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Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Yukon Territory
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Superintendent of Securities, Nunavut

Dear Me Beaudoin:

**Re: CSA Notice and Request for Comment re MI 62-104 Take-Over Bids and Issuer Bids, NI 62-103
Early Warning System and NP 62-203 Take-Over Bids and Issuer Bids (#4411223 v6)**

The Canadian Investor Relations Institute (CIRI; see also Appendix 1) is pleased to provide its comments to the Canadian Securities Administrators (CSA) in response to the above noted Notice and Request for Comments, particularly given CIRI's previous correspondence of January 31, 2011 to the CSA outlining recommendations regarding share ownership disclosure in Canada under the Early Warning System (EWS). The CIRI 2011 letter is detailed in Appendix 2.

In its 2011 letter, CIRI asked the CSA to:

1. **Lower the beneficial ownership threshold under the EWS to 5%** from 10% for a class of voting or equity securities, including convertible securities. Reducing the threshold to this level will place Canada at the same level as other major capital markets.
2. Require beneficial owners to **disclose if there are subsequent 1% incremental increases or decreases in the shareholder's holding**, from the current requirement to report subsequent purchases of 2% or more.

CIRI encourages the CSA to enact the Proposed Amendments as outlined in the Notice, which will provide the market with increased transparency regarding significant holdings of issuers' securities that may affect control of that issuer. These Proposed Amendments "foster fair and efficient capital markets" and would instill "confidence in capital markets" as stated in the Securities Act.

Comments Regarding the Proposed 2013 CSA Amendments

In general, CIRI is pleased to note that a significant portion of its 2011 recommendations have been incorporated into the Proposed Amendments currently presented in the CSA Notice. CIRI is also pleased to note that the CSA have stated that the objective of the Proposed Amendments is consistent with the objectives of CIRI: to provide increased transparency through strengthened investor disclosure as a key component of value-creating market efficiency in Canada's capital marketplace.

While CIRI's letter of 2011 did not address the additional concerns regarding hidden ownership and empty voting, both these issues have been identified by CIRI as issues of concern for corporate issuers and investor relations professionals. The increased use of derivatives in today's markets has accelerated an investor's ability to accumulate substantial ownership positions without timely disclosure, thereby avoiding public scrutiny of substantial ownership positions (i.e. hidden ownership), especially when such positions approach or exceed the existing early warning threshold.

CIRI is of the view that the issue of empty voting (i.e. the use of derivatives or securities lending arrangements to hold voting rights while not necessarily holding an equivalent economic stake in an issuer) has not been adequately addressed to this point. While this situation may be, in large part, due to a lack of concrete instances of market inefficiency that may have resulted, the recent example involving TELUS Corporation and Mason Capital Management LLC has brought to light the significant problem that empty voting poses to market efficiency and integrity. In an August 2012 article, *A Call to Arms on Empty Voting* by MacDougall, Yalden and Fraibeg from Osler, Hoskin & Harcourt LLP (1) states correctly that, "...it is a fundamental assumption underlying our system of corporate governance that shareholders are entitled to make certain decisions because they have a real economic interest in the outcome." The decoupling of voting rights and economic interests as evidenced in the TELUS / Mason Capital example provides to regulators a precedent-setting Canadian transaction that calls out for a review of empty voting and an appropriate response as evidenced in the Proposed Amendments. As

summarized in the MacDougall et al article, “Canada has had a wake-up call to a major flaw in the regulation of its public markets and securities regulators need to respond promptly and decisively.”¹

CIRI further encourages the CSA to consider proceeding with a future review of the Alternative Monthly Reporting (AMR) framework and regime as mentioned in page 2 of the Notice.

The Proposed Amendments

Further to CIRI’s general agreement with the seven Proposed Amendments, the following specific comments are provided in an effort to clarify the rationale behind CIRI’s position on each amendment.

1. *The early warning reporting threshold is decreased from 10% to 5%. The news release must be issued and filed promptly but no later than the opening of trading on the next business day.*

Comment: The reduction to a 5% threshold is wholly consistent with CIRI’s recommendation of January 2011 to the CSA and will place Canada at the same level as other developed capital markets around the world, including the United States, France, India, China, Sweden, Japan and Australia and closer to the United Kingdom (3%), Switzerland (3%), Germany (3%) and Italy (2%). Many of these markets have liquidity similar to the Canadian market and operate effectively and efficiently under this level of share ownership disclosure.

The requirement to report positions of this size prior to opening of trading hours the next business day is reasonable given the sophistication of technology in Canadian capital markets. This would put us more in line with other developed capital markets including Australia and the United Kingdom, which require disclosure within two business days. While the reporting period in the United States is 10 days, there are interested parties lobbying the SEC to reduce this window.

2. *In calculating whether the threshold has been reached, an investor must include equity derivative positions that are substantially equivalent in economic terms to conventional equity holdings, and securities lending arrangements.*

Comment: CIRI strongly agrees with this proposed amendment as a significant measure to address the market deficiencies and lack of transparency inherent in hidden ownership and empty voting. CIRI further notes that this issue is not isolated to Canada and that other countries, including the United Kingdom, Germany, Switzerland, Australia and Hong Kong, have introduced regulatory reforms that effectively require the inclusion of synthetic financial instruments that effectively replicate the economic consequences of share ownership. Despite the oft-quoted assertion that there is too little evidence that a problem exists, it is clear that the

¹ Andrew MacDougall,, Robert M. Yalden, Jeremy Frailberg, *A Call to Arms on Empty Voting*, News & Resources, Osler, Hoskin & Harcourt LLP, August 12, 2012. Available at <http://www.osler.com/NewsResources/A-Call-to-Arms-on-Empty-Voting/>

use of such derivative instruments has increased significantly along with the potential for abuse through the application of such vehicles.

3. *Further disclosure is required if there is a 2% increase or decrease in ownership or if there is a change in a material fact contained in an earlier report.*

Comment: CIRI agrees with the CSA that decreases in ownership of an issuer are as relevant to the market as increases in ownership and should be disclosed. This move to increased disclosure contributes to improved transparency and market efficiency.

However, CIRI submits that information regarding significant shareholders is relevant and necessary information for other market participants. Lowering the initial threshold to 5% and requiring disclosure of **increases or decreases of 1%** once the initial threshold has been reached can only help foster greater transparency and efficiency. This is also consistent with other developed capital markets.

Note that this proposed 1% increment represents one-fifth of the proposed 5% threshold, consistent with the current 2% increment of the existing 10% initial reporting threshold.

