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May 21, 2013

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

Dear Sirs/Mesdames:

Re: CSA Notice of March 13, 2013 re Proposed Amendments to NI 62-104 (“NI 62-104”), *Take-over Bids and Issuer Bids*, NP 62-203 (“NP 62-203”), *Take-over Bids and Issuer Bids and NI 62-103 Early Warning Systems and Related Take-over Bid and Insider Reporting Issues* (“NI 62-103”) (“Notice”)

Thank you for inviting comment on the Notice. Though I am a partner of McCarthy Tétrault LLP, I offer these comments on my own behalf and not on behalf of my firm. My comments are confined to particular aspects of the Notice that concern the early warning reporting (“EWR”) rules.

My comments are as follows:

1. A premise of the Notice seems to be that some parties borrow securities to hold and vote them rather than to satisfy delivery obligations in short sale transactions or to satisfy delivery obligations when securities lenders recall securities from borrowers.¹

This premise is incorrect in my experience. Borrowing securities to hold and vote them, though not illegal or explicitly prohibited in most securities lending agreements, is regarded as inappropriate.² Leading brokers do

¹ See Notice (2013), 36 OSCB 2675 at 2680 (example under heading “Reporting by Borrowers”).

² See Faulkner, “An Introduction to Securities Lending”, (First Canadian edition) p. 64.

not permit borrowing in their agreements. When borrowers do not borrow securities to hold and vote them, there is no reason to subject them to EWR requirements.

2. The Notice proposes that a party be ineligible to rely on the slower alternative monthly reporting regime (“AMR”) created by NI 62-103 if that party:

“solicits or intends to solicit proxies from security holders of a reporting issuer on matters relating to the election of directors of the reporting issuer or to a reorganization, amalgamation, merger arrangement or similar corporate action involving securities of the reporting issuer.”³

Over the years, a statutory safe harbour has been created to protect the publication and dissemination by shareholders of Canadian reporting issuers of opinions about the way the affairs of the corporation are conducted.⁴ So long as proxies are not solicited in connection with the exercise of this right, such communications are not treated as “solicitations”. This is an important shareholder right and should not be compromised by the EWR system.

Shareholders who seek the removal of management or oppose particular initiatives of management typically engage directly with management in the hope of arriving at a consensual outcome. Contested shareholders meetings happen when management and dissidents cannot agree and where a proxy battle has become the last option. Only at the stage where the dissident has determined to solicit proxies directly to advance its views can it be said that there is an intent to solicit and that exclusion from the AMR regime might be justified.

Perhaps the language quoted above could be recast as follows:

“directly solicits from securityholders of a reporting issuer in reliance on an information circular, its own proxies in opposition to management as to the election of directors of the reporting issuer or to a reorganization, amalgamation, merger, arrangement or similar corporate action involving the securities of the reporting issuer.”

³ See Notice, Annex C, s. 6.

⁴ See National Instrument 51-102 *Continuous Disclosure Obligations* (“NI 51-102”), clause (k) of the definition of “solicit” in s. 1.1(1) of NI 51-102.

Thank you for considering these comments.

Yours very truly,

A handwritten signature in blue ink, appearing to read "Rene Sorell", with a stylized flourish at the end.

Rene Sorell