicable to acquisitions that result in the person acquiring beneficial ownership of, or control or direction over, 20% or more of the voting or equity securities on the basis that the take-over bid provisions are applicable at the 20% level.*

*The proposed decrease to the early warning reporting threshold would result in the moratorium applying at the 5% ownership threshold. We believe that the purpose of the moratorium is still valid at the 5% level because the market should be alerted of the acquisition before the acquiror is permitted to make additional purchases.*

- (a) *Do you agree with our proposal to apply the moratorium provisions at the 5% level or do you believe that the moratorium should not be applicable between the 5% and 10% ownership levels? Please explain your views.*

We agree that the moratorium provisions should apply at the 5% level. However, we question whether it is appropriate to maintain the period the moratorium is in effect until the end of the business day following the filing of the early warning report. We believe that modern information dissemination systems make disclosure virtually immediate and submit that it would be sufficient if the moratorium extended only for a period of 24 hours following the filing of the report.

- (b) *The moratorium provisions apply to acquisitions of "equity equivalent derivatives". Do you agree with this approach? Please explain why or why not.*

As discussed in our general remarks above, PSP Investments is concerned about imposing requirements in respect of equity equivalent derivatives except in respect of exceptional and narrowly defined derivative products. To the extent "equity equivalent derivatives" are so defined, the moratorium should apply to those as well.

- (c) *Do you think that a moratorium is effective? Is the exception at the 20% threshold justified? Please explain why or why not.*

PSP Investments believes that a moratorium is effective to permit the market to digest trading information. However, as noted above, we believe limiting the moratorium to a period of 24 hours following the filing of the report would be adequate.

The exception at the 20% threshold is justified given that take-over bid provisions would be engaged at that stage.

3. *We currently recognize that accelerated reporting is necessary if securities are acquired during a take-over bid by requiring a news release at the 5% threshold to be filed before the opening of trading on the next business day.*

*With the Proposed Amendments to the early warning reporting threshold, we do not propose to further accelerate early warning reporting during a take-over bid.*

- (a) *Do you agree? Please explain why or why not.*

We agree.

*(b) If you disagree, how should we accelerate reporting of transactions during a take-over bid? Should we decrease the threshold for reporting changes from 2% to 1%? Or do you think that requiring early warning reporting at the 3% level is a more appropriate manner to accelerate disclosure? Please explain your views.*

Not applicable.

4. *The Proposed Amendments would apply to all acquirors including ELLs.*

*(a) Should the proposed early warning threshold of 5% apply to ELLs reporting under the AMR system provided in Part 4 of NI 62-103? Please explain why or why not.*

PSP Investments benefits from the AMR regime applicable to ELL's as a result of an order granted June 17, 2008, and assumes that such order would remain in effect following the coming into force of these proposals in their final form. PSP Investments agrees that the Proposed Amendments apply to ELL's.

*(b) Please describe any significant burden for these investors or potential benefits for our capital markets if we require ELLs to report at the 5% level.*

PSP Investments does not anticipate that the increased compliance burden which results from the reduction of the reporting threshold to 5% outweighs the benefits of the Proposed Amendments and supports the reduction of the disclosure threshold from 10% to 5%.

5. *Mutual funds that are reporting issuers are not ELLs as defined in NI 62-103 and are therefore subject to the general early warning requirements in MI 62-104. Are there any significant benefits to our capital markets in requiring mutual funds to comply with early warning requirements at the proposed threshold of 5% or does the burden of reporting at 5% outweigh the potential benefits? Please explain why or why not.*

No comment.

6. *As explained above, we propose to amend the calculation of the threshold for filing early warning reports so that an investor would need to include within the early warning calculation certain equity derivative positions that are substantially equivalent in economic terms to conventional equity holdings. These provisions would only capture derivatives that substantially replicate the economic consequences of ownership and would not capture partial-exposure instruments (e.g., options and collars that provide the investor with only limited exposure to the reference securities). Do you agree with this approach? If not, how should we deal with partial-exposure instruments?*