A 2010 paper by Michael C. Schouten and Mathias M. Siems, *The Evolution of Ownership Disclosure Rules Across Countries*, (2) discusses the various mechanisms through which ownership disclosure can fulfill two main functions: improving corporate governance and improving market efficiency. The abstract for this paper states, in part, “ [Ownership disclosure] differences have become smaller over time, though, as most countries had settled for a 5% threshold for ownership disclosure by the end of the sample period. Furthermore, we observe a large positive correlation between the variable for ownership disclosure and other variables that protect minority shareholders against controlling shareholders. The data also indicates that the stringency of countries’ ownership disclosure rules is positively correlated with the degree of dispersed ownership.”²

The authors also speak directly to improved transparency and market efficiency: “Once the shares are floating, disclosure of the entry or exit of large shareholders enables investors to continue to anticipate agency costs. The appearance of an activist hedge fund, for example, may signal an increase in monitoring. By requiring shareholders to disclose major acquisition, again, investors are enabled to make an informed estimate of the implications for the value of the share - this is one of the objectives of the US disclosure regime.”²

4. *A news release must be issued and filed and a report must be filed if the ownership percentage decreases to less than 5%. This proposed change provides valuable information to the market and also resolves reporting difficulties. For example, if ownership decreases from 6% to 4.5%,*

² Michael Schouten and Mathias M. Siems. *The Evolution of Ownership Disclosure Rules Across Countries*, Journal of Corporate Law Studies 10 (2010): 451---483. Available at: http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1765344_code656349.pdf?abstractid=1434144&mirid=1

without the proposed change, disclosure of the decrease to 4.5% would not be required. If, at a later date, a person acquires a 1% ownership, it would not be clear how to disclose the acquisition because the previous report disclosed a 6% ownership but the person owns 5.5%. With the Proposed Amendments, we require disclosure if ownership drops to 4.5% and further disclosure if the 5% threshold is subsequently crossed.

Comment: CIRI agrees with this further clarification to the 5% reporting threshold requirement regarding changes in a shareholder's ownership position and believes such clarification is required in light of the proposed change to include a decrease in ownership. CIRI further agrees that any decrease that results in an ownership level below the 5% threshold should be reportable, whether or not such decrease meets the 2% (as proposed by CSA) or 1% (as proposed by CIRI) hurdle for reporting changes in ownership position. The 5% ownership represents an important milestone for investors, with regard to reportable ownership, proxy-related matters such as the right to requisition a shareholder meeting and consistency with several other key foreign jurisdictions.

CIRI further encourages the CSA to consider further amendments to require share ownership percentages to be updated, and appropriate disclosure to be applied in the event that corporate actions may alter the number of shares issued and outstanding (and thus the calculation of ownership percentage). Such actions may include for example normal course issuer bids to purchase shares for discontinuation, the issue of additional shares from treasury and possible share splits and/or consolidations.

5. *Presently, the early warning requirements are accelerated during a take-over bid by requiring disclosure of acquisitions by a party other than the offeror at the 5% level. Since the Proposed Amendments impose a reporting threshold of 5% and disclosure no later than the opening of trading on the next business day, we do not think that we need to maintain the particular provisions for reporting during a take-over bid.*

We are proposing, as a consequential amendment, the repeal of the definition of "acquisition announcement provisions" in NI 62-103.

Comment: CIRI has no objection to the repeal of the definition of "acquisition announcement provisions" in NI 62-103.

6. *We propose to replace current Appendix E to NI 62-103 with new disclosure requirements in the form of Form 62-103F1. We have added instructions on the type of disclosure we expect for each of the items required to be disclosed. We also propose that the report be certified and signed. Conforming amendments have been made to the disclosure required for an EII found in former Appendix F and Appendix G (now Form 62-103F2 and Form 62-103F3).*

Comment: CIRI believes that the amendments inherent in the proposed new Form 62-103F1 (and conforming amendments incorporated in Form 62-103F2 and Form 62-103F3) are consistent with our long-held and well-recognized belief that capital markets and their

stakeholders are best served through the application of policies and procedures based on principles inherent in full and complete disclosure. Our organization's commitment to disclosure is evidenced by our ongoing efforts to provide guidance to our members through the development and publication of *CIRI's Standards and Guidance for Disclosure and Model Disclosure Policy* (update 4th Edition published in 2012).

CIRI further believes that such improved investor disclosure also serves to reduce the increasing emphasis on short-term market perspective ("short-termism") in favour of actions to create value over a longer-term investment horizon. A September 2009 position paper, *Overcoming Short-termism: A Call for a More Responsible Approach to Investment and Business Management* (3), issued by the Corporate Values Strategy Group (CVSG) of the U.S.-based Aspen Institute Business & Society Program, endorsed a call to end the focus on value-destroying short-termism in financial markets and create public policies that reward long-term value creation for investors and the public good.

The Aspen Institute report recognized that increased transparency resulting from strengthened investor disclosure is a key component of value-creating market efficiency. The report stated that, "... greater transparency in investor disclosures can also play an important role in helping corporations maintain a long-term orientation. The advent of increasingly complex non-traditional structured and derivative arrangements has enabled some investors to influence corporate decision-making without being subject to duties to disclose the existence or nature of their positions or their plans. This lack of transparency undermines the efficacy of the disclosure regime and creates opportunities for investors to use their influence to achieve short-term gains at the expense of long-term value creation. These opportunities may take many forms. To cite some extremes, they range from an activist who becomes a formal shareholder with voting power while simultaneously 'shorting' a corporation's shares or entering into a derivatives contract to hedge away its economic interest, to an investor who owns shares of one company and uses that position to increase the value of its holdings in another company instead. There are other more sophisticated techniques. Updated disclosure rules that take into account these complex but increasingly common arrangements can play a significant role in helping corporations maintain a long-term orientation by encouraging investment behaviour consistent with longer-term value creation and providing corporate decision-makers with a better understanding of the corporation's shareholders and their motivations."³

7. *We exclude a person from the AMR system if the person solicits, or intends to solicit, proxies from the 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 the securities of the reporting issuer.*

³ Aspen Institute Business & Society Program, *Overcoming Short-termism: A Call for a More Responsible Approach to Investment and Business Management*, September 2009. Available at: <http://www.aspeninstitute.org/publications/overcoming-short-termism-call-oreresponsible-approach-investment-business-management>

Comment: CIRI understands that the early warning system is designed primarily to address potential changes to the corporate control of reporting issuers as initiated by 'active' investors, while the AMR system was introduced to provide a disclosure vehicle for 'passive' investors, those with no intent to utilize their share ownership position to gain control of or unduly influence the operation and governance of a reporting issuer.

It would seem that a key issue may be identifying when an investor crosses the line from being passive to becoming active. It may not always be triggered or identified by reaching an arbitrary percentage ownership, such as the 5% trigger proposed by the CSA. Other activities may characterize an investor as being active, such as proxy solicitation, nomination and/or election of dissident directors, merger and acquisition activities or investor driven corporate realignments. It makes sense, therefore, that investors exhibiting such 'active' behaviour should be considered active and be required to adhere to the rules under early warning rather than AMR.

One additional concern that may arise, given the language of the proposed Amendment, may well be the practical determination of just when an investor actually "...intends to solicit proxies...". The determination of the point in time when that intent crystallizes and the share ownership at that time may prove to be a sticking point in future.

Responses to Specific Questions

In response to the Proposed Amendments CIRI is providing its comments to the specific questions included in the Notice as follows:

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.

