POLICY STATEMENT TO REGULATION 62-104 RESPECTING TAKE-OVER BIDS AND ISSUER BIDS

PART 1 INTRODUCTION AND PURPOSE

1.1 Application

Regulation 62-104 respecting Take-Over Bids and Issuer Bids (the Regulation) consolidates and harmonizes requirements governing the conduct of take-over bids and issuer bids in Canada. The Regulation has been implemented in all jurisdictions as a rule or regulation.

1.2 Purpose

The purpose of this policy statement is to help you understand how the provincial and territorial regulatory authorities interpret or apply certain provisions of the Regulation and to provide guidance on the conduct of parties involved in a bid.

PART 2 BID REGIME

2.1 General

The Regulation is designed to establish a clear and predictable framework for the conduct of bids in a manner that achieves three primary objectives:

- equal treatment of offeree issuer security holders,
- provision of adequate information to offeree issuer security holders,
- an open and even-handed bid process that does not unfairly discriminate among, or exert pressure on, offeree issuer security holders.

Those involved in a take-over bid or issuer bid are encouraged to conduct themselves in a manner consistent with these objectives.

2.2 Identifying the Offeror

More than one person may constitute an offeror under a take-over bid. This can arise if an offer is made indirectly, because the terms *offer to acquire* and *take-over bid* include direct and indirect offers to acquire securities.

For example, a party (the primary party) that uses an acquisition entity, subsidiary or other affiliate (the named offeror) to make a take-over bid, may itself be making an indirect bid. In that case, the named offeror and the primary party may be joint offerors. Both would be subject to the bid requirements of the Regulation, including the requirements to certify and deliver the bid circular.

If a take-over bid is made by a wholly-owned entity, we regard the entity's parent to be a joint offeror. If the named offeror is not a wholly-owned entity, assessment of whether the primary party is a joint offeror would depend on its role, taking into account, among other factors, the answers to the following questions:

- Did the primary party play a significant role in initiating, structuring and negotiating the take-over bid?
- Does the primary party control any of the terms of the offer?

- Is the primary party financing the bid, guaranteeing the financing, or integral to obtaining the financing?

- Does the primary party directly or indirectly control the named offeror?

- Did the primary party form, or cause to be formed, the named offeror?

- Are the primary party's securities being offered as consideration under the bid?

- Will the primary party beneficially own the assets or securities of the target?

A *yes* answer to any of these questions may, in our view, mean that the primary party is making an indirect offer, and is a joint offeror under the bid.

2.3 Collateral agreements

Subsection 2.22(2) of the Regulation prohibits an offeror from entering into a collateral agreement, understanding or commitment that has the effect of providing a security holder of the offeree issuer with greater consideration than that offered to other security holders of the same class. This prohibition against collateral agreements extends to any direct or indirect benefit being provided by the offeror to the holder.

If a party is able to demonstrate that a particular agreement, understanding or arrangement is undertaken for a valid business purpose and that the terms of the agreement, understanding or arrangement provide for a mutual exchange of consideration of equivalent value, the securities regulatory authority or regulator will consider granting an exemption from the collateral benefit prohibition under section 7.1 of the Regulation.

Subsection 2.22(3) of the Regulation excludes certain employment-related arrangements from the scope of the collateral agreement prohibition in subsection 2.22(2) if an independent committee, acting in good faith, determines that the value of the consideration, net of any offsetting costs to the security holder, is less than five per cent of the value the security holder expects it will be beneficially entitled to receive under the terms of the bid in exchange for the equity securities beneficially owned by the security holder. For this purpose, we consider an independent committee to mean a committee composed exclusively of directors who are disinterested in the bid or any related transactions.

2.4 Lockup and support agreements

Documents required to be filed under section 3.2 of the Regulation that have been previously filed (for example under Regulation 44-101 respecting Short Form Prospectus Distributions or Regulation 51-102 respecting Continuous Disclosure Obligations*)* should not be refiled. Instead, the offeror should file a letter with the regulator describing the previously filed documents and the filing date and SEDAR project number.

2.5 Valuations

Issuer bids and insider bids may be subject to valuation requirements under the securities legislation of certain jurisdictions. Offerors whose securities are listed on the TSX Venture Exchange may also be subject to exchange valuation requirements. In these circumstances, offerors and offeree issuers are reminded to consider whether the valuation requirements contained in local rules or regulations such as OSC Rule 61-501 *Insider Bids, Issuer Bids, Business Combinations and Related Party Transactions* or Quebec Regulation Q-27 r*especting Protection of Minority Securityholders in the Course of Certain Transactions*, or in TSX Venture Policy 5.9 Insider Bids, Issuer Bids, Business Combinations and Related Party Transactions apply.

2.6 Plain language principles

Plain language will help investors understand your disclosure so that they can make informed investment decisions:

- use short sentences
- use the active voice
- use personal pronouns to speak directly to the reader
- avoid superfluous words
- organize the document in clear, concise sections, paragraphs and sentences
- avoid jargon
- avoid reliance on glossaries and defined terms unless it facilitates understanding of the discipline
- avoid boilerplate wording
- avoid multiple negatives
- use technical terms only when necessary and explaining them
- use charts, tables and examples to make disclosure easier to understand.

2.7 Determination of shareholdings

For the purposes of sections 5.5, 5.6, 5.12 and 5.13 of the Regulation, in determining the outstanding voting securities that are owned, directly or indirectly, by residents of Canada, an offeror should

(a) use reasonable efforts to identify securities held by registrants, financial institutions or nominees for the accounts of customers resident in Canada;

(b) count securities beneficially owned by residents of Canada as disclosed in insider reports and early warning reports; and

(c) assume that a customer is a resident of the jurisdiction or foreign jurisdiction in which the nominee has its principal place of business if, after reasonable inquiry, information regarding the jurisdiction or foreign jurisdiction of residence of the customer is unavailable.

Lists of beneficial owners of securities maintained by intermediaries under SEC Rule 14a-13 under the 1934 Act or other securities laws analogous to Regulation 54-101 respecting Communication with Beneficial Owners of Securities of a Reporting Issuer may also be helpful.

2.8 Equal Treatment

The failure to make a bid to security holders of an offeree issuer in one or more jurisdictions if the bid is made to security holders in other jurisdictions is inconsistent with the equal treatment requirement in section 2.6 of the Regulation because of the prejudice to the interests of security holders in the excluded jurisdictions. Offerors are reminded that securities regulatory authorities in the jurisdictions in which the bid is made may issue cease trade orders in respect of the bid.

2.9 Odd Lots

For purposes of subsection 2.23(2) of the Regulation, an offeror should refer to the definition of *board lot* as that term is defined in section 1-101 of The Rules of The Toronto Stock Exchange or TSX Venture Policy 1.1 to determine what constitutes an odd lot as an odd lot consists of security holdings of less than a board lot.

2.10 Early Warning

Persons acquiring securities of a reporting issuer may trigger the obligation to issue and file a news release and file a report under sections 6. 2 and 6.3 of the Regulation by acquiring ownership through market purchases or through the issuance of treasury securities under an exempt offering.