See our remarks above under "General" regarding PSP Investment's view on the requiring of reporting of "equity equivalent derivatives". PSP Investments strongly believes that partial-exposure instruments, which are often used by institutional investors as part of an investment strategy, should not be captured, as so doing would unnecessarily complicate the compliance burden and would lead to over-reporting without any meaningful benefit to the investing public or the market at large. It would be highly desirable for any companion policy which may accompany amendments to the early warning regime to specify explicitly that option such puts and calls are not covered by the Proposed Amendments and provide very specific guidance as to the types of derivatives intended to be covered. We caution the CSA that the current definition of "equity equivalent derivatives" which refers to a 90% holding threshold of the underlying securities could be complicated and burdensome in practice from an administrative and compliance perspective. PSP Investments notes that derivatives are generally used to hedge economic risks and not to signal an intention to take an active role in the control of an issuer. In particular, PSP Investments is of the view that "cash-settled" derivatives (including cash-settled Total Return Swaps)

should not be covered by the early warning regime and that the CSA should consider excluding from the early warning calculation all derivative products that are used solely for the purpose of hedging long positions as disclosure of such positions could allow the market to deduce certain investment strategies and this could be detrimental to large institutional investors such as PSP Investments. Not providing this exemption could have undesired and significant market impact on the investment strategy of institutional investors with “cash-settled” derivative positions.

7. *We propose changes to NP 62-203 in relation to the definition of equity equivalent derivative to explain when we would consider a derivative to substantially replicate the economic consequences of ownership of the reference securities. Do you agree with the approach we propose?*

Yes. As discussed above, to the extent equity equivalent derivatives are ultimately covered by the amendments, detailed definitions and guidance should be provided.

8. *Do you agree with the proposed disqualification from the AMR system for an EII who solicits or intends to solicit proxies from security holders on matters relating to the election of directors of the reporting issuer or to a reorganization or similar corporate action involving the securities of the reporting issuer? Are these the appropriate circumstances to disqualify an EII? Please explain, or if you disagree, please suggest alternative circumstances.*

PSP Investments believes that to the extent a shareholder is using the proxy system for the purpose of influencing the vote at a shareholders meeting, it would be appropriate to disqualify such shareholder from the AMR system.

9. *We propose to exempt from early warning requirements acquirors that are lenders in securities lending arrangements and that meet certain conditions. Do you agree with this proposal? Please explain why or why not.*

PSP Investments agrees with this proposal and with the proposed conditions for exemption (in particular, the ability to recall lent shares at will). The investor that has the ability to recall lent shares at will continues to exercise effective dominion over such shares and should not be subject to reporting requirements which may not be meaningful and, worse, could lead to a certain confusion in the market.

10. *Do you agree with the proposed definition of “specified securities lending arrangement”? If not, what changes would you suggest?*

Yes.

11. *We are not proposing at this time an exemption for persons that borrow securities under securities lending arrangements as we believe securities borrowing may give rise to empty voting situations for which disclosure should be prescribed under our early warning disclosure regime. Do you agree with this view? If not, why not?*

PSP Investments is of the view that there are situations where borrowers of securities need be exempted from reporting. In particular, situations regularly arise where institutional investors borrow securities for the purpose of covering short positions. We understand the disclosure regime in the UK (see DTRs 5.1.1R (5) and 5.1.3R (6) of the *Financial Conduct Authority Handbook*) exempts the reporting of share borrowing transactions where the “borrow” is in place to cover a short position and would encourage the CSA to investigate the UK approach and experience on this specific matter before adopting rules insofar as they relate to securities lending transactions. Not providing this exemption could have undesired and significant market impact on the investment strategy of institutional investors with short positions.

*12. Do the proposed changes to the early warning framework adequately address transparency concerns over securities lending transactions? If not, what other amendments should be made to address these concerns?*

Subject to the addition of an exemption of the nature described in the preceding response, PSP Investments is of the view that the proposed changes adequately address transparency concerns over securities lending transactions.

*13. Do you agree with our proposal to apply the Proposed Amendments to all reporting issuers including venture issuers? Please explain why or why not. Do you think that only some and not all of the Proposed Amendments should apply to venture issuers? If so, which ones and why?*

PSP Investments is of the view that the Proposed Amendments should apply to all reporting issuers.

### **CONCLUSION**

We appreciate this opportunity to comment on the CSA Proposal. Please do not hesitate to contact the undersigned if you wish to discuss any aspect of this letter in further details,

Sincerely,



Stéphanie Lachance  
Vice President, Responsible Investment and  
Corporate Secretary