CIRI's view is unchanged from our letter to the CSA in 2011, wherein we requested that once the EWRT of 5% was reached subsequent disclosure would be required for increases and decreases of 1% or more. Our rationale is that it seems appropriate to maintain the same relative value compared to the current EWR threshold (i.e. one-fifth of the threshold). Additionally, other developed capital markets (UK and USA; both major trading partners with Canada) currently require subsequent disclosure of increases and decreases of 1%.

In the case of the UK, the Financial Conduct Authority (FCA) Handbook states, under the Disclosure Rules and Transparency Rules (DTR), specifically under DTR 5.1.2, which speaks to the notification of the acquisition or disposal of major shareholdings, that: "Subject to the exemption for certain third country issuers a person must notify the issuer of the percentage of its voting rights he holds as shareholder or holds or is deemed to hold through his direct or indirect holding of financial instruments falling within 22DTR 5.3.1R (1), subject to the exemption in DTR 5.3.1R(2),⁶⁷ and DTR 5.3.1R (2A), (or a combination of such holdings) if the percentage of those voting rights:

- (1) reaches, exceeds or falls below 3%, 4%, 5%, 6%, 7%, 8%, 9%, 10% and each 1% threshold thereafter up to 100% (or in the case of a non-UK issuer on the basis of thresholds at 5%, 10%, 15%, 20%, 25%, 30%, 50% and 75%) as a result of an acquisition or disposal of shares or financial instruments falling within DTR 5.3.1 R2; or
- (2) reaches, exceeds or falls below an applicable threshold in (1) as a result of events changing the breakdown of voting rights and on the basis of information disclosed by the issuer in accordance with DTR 5.6.1 R7 and DTR 5.6.1A R;

and in the case of an issuer which is not incorporated in an EEA State a notification under (2) must be made on the basis of equivalent events and disclosed information."

In the USA for 13G or 13F filings the following is relevant (bolded added by editor): "**(a)** If any material change occurs in the facts set forth in the Schedule 13D (§ 240.13d-101) required by § 240.13d-1(a), including, but not limited to, any material increase or decrease in the percentage of the class beneficially owned, the person or persons who were required to file the statement shall promptly file or cause to be filed with the Commission an amendment disclosing that change. An acquisition or disposition of beneficial ownership of securities in **an amount equal to one percent or more of the class of securities shall be deemed "material" for purposes of this section**; acquisitions or dispositions of less than those amounts may be material, depending upon the facts and circumstances" (Reference: <http://www.law.cornell.edu/cfr/text/17/240.13d-2>).

Furthermore, CIRI feels compelled to emphasize that several other key jurisdictions globally are at or below a 5% threshold as follows and that Canada is significantly out of step with other developed capital markets around the world and has been for several years. (Reference: Mathias M. Siems, personal communication re database referenced in footnote #2 updated to 2012)

- 3%: UK, Switzerland, Germany
- 5%: USA, Japan, India, France, China, Sweden
- 10% Canada

CIRI further notes that, as referenced in the CSA proposal under its footnote 10, there is currently precedent for reporting ownership changes that would include both upward and downward movement in that, "...EIs reporting under the AMR system are currently subject to a reporting requirement for incremental decreases in ownership."

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 acquirer 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.

While CIRI does not disagree with the proposal to apply the moratorium provisions at the 5% level, since that approach is consistent with the new regime, CIRI's primary focus is on improved ownership disclosure to facilitate a fair and efficient market. Recognizing that acquisitions beyond 5% could be termed passive (i.e. solely for investment purposes) or active (i.e. potentially for an attempted acquisition transaction), it would be helpful if the final rule could take into account the intent of the investor who obtains more than 5% ownership of issued shares.

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

CIRI agrees that for consistency across the regime derivatives should be included in the proposed moratorium provisions. The rules should take into account the full position/stake an institution or investor has in an issuer given that they have the ability to affect change with that total position. Further, a 24-hour moratorium seems appropriate given the speed with which markets react today (virtually instantaneous for large traders with algorithmic trading).

However, this speed of execution is not generally available to individual retail investors so a moratorium contributes to 'fairness' helping to 'level the playing field'.

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

As noted above, CIRI's position is that the effectiveness of a moratorium will likely depend largely on the intent of the purchaser of the shares, whether they are passive or active, and that the application of the moratorium should take into account the intent of the purchaser.

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.

CIRI agrees that further acceleration of reporting is not necessary and that this is consistent with the concept of timely disclosure applied to both investors and issuers. The proposed amendments would require additional disclosure with incremental changes in ownership, which we support at 1%, and we feel that is sufficient.

(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.

N/A

4. The Proposed Amendments would apply to all acquirers including EIs.

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

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

CIRI believes that the 5% reporting threshold should apply to EIs. While the AMR system was established to address the legitimate concerns of passive investors, any such investor may decide to become active at any point. The key question then becomes – "At what level beyond 5% does a passive investor become 'active' and reportable?" The answer would likely depend on multiple factors such as intent to acquire, market capitalization, liquidity, shares outstanding,

analyst support, etc. so a 'bright line' definition (i.e. 5% reporting threshold) adds clarity and improves transparency to the marketplace.

It is perhaps illustrative at this stage to reference the 'empty voting' situation with TELUS Corporation and Mason Capital, who did qualify under the AMR system and yet was still able to accumulate a large position in TELUS undetected by the marketplace or by regulators.

By applying the 5% reporting threshold to EIs, our capital market would benefit from increased transparency, which generally moves issuers closer to a fair market valuation, a positive impact for market efficiency as well as potentially lowering the cost of capital for issuers.

5. Mutual funds that are reporting issuers are not EIs 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.

CIRI recognizes that mutual funds are generally 'passive' investors, in the sense that they are not in the business of launching transactions to take control of a listed issuer. Therefore, it may be more appropriate that mutual funds should fall under the AMR regime rather than the general early warning requirements in MI 62-104. However, it should be recognized that the technology to accurately track ownership positions is readily available to all investors, whether large mutual funds or smaller investor groups and there should be no significant burden for such reporting. Mutual funds currently have the ability to report under the 10% EWR regime so the infrastructure must be in place to establish the same systems at 5% levels under the AMR regime.

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?

CIRI agrees with and encourages the concept that early warning reporting should capture any and all full shares for which an institution has voting rights. CIRI further agrees with the concept of including only substantially equivalent derivatives. However, the issue is how is 'substantially equivalent' defined and at what point does a derivative instrument cross over from being substantially equivalent (95%, 90%, 80%?) to become a partial-exposure instrument? Is it possible to require that any current and new derivative product be classified upon registration? And if so, by whom – the registrant (developer of the instrument) or the regulator?

It may be noted that in the UK, the Financial Conduct Authority (FCA) Handbook includes under its Disclosure Rules and Transparency Rules (DTR) some financial instruments are included in the calculation as indicated below:

DTR 5.3 Notification of voting rights arising from the holding of certain financial instruments

DTR 5.3.1 (01/04/2013)

(1) A person must make a notification in accordance with the applicable thresholds in DTR 5.1.2R in respect of any financial instruments which they hold, directly or indirectly, which:

(a) are qualifying financial instruments within DTR 5.3.2R;

AND

DTR 5.3.2 (01/06/2009)

For the purposes of DTR 5.3.1 R (1)(a):

(1) transferable securities and options, futures, swaps, forward rate agreements and any other derivative contracts, as referred to in Section C of Annex 1 of MiFID, shall be considered to be qualifying financial instruments provided that they result in an entitlement to acquire, on the holder's own initiative alone, under a formal agreement, shares to which voting rights are attached, already issued of an issuer whose shares are admitted to trading on a regulated market or a UK prescribed market;

(2) the instrument holder must enjoy, on maturity, either the unconditional right to acquire the underlying shares or the discretion as to his right to acquire such shares or not;

(3) a 'formal agreement' means an agreement which is binding under applicable law.

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?

CIRI believes that the proposed seems reasonable, particularly given the definition outlined in Annex B of the proposal regarding amendments to NP 62-203, Part 3.1, specifically, "... if a dealer or market participant that took a short position on the derivative could substantially hedge its obligations under the derivative by holding 90% or more of the specified number of reference securities." CIRI further agrees with the statement: "An equity equivalent derivative would generally include only a cash-settled equity total return swap or substantially similar derivative." It is not clear in the proposal exactly who would have the final say on the final determination of a given derivative instrument.

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.

CIRI agrees with the proposed disqualification of an EII from the AMR under the term described above. It is our position that the intent of the proposed amendments is consistent with improved corporate governance practices and thus would require this additional disclosure. CIRI further notes that this amendment as proposed also takes into account the rights of other shareholders to have access to timely disclosure information regarding potential changes in corporate control so they can reasonably assess the implications of the proposed corporate action (i.e. have sufficient time to analyze and consider the change before deciding how to vote).

Please also refer to our discussion in our answer to Question 4 regarding the application of a revised early warning threshold to EIIs.

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

CIRI generally agrees with the exemption from early warning requirements noting that the exception applies only in cases where the lending arrangement specifies that the lender has an unrestricted right to recall by the lender from the borrower in a timely manner. CIRI believes it is important to emphasize the point made in the proposal that, “increased transparency about these arrangements is appropriate.”

Further to this point, in the UK the FCA Handbook further states, “a stock-lending agreement which provides for the outright transfer of securities and which provides the lender with a right to call for re-delivery of the lent stock (or its equivalent) is not (as respects the lender) to be taken as involving a disposal of any shares which may be the subject of the stock loan”.

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

It seems that a ‘specified securities lending arrangement’ is being defined in the proposal as an arrangement that includes an unrestricted ability to recall the securities before a meeting of security holders. CIRI agrees that the unrestricted ability to recall is critical but would prefer to see the definition address recall by the lender in ‘a timely manner’. If voting by the lender is to be effective the timing of the recall should allow the lender to assess and properly consider the implications of any issues that are to be voted on at the meeting of shareholders. Defining the ability to recall simply ‘before the meeting’ may not provide opportunity for such proper consideration by the lender.

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?

CIRI strongly agrees with this view as expressed in the proposal. CIRI and its issuer members believe there is a need to better manage the securities lending process and incorporate stricter constraints for parties to manage, track, quantify and ascribe specific primary ownership of borrowed shares. If borrowed shares are pooled by lending agencies, those agencies must be able to specifically identify who the shares were borrowed from, who the shares were lent to and who, if anyone, they are assigned as collateral in subsequent transactions.

Increased transparency regarding securities lending is supported by the International Corporate Governance Network (Not-for-profit body, founded in 1995 that has evolved into a global membership organisation of more than 500 leaders in corporate governance. Its members are based in 38 countries from around the world, and include professionals, corporations, policy makers and institutional investors with capital under management in excess of US\$10 trillion). This international organization, in its Securities Lending Code of Best Practice 2007, stated, in part:

“The ICGN affirms the principle that companies should know who controls the votes at their general meetings, and that this transparency should benefit all market participants. Considering the availability of market instruments that separate economic ownership from control, the ICGN believes that it has become desirable for companies and the broader market to be able to track significant divergence of voting power from declared economic ownership. **The ICGN therefore invites the relevant market authorities to consider amending their holdings disclosure regimes to include the transfer of actual or contingent voting rights executed through the use of securities lending and derivatives.**”

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?

CIRI is not clear if the proposed changes adequately address transparency concerns. Comments from various market participants appear to indicate that the current situation regarding share lending transparency is not orderly. Certainly there is little if any visibility for the issuers of the shares being lent and this does concern CIRI, given that our primary motivation for supporting the Proposed Amendments is to improve share ownership disclosure for the benefit of market transparency and efficiency.

The entire process of share lending and its implications for empty voting and hidden voting may need to be the subject of a separate review by securities regulators and market participants.

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?

CIRI agrees that the Proposed Amendments should be applied to all reporting issuers, including venture issuers, particularly when one considers that institutions can often more easily accumulate 5% in these smaller capitalization issuers. CIRI believes that such disclosure will enhance rather than hinder the ability of such issuers to raise capital. The reality is that, particularly for venture issuers, investors freely communicate with each other regarding their investment opportunities and the risks involved. Improved transparency regarding share ownership should increase inter-investor confidence across the marketplace.

14. Some parties to equity equivalent derivatives may have acquired such derivatives for reasons other than acquiring the referenced securities at a future date. For example, some parties to these derivatives may wish to maintain solely an economic equivalency to the securities without acquiring the referenced securities for tax purposes or other reasons. Would the proposed requirement lead to over-reporting of total return swaps and other equity equivalent derivatives? Or would the possible over-reporting be mitigated by the fact that it is likely that parties to equity equivalent derivatives would qualify under the AMR regime?

If the investor seeks to maintain solely an economic equivalency and does not intend to acquire the referenced securities, then they could be deemed as being 'passive'. In this scenario, they would report under the AMR regime. The concern is, as raised in our response to question 4, at what point does an investor become 'active' and what share ownership have they been able to accumulate? Therefore, CIRI feels that these holders of derivative products should report under the EWS with a 5% threshold given that they have an opportunity to convert their derivative into the referenced securities upon termination of the derivative, which would enable them to affect control of that issuer.

In order to ensure that total return swaps and other equity derivatives do not result in over-reporting, the CSA will need to provide specific guidelines for reporting.

15. If the proposed new requirement does lead to an over-reporting of these derivatives, is this rectified by the requirement in the early warning report for acquirers to explain the purpose of their acquisition and thereby clarify that they do not intend to acquire the referenced securities upon termination of the swap?

N/A

Summary and Recommendations

CIRI believes that the Proposed Amendments provide the market with increased transparency regarding significant holdings of issuers' securities that may affect control of that issuer and that this is information all market participants are entitled to. These Proposed Amendments would support the purpose of the Securities Act "to foster fair and efficient capital markets and confidence in capital markets".

CIRI recommends that the CSA:

- lower the beneficial ownership threshold under the Early Warning System to five percent (5%) from 10 percent (10%);
- include equity equivalent derivatives and securities lending positions in the Early Warning System threshold calculation;
- require disclosure of share ownership when shareholders fall below the Early Warning System threshold;
- require beneficial owners to disclose if there are **subsequent one percent (1%) incremental increases or decreases** in the share ownership;
- require that these disclosures be made before trading hours commence the following business day; and
- consider a future review of the Alternative Monthly Reporting system.

CIRI recommends that the CSA move forward with these changes and establish a reasonable time frame for their implementation, recognizing that some stakeholders may require some period of time to allocate sufficient resources to comply with the amendments.

Yours truly,



Yvette Lokker
President and Chief Executive Officer
Canadian Investor Relations Institute

APPENDIX 1

The Canadian Investor Relations Institute

The Canadian Investor Relations Institute (CIRI) is a professional, not-for-profit association of executives responsible for communication between public corporations, investors and the financial community. CIRI contributes to the transparency and integrity of the Canadian capital markets by advancing the practice of investor relations, the professional competency of its members and the stature of the profession.

Investor Relations Defined

Investor relations is the strategic management responsibility that integrates the disciplines of finance, communications and marketing to achieve an effective two-way flow of information between a public company and the investment community, in order to enable fair and efficient capital markets.

The practice of investor relations involves identifying, as accurately and completely as possible, current shareholders as well as potential investors and key stakeholders and providing them with publicly available information that facilitates knowledgeable investment decisions. The foundation of effective investor relations is built on the highest degree of transparency in order to enable reporting issuers to achieve prices in the marketplace that accurately and fully reflect the fundamental value of their securities.

CIRI is led by an elected Board of Directors of senior IR practitioners, supported by a staff of experienced professionals. The senior staff person, the President and CEO, serves as a continuing member of the Board. Reporting directly to the Board are the Nominating, Audit, Membership, Issues, Editorial Board, Resources and Education, and Certification Committees.

CIRI chapters are located across Canada in Ontario, Quebec, Alberta and British Columbia. Membership as of July 2013 consists of approximately 600 professionals serving as corporate investor relations officers for reporting issuers, consultants to issuers, or service providers to the investor relations profession. CIRI is also a member of the Global Investor Relations Network (GIRN), which provides an international perspective on the issues and concerns of investors and shareholders in capital markets outside of North America. In addition, a number of members, including the President and CEO of CIRI, are members of the National Investor Relations Institute (NIRI), the corresponding professional organization in the USA.

APPENDIX 2: CIRI Letter of Recommendation January 31, 2011



January 31, 2011

Mr. William S. Rice
Chair
Canadian Securities Administrators
Tour de la Bourse
800, Square Victoria
Suite 2510
Montreal, QC H4Z 1J2

Dear Mr. Rice:

Re: Recommendation to Improve Share Ownership Disclosure in Canada

Currently, the ownership threshold under the Early Warning System (EWS) in Canada is reached when a shareholder acquires beneficial ownership of, or the power to exercise control or direction over, voting or equity securities of any class of a reporting issuer or securities convertible into voting or equity securities of any class of a reporting issuer that would constitute 10 percent or more of the outstanding securities of that class. The current ownership threshold (i.e. the “10 percent rule”) under the EWS is set out in subsections 5.2(1) of Regulation 62-104 respecting Take-over Bids and Issuer Bids (Quebec) and in Ontario, subsection 102.1(1) of the Securities Act (Ontario).

In addition, under subsection 102.1(2) of the Securities Act (Ontario), a shareholder is further required to make disclosure each time a shareholder or any person or company acting jointly or in concert with a shareholder acquires beneficial ownership of, or the power to exercise control or direction over, (i) an additional 2 percent or more of the outstanding securities of the class to which the disclosure required under subsection (1) relates, or (ii) securities convertible into an additional 2 per cent or more of the outstanding securities (i.e. the “further 2 percent rule”).

The Canadian Investor Relations Institute (CIRI) strongly believes that the current 10 percent rule threshold under the EWS and subsequent incremental further 2 percent rule for disclosure are too high and are out of step with requirements in other major marketplaces. As a result, the transparency and efficiency of Canada’s marketplace may be negatively impacted. For more information about CIRI please refer to Appendix 1.

CIRI asks that the Canadian Securities Administrators

1. **lower the beneficial ownership threshold under the EWS to 5%** from 10% for a class of voting or equity securities, including convertible securities. Reducing the threshold to this level will place Canada at the same level as other major capital markets.
2. require beneficial owners to **disclose if there are subsequent 1% incremental increases or decreases in the shareholder's holding**, from the current requirement to report subsequent purchases of 2% or more.

For your information, CIRI has reviewed the February 24, 2010 letter from Thierry Dorval of Ogilvy Renault to Louis Morisset of the AMF regarding a proposed reduction of the early warning disclosure thresholds (the *Ogilvy Renault Letter*), and we support the recommendation in the Ogilvy Renault Letter, which is attached in Appendix 2.

Rationale for Recommendations

1. Address Deficiencies in Current Situation

Currently, issuers interested in identifying shareholders typically use the services of third-party providers such as proxy solicitation firms and shareholder identification agencies. The methods used by such providers to identify shareholders depend, to a large extent, on market relationships and goodwill; estimates derived from available data, past experiences, patterns of trading and other non-quantitative strategies. This route to shareholder identification is costly, and thus their use is often restricted to large cap issuers. In addition, the resulting ownership information is often imprecise and is typically not in the public domain, which reduces transparency and market efficiency.

As a result of cost and opaque ownership data, most reporting issuers in Canada, particularly small-to-medium capitalization issuers who constitute the majority of reporting issuers, do not adequately know their shareholder base and cannot communicate effectively and directly with a significant proportion of their owners. Reducing the threshold under the EWS from 10% to 5% we expect will provide significantly more publicly available information leading to greater transparency and market efficiency.

Further, any change in the holdings of significant shareholders, both increases and decreases, is relevant information that should be publicly available to other market participants in a transparent and efficient capital market. The reporting of both increases and decreases in share ownership holdings, as opposed to only increases, is consistent with a similar requirement in Part 4.5 (c) Filing Obligations under Part 4 Alternative Monthly Reporting System of National Instrument 62-103.

2. Align Canadian Requirements with Other Major Markets

The following major markets, including markets that the CSA has previously used to benchmark practices, have the following early warning thresholds:

The United States, France, Germany, India, Japan and Australia each have a 5% disclosure threshold. United Kingdom applies a 3% threshold and Italy has a 2% threshold.

When Canadian reporting issuers look for capital or shareholders outside our national borders, global investors look closely at many factors, including the Canadian regulatory environment. A less rigorous regime may impede potential investors from investing, thus raising the cost of capital for Canadian issuers. Clearly, other major markets have adopted a lower early warning threshold than Canada.

3. Improve Market Transparency to Increase Market Efficiency

The European Union clearly links transparency to market efficiency. “In 1999, the European Commission announced a range of measures to promote integration of European financial markets. One of the aims was to enable issuers to raise capital on competitive terms across Europe. To achieve this, the Commission intended to update existing disclosure obligations. This resulted in the Transparency Directive, which in its first recital states that

“[t]he disclosure of accurate, comprehensive and timely information about security issuers builds sustained investor confidence and allows an informed assessment of their business performance and assets. This enhances both investor protection and market efficiency.”

To this end, according to the Directive, those who hold or have access to voting rights should disclose major holdings in listed companies.”⁴

CIRI submits that information regarding significant shareholders is relevant necessary information for other market participants and a key element for a transparent and efficient capital market. Lowering the initial threshold to 5% and requiring disclosure of decreases, in addition to increases, of 1% above the initial threshold can only help foster greater transparency and efficiency. Note that this proposed 1% increment represents one-fifth of the proposed 5% initial threshold, consistent with the current 2% increment that is one-fifth of the existing 10% initial reporting threshold.

⁴Abstract: Schouten, Michael C., *The Case for Mandatory Ownership Disclosure* (September 28, 2009). Stanford Journal of Law, Business, and Finance, Vol. 15, pp. 127-182, 2010. Available at SSRN: <http://ssrn.com/abstract=1327114>

A later paper by Michael C. Schouten and Mathias M. Siems, *The Evolution of Ownership Disclosure Rules Across Countries*⁵ discusses the various mechanisms through which ownership disclosure can fulfill two main functions: improving corporate governance and improving market efficiency. The abstract for this paper states, in part, “Our main finding is that ownership disclosure rules have become more stringent over time. A breakdown of the results suggests that not legal origin, but the degree of countries’ economic development is a relevant factor in explaining the differences between countries. The differences have become smaller over time, though, as most countries had settled for a 5% threshold for ownership disclosure by the end of the sample period. Furthermore, we observe a large positive correlation between the variable for ownership disclosure and other variables that protect minority shareholders against controlling shareholders. The data also indicates that the stringency of countries’ ownership disclosure rules is positively correlated with the degree of dispersed ownership.”

The authors also speak directly to improved transparency and market efficiency: “Once the shares are floating, disclosure of the entry or exit of large shareholders enables investors to continue to anticipate agency costs. The appearance of an activist hedge fund, for example, may signal an increase in monitoring. By requiring shareholders to disclose major acquisition, again, investors are enabled to make an informed estimate of the implications for the value of the share - this is one of the objectives of the U.S. disclosure regime.”

In addition, the importance of share ownership identification has long been recognized in the United States. According to the SEC website, Congress passed Section 13(f) of the Securities Exchange Act in 1975 in order to increase public availability of information regarding the securities holdings of institutional investors. See Section 13(f) of the Securities Exchange Act. Congress believed that this institutional disclosure program would increase investor confidence in the integrity of the United States securities markets.

Furthermore, in a September 2009 position paper, *Overcoming Short-termism: A Call for a More Responsible Approach to Investment and Business Management*⁶, twenty-eight leaders in the U.S. representing business, investment, government, academia, and labor joined the Aspen

⁵Michael Schouten and Mathias M. Siems. *The Evolution of Ownership Disclosure Rules Across Countries* Journal of Corporate Law Studies 10 (2010): 451-483.

⁶ Aspen Institute Business & Society Program, *Overcoming Short-termism: A Call for a More Responsible Approach to Investment and Business Management*, September 2009. Available at: <http://www.aspeninstitute.org/publications/overcoming-short-termism-call-more-responsible-approach-investment-business-management>.

Institute Business & Society Program's Corporate Values Strategy Group (CVSG) to endorse a call to end the focus on value-destroying short-termism in financial markets and create public policies that reward long-term value creation for investors and the public good. One of three key leverage points recognized that increased transparency resulting from strengthened investor disclosure is a key component of value-creating market efficiency. Further detail is included in Appendix 3.

4. Foster Good Corporate Governance

NP 58-201 *Corporate Governance Guidelines* states that 'the board should adopt a written mandate in which it explicitly acknowledges responsibility for the stewardship of the issuer including responsibility for adopting a communication policy for the issuer (Board Mandate 3.4 (e)). This responsibility originated in the 1994 Report *Where Were the Directors*. This report described the responsibility to "ensure the corporation has in place a policy to enable the corporation to communicate effectively with its shareholders, other stakeholders and the public generally ..." Clearly, dialogue can be strengthened if the corporation can more easily identify its shareholders and if shareholders have greater transparency to the ownership of a company.

In addition, while institutional investors push for greater access to the boardroom, the conversation can be one-sided unless issuers are provided with a better opportunity to know and understand who their shareholders are.

Summary and Recommendations

The Canadian regulatory EWS regime is out of step with major capital markets such as the United States, France, Germany, India, Japan, Italy, the United Kingdom and Australia. The following two recommendations:

- lowering the initial reporting threshold to 5%, and
- requiring disclosure with incremental increases or decreases of 1% in shareholdings

are expected to address deficiencies in the current system, have a positive impact on ownership transparency and market efficiency and improve engagement between issuers and investors to strengthen corporate governance.

We would be pleased to discuss this letter with you further. Please contact the undersigned at (416) 364-8200 or by e-mail at tenright@ciri.org.

Yours truly,



Tom Enright,
President & Chief Executive Officer
Canadian Investor Relations Institute

cc: Alberta Securities Commission
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T2P 3C4
ATTN: William S. Rice, Chair

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ATTN: Brenda Leong, Chair and Chief Executive Officer

Manitoba Securities Commission
500-400 St. Mary Avenue
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R3C 4K5
ATTN: Don Murray, Chair

New Brunswick Securities Commission
85 Charlotte Street, Suite 300
Saint John, NB

E2L 2J2

ATTN: David G. Barry, Chair and Chief Executive Officer

Securities Commission of Newfoundland and Labrador
Department of Government Services

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ATTN: H. Leslie O'Brien, Chair

Nunavut Superintendent of Securities

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Iqaluit, NU

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ATTN: Louis Arki, Superintendent of Securities

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ATTN: Howard Wetston, Chair

Prince Edward Island Securities Office
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ATTN: Katharine Tummon, Superintendent of Securities

Autorité des marchés financiers
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ATTN: Mario Albert, Interim President and Chief Executive Officer

Saskatchewan Financial Services Commission
6th Floor, 1919 Saskatchewan Drive
Regina, SK
S4P 3V7
ATTN: David Wild, Chair

APPENDIX 1

The Canadian Investor Relations Institute

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CIRI is led by an elected Board of Directors of senior IR practitioners, supported by a staff of experienced professionals. The senior staff person, the President and CEO, serves as a continuing member of the Board. Committees reporting directly to the Board include, but are not limited to: Nominating; Audit; Membership; Issues; Editorial Board; Resource and Education; Certification.

CIRI chapters are located across Canada in Ontario, Quebec, Alberta and British Columbia. Membership as of October 31, 2010 consisted of 594 professionals serving as corporate investor relations officers in reporting issuer companies, consultants to issuers or service providers to the investor relations profession. CIRI is also a member of the Global Investor Relations Network (GIRN), which provides an international perspective on the issues and concerns of investors and shareholders in capital markets outside of North America. In addition, several members, including the President and CEO of CIRI are members of the National Investor Relations Institute (“NIRI”), the corresponding professional organization in the United States.

OGILVY
RENAULT

Direct Dial: (514) 847-4528
tdorval@ogilvyrenault.com

Montréal, February 24, 2010

BY EMAIL & ORDINARY MAIL

Autorité des marchés financiers
800 Square Victoria, 22nd Floor
C.P. 246, Tour de la Bourse
Montréal, Quebec H4Z 1G3

To the attention of:

M^e Louis Morisset,
Superintendent, Securities Markets
e-mail: louis.morisset@lautorite.qc.ca

Dear Sirs/Mesdames:

RE: Position Paper for changing the Early Warning Threshold from 10% to 5%

This letter reflects a position advocated by this firm, on behalf of a number of senior Canadian reporting issuers, for a reset of the current early warning disclosure threshold set out in sub-sections 5.2(1) of Regulation 62-104 respecting Take-over Bids and Issuer Bids (Quebec) and, in Ontario, sub-section 102.1(1) of the Securities Act (Ontario) (the "Early Warning Threshold").

The current Early Warning Threshold is **10% or more** of the outstanding securities of any class of voting or equity securities of a reporting issuer. We are advocating a change of the Early Warning Threshold to **5% or more** of any class of voting or equity securities.

This position is being advocated on behalf of a group of Canadian-based senior reporting issuers with a combined market capitalization of more than \$50 billion (the "Proponents").

OGILVY RENAULT S.E.N.C.R.L., s.r.l. / LLP
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GENERAL

The Proponents are not aware of any recent consultation or request for comments of the Canadian Securities Administrators (the "CSAs") on the appropriateness of the current the Early Warning Threshold.

This position paper describes a number of recent developments in the Canadian securities markets which make it more necessary than ever for the CSAs to reconsider the current 10% Early Warning Threshold and to implement a more up-to-date 5% Early Warning Threshold.

1. Early Warning Threshold in other jurisdictions

Canada's current Early Warning Threshold of 10% puts us in the company of jurisdictions such as Latvia, Pakistan and Chile (10%) and Russia (25%), as indicated in the table showing disclosure thresholds across various countries attached as **Schedule "A"**.

A 5% Early Warning Threshold would bring Canadian securities legislation in line with beneficial ownership disclosure requirements of other major capital market jurisdictions, such as the United States, Australia, Japan, Hong Kong and the United Kingdom, as summarized below:

United States

- When a person or group of persons acquires beneficial ownership of more than 5% of a voting class of a company's equity securities registered under Section 12 of the Securities Exchange Act of 1934, they are required to file a "beneficial ownership report" (Schedule 13D) with the SEC within ten days after the purchase.

Australia

- Any person who acquires a relevant interest in 5% or more of the shares in an Australian listed company must disclose that interest to the target company and ASX.
- The company can also find out the identity of holders of relevant interests in shareholdings of any size by making enquiries under section 672A of the *Corporations Act*.

Japan

- Record holders and certain beneficial owners are required to file a report of large shareholdings when their ownership percentage in a Japanese public company reaches 5% or more, or thereafter changes by more than 1%.



Hong Kong

- A notice must be given pursuant to s. 308 of the Securities and Futures Ordinance when, among other things:
 - a shareholder becomes interested in 5% or more of the shares of a listed corporation;
 - a shareholder's interest drops below 5%; or
 - there is an increase or a decrease in the percentage figure of a shareholder's holding that results in such shareholder's interest crossing over a whole percentage number which is above 5%.

United Kingdom

- Shareholders must disclose all interests above 3% (and subsequent increases of 1%).
- A company shall disclose all information received from major shareholders within 1 day of the receipt of such information.

2. Lack of visibility by reporting issuers into their shareholder base

Under most corporate regimes in Canada, shares may only be issued in registered form and corporations themselves or their registrars and transfer agents maintain records of shareholders and their share ownership, which allows issuers to know the identity of their registered shareholders and to engage in a dialogue with them where required.

However, with street name holding by most institutional and individual shareholders in Canada, reporting issuers have lost to a significant extent the ability to know the identity of the holders of their shares (ranging anecdotally from 80% detention in street name to 100% in the case of more recent book-based only IPOs). Issuers can piece together information on the identity of their shareholders under limited circumstances, such as where the shareholder is a non objecting beneficial owner under National Instrument 54-101 – Communications with Beneficial Owners, or a shareholder has crossed the current 10% Early Warning Threshold (press release and report under National Instrument 62-103 – Early Warning System).

Issuers may also have recourse to the services of proxy solicitation firms such as Kingsdale Shareholders Services, Georgeson Shareholder, Laurel Hill, or others which offer shareholder identity monitoring services. These firms will after they are retained by an issuer perform a haphazard interpolation of various available data points to try to identify the more significant beneficial owners of a given issuer and attempt to keep the information up-to-date between annual meetings.

The current rules and interaction of systems in place in Canada, including the current 10% Early Warning Threshold, result in most reporting issuers having a very partial picture of their

shareholder base, inconsistent with the corporate regime of most incorporations in Canada, such as the *Canada Business Corporations Act*, and the greater level of engagement with shareholders required of reporting issuers under evolving best corporate governance practices.

3. Need for reporting issuers to communicate with their shareholders in light of evolving best corporate governance practices

a) Shareholder Engagement

As of the date of this letter, more than 15 senior Canadian reporting issuers, including major Canadian financial institutions, announced that they would be moving ahead with Say-on-Pay proposals in their forthcoming proxy circulars. The Say-on-Pay proposals will allow for shareholders to express approval or disapproval of compensation practices. In order to avoid misunderstandings on complex compensation policies and principles and in order to foster acceptance before the actual shareholders' meeting is held, many issuers will engage with their key shareholders in a dialogue on compensation policies and principles.

The Canadian Coalition for Good Governance ("CCGG") has been offering as part of their board engagement initiative the opportunity for selected issuers to communicate explanations and positions on compensation matters with senior staff of CCGG, which may then communicate those positions to the CCGG shareholder base.

RiskMetrics / ISS Communication ("RiskMetrics") issues negative proxy voting alerts to their institutional shareholder client base, on items presented to shareholders by issuers in their proxy circulars. Once these voting alerts are published, many issuers find it difficult to provide explanations to their shareholder base as a result of the current street name beneficial ownership regime and high Early Warning Threshold.

b) Proxy Fights

The current regulatory regime in Canada is favourable to dissidents wishing to mount a proxy fight or threatening to launch a proxy fight. The two key statutory aspects making proxy fights possible in Canada are the ability of shareholders to requisition meetings and the ability of shareholders to communicate among each other with respect to their voting intentions.

Under the *Canada Business Corporations Act*, holders, jointly or individually, of 5% or more of issued and outstanding shares can requisition a special meeting of shareholders. Proxy solicitation rules in Canada allow the solicitation of proxies from not more than 15 shareholders.

Activist hedge funds holding less than 10% of shares of a company and therefore remaining below the Early Warning Threshold, may communicate with issuers to request short term share value enhancing corporate actions (such as a special dividend, return of capital, share repurchase

or division sale) and threaten a proxy fight to replace the issuer's board if the issuer's board does not cooperate.

The current street name beneficial ownership regime, combined with the current high Early Warning Threshold make it possible for activist hedge funds to deploy in Canada their wolfpack strategy: activist hedge funds claim in their discussions with issuers widespread support for their proposals from a significant number of significant shareholders (not more than 15 of them, each holding less than 10% of the shares). The reporting issuer on the receiving end of an activist hedge fund wolfpack strategy to force a short-term share value enhancing corporate action may not have the tools necessary to debunk the alleged shareholder support.

A revised 5% Early Warning Threshold would provide reporting issuers with significantly more visibility into their shareholder base and a greater ability to engage directly in discussions with shareholders either in response to threats of an activist hedge funds or on significant governance issues.

We would suggest that the early warning disclosure be made through a mandatory report on SEDAR, as opposed to the filing of a press release, as it is the case in certain jurisdictions. This would ensure a level of consistency and comparability between issuers.

4. Disclosure by mutual funds of their positions in various reporting issuers

Pursuant to National Instrument 81-106 – Investment Fund Continuous Disclosure, publicly distributed mutual funds are required to issue and file on SEDAR interim and annual statements of investment portfolio as at the end of each relevant interim period which indicate the number and class of equity security of each issuer held by the mutual fund.

Also, non-mutual fund institutional investors do not appear to be deterred from investing in Canadian reporting issuers, which are dual listed in Canada and in the United States, and in respect of which investors are required to provide declarations of beneficial ownership at the 5% level under US rules.

Implementing a new Early Warning Threshold at 5% would cause no competitive harm to mutual funds or other types of institutional investors.

CONCLUSION

In light of the internationally recognized Early Warning Threshold of 5%, the growing need for Canadian reporting issuers to be able to identify more clearly their shareholder base in order to further governance initiatives with an open dialogue and in the absence of compelling reasons on the part of the investment industry to maintain a 10% Early Warning Threshold in Canada, the



Proponents behind this position paper as well as the undersigned strongly advocate a review by the CSAs of the historical 10% Early Warning Threshold and the announcement of a review and proposal and comment period to bring the Early Warning Threshold at 5% in line with international requirements.

* * * * *

If you have any questions concerning this letter, please contact Francis R. Legault at (514) 847-4495 (direct line) or by e-mail at flegault@ogilvyrenault.com or Thierry Dorval at (514) 847-4528 (direct line) or by e-mail at tdorval@ogilvyrenault.com.

Yours very truly,

A handwritten signature in black ink, appearing to read 'Thierry Dorval', written over a horizontal line.

Thierry Dorval

cc: British Columbia Securities Commission
P.O. Box 10142, Pacific Centre
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Attention: Chairman

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Attention: Chairman

Saskatchewan Financial Services Commission
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Attention: Chairman

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Attention: Chairman

Securities Commission of Newfoundland and Labrador
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Attention: Chairman

Schedule "A"

Disclosure Thresholds across countries

	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
Italy	2	2	2	2	2	2	2	2	2	2	2
UK	3	3	3	3	3	3	3	3	3	3	3
Brazil	5	5	5	5	5	5	5	5	5	5	5
China	5	5	5	5	5	5	5	5	5	5	5
France	5	5	5	5	5	5	5	5	5	5	5
Germany	5	5	5	5	5	5	5	5	5	5	5
India	5	5	5	5	5	5	5	5	5	5	5
Japan	5	5	5	5	5	5	5	5	5	5	5
Malaysia	5	5	5	5	5	5	5	5	5	5	5
Netherlands	5	5	5	5	5	5	5	5	5	5	5
S. Africa	5	5	5	5	5	5	5	5	5	5	5
Spain	5	5	5	5	5	5	5	5	5	5	5
Sweden	5	5	5	5	5	5	5	5	5	5	5
Switzerland	5	5	5	5	5	5	5	5	5	5	5
Turkey	5	5	5	5	5	5	5	5	5	5	5
US	5	5	5	5	5	5	5	5	5	5	5
Slovenia	10	10	5	5	5	5	5	5	5	5	5
Argentina	no	no	5	5	5	5	5	5	5	5	5
Czech Rep.	no	10	10	10	10	10	5	5	5	5	5
Russia	no	25	25	5	5	5	5	5	25	25	25
Canada	10	10	10	10	10	10	10	10	10	10	10
Chile	10	10	10	10	10	10	10	10	10	10	10
Pakistan	no	no	no	no	no	10	10	10	10	10	10
Latvia	no	no	no	no	no	10	10	10	10	10	10
Mexico	no	no	no	no	no	no	no	no	no	no	no

Note: Table constructed by the Centre for Business Research of the University of Cambridge, extracted from an article by Michael C. Schouten, Visiting Research Fellow at Columbia Law School, entitled "The Evolution of Ownership Disclosure Rules Across Countries" available at: www.ssrn.com.

APPENDIX 3

From Aspen Institute Business & Society Program, *Overcoming Short-termism: A Call for a More Responsible Approach to Investment and Business Management**

The Aspen Institute report stated that, “[G]reater transparency in investor disclosures can also play an important role in helping corporations maintain a long-term orientation. The advent of increasingly complex non-traditional structured and derivative arrangements has enabled some investors to influence corporate decision-making without being subject to duties to disclose the existence or nature of their positions or their plans. This lack of transparency undermines the efficacy of the disclosure regime and creates opportunities for investors to use their influence to achieve short-term gains at the expense of long-term value creation. These opportunities may take many forms. To cite some extremes, they range from an activist who becomes a formal shareholder with voting power while simultaneously “shorting” a corporation’s shares or entering into a derivatives contract to hedge away its economic interest, to an investor who owns shares of one company and uses that position to increase the value of its holdings in another company instead. There are other more sophisticated techniques. Updated disclosure rules that take into account these complex but increasingly common arrangements can play a significant role in helping corporations maintain a long-term orientation by encouraging investment behavior consistent with longer term value creation and providing corporate decision-makers with a better understanding of the corporation’s shareholders and their motivations.”

* Aspen Institute Business & Society Program, *Overcoming Short-termism: A Call for a More Responsible Approach to Investment and Business Management*, September 2009.

Available at: <http://www.aspeninstitute.org/publications/overcoming-short-termism-call-more-responsible-approach-investment-business-management>