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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

Anne-Marie Beaudoin, Corporate Secretary
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Dear Sirs/Mesdames:

**Re: Proposed Amendments to Multilateral Instrument 62-104 *Take-over Bids and Issuer Bids*, National Policy 62-203 *Take-over Bids and Issuer Bids* and National Instrument 62-103 *Early Warning System and Related Take-over Bid Insider Reporting Issues***

We submit the following comments in response to the Notice and Request for Comments (the **Request for Comments**) published by the Canadian Securities Administrators (the **CSA**) on March 13, 2013 ((2013) 36 OSCB 2675) with respect to proposed amendments (the **proposed amendments**) to Multilateral Instrument 62-104 *Take-over Bids and Issuer Bids* (**MI 62-104**), National Policy 62-203 *Take-over Bids and Issuer Bids,* National Instrument 62-103 *Early Warning System and Related Take-over Bid Insider Reporting Issues* (**NI 62-103**) and related take-over and insider reporting issues.

Thank you for the opportunity to comment on the Request for Comments. We support the CSA's efforts to increase transparency and provide clarity on issues relating to early warning reporting.

We are not commenting on the principal issue of lowering the reporting threshold from 10% to 5%. In our view, this is an issue that is more appropriately addressed by issuers and other market participants. However, we do submit that any consideration of the threshold should take into consideration certain unique features of Canadian corporate and securities laws. For example, the 5% threshold is significant from a Canadian corporate law perspective given that it triggers shareholder rights such as the right to requisition a meeting or make a shareholder proposal. Consideration should be given to how earlier disclosure at the 5% threshold might intersect with such rights, which are not necessary available in other jurisdictions. While not technically securities law issues, these are particular to the Canadian corporate landscape and merit consideration. Issues to consider include whether disclosure at a 5% threshold might discourage the use of such rights. In addition, in contrast to the United States where there is a 10-day filing deadline, early warning reporting in Canada is significantly accelerated through the requirement to file an early warning report within two business days of the triggering event. If a lower threshold is imposed, both frequency and volume of reports can be expected to significantly increase, thereby increasing the corresponding burden upon filers subject to a 2-day filing deadline. (While the requirement to promptly file a press release is another distinction we have not addressed it here as, for the reasons discussed below, it is a requirement that in our view should not be carried forward.) Further, under Canadian securities laws, there is also, subject to certain exemptions for eligible institutional investors, a concurrent disclosure regime under the insider reporting requirements. As discussed below, insider reporting currently applies at the 10% threshold and, while not included for the purposes of calculating the threshold, requires disclosure of a broad range of financial and economic interests relating to securities of a reporting issuer under National Instrument 55-104 *Insider Reporting Requirements and Exemptions* (**NI 55-104**). Any duplication of the disclosure required under NI 55-104 should be carefully considered have regard to, among other things, the benefits when balanced against the costs. As noted below, the proposed amendments will significantly expand disclosure required in an early warning report and, in many respects, the expanded disclosure is currently already covered under NI 55-104. While we understand that including such disclosure for acquirors who own or control between 5% to 10%

would be new if the threshold is decreased to 5%, for any acquiror over the 10% threshold the disclosure would essentially be duplicative (other than for those relying on the eligible institutional investor exemptions from insider reporting).

The following are specific comments on the proposed amendments to MI 62-104, NI 62-103 and other related rules and policies.

**MI 62-104**

We note that while proposed amendments to s. 102.1. of the *Securities Act* (Ontario) have not been published, our comments apply equally to equivalent provisions of the early warning reporting provisions of the *Securities Act* (Ontario) as to Part 5 of MI 62-104.

As an overriding issue, we strongly urge the CSA to strive for greater consistency and harmony across Canada, including the implementation of a harmonized national instrument governing such matters. We also note that the reporting trigger under s. 102.1 of the *Securities Act* (Ontario) applies to an acquiror who acquires beneficial ownership of, or *the power to exercise* control or direction over, the requisite securities. The concept of the "power to exercise" is not included in section 5.2(1) MI 62-101. If this distinction is to be carried forward under the proposed amendments, we urge the CSA to explain the distinction and consider how the implications may be different in Ontario as compared to other Canadian jurisdictions under the proposed amendments. For example, an interest in reference securities underlying certain types of derivative instruments may, arguably, currently be disclosable in Ontario where there is "power to exercise" control or direction over such reference securities. We urge the CSA to consider how this concept may overlap with and apply in contrast to the interests sought to be encompassed by introducing deemed ownership or control or direction in respect of "equity equivalent derivatives" as is proposed.

Definition of "equity equivalent derivative." We note that this definition uses the term "derivative" which is or is proposed to be defined separately in the securities legislation of each province or territory in Canada. We therefor urge the CSA to adopt a uniform and harmonized definition to avoid and interpretation issues that may arise from differing definitions. We also question whether the words "that is substantially equivalent to the economic interest associated with beneficial ownership of the security" are necessary given that the definition of "economic interest" in NI 55-104 arguably encompasses such a concept.

Definition of "economic interest." This definition is cross-referenced to NI 55-104. We note that in NI 55-104 one definition applies in certain jurisdictions, with different local definitions applying in other jurisdictions. We again urge the CSA to adopt uniform and harmonized definitions for these purposes.

Section 5.1 (4) – deemed acquisition and control or direction over equity equivalent derivatives (the **proposed deeming provision**).

This concept needs to be clarified. To the extent that the purpose is to deem an acquiror to have control or direction over reference securities underlying an equity equivalent derivative, this should be clearly stated. Currently there is no mention of "reference securities" in the proposed deeming provision. In our view, an acquiror should not be deemed to "acquire" reference securities underlying an equity equivalent derivative given the consequences of acquisition under other provisions of securities legislation (such as the definition of "insider," insider reporting and the take-over bid provisions). In our view, to the extent that the objective is to capture such interests, it may be more appropriate to deem the acquisition of "control or direction" only over reference securities underlying an equity equivalent derivative. We further submit that it is also confusing to trigger the deemed interest where the "acquiror or the person has acquired beneficial ownership of, or has control or direction over, an equity equivalent derivative of that security" as these concepts are not readily applicable to the entering into of equity equivalent derivative transactions in the same manner as they apply to the acquisition of beneficial ownership or control or direction over voting or equity securities. We also reiterate our comment above with respect to the difference between s. 102.1 of the *Securities Act* (Ontario) and MI 62-104, and the impact that such difference may have on the proposed deeming provision. The lead-in for s. 5.1 should also not limit application of the proposed deeming provision to s. 5.2, as it would conceivably exclude application to s. 5.3 and it is not clear whether it would apply to the form of report and press release required under s. 5.2.

Finally, we question the impact of the proposed deeming provision and how it is to be interpreted given the "**deemed 60-day beneficial ownership rule**" under MI 62-104 and the *Securities Act* (Ontario), which deems a person to have acquired and to be the beneficial owner of a security where they have the right or obligation to acquire beneficial ownership of the security within 60 days by a single transaction or a series of linked transactions. In contrast to the proposed deeming provision, we note that the deemed 60-day beneficial ownership rule applies to deem acquisition of beneficial ownership only (and not control or direction or both) and it applies equally for take-over bid purposes.

Section 5.2 (a). We submit that the requirement to issue and file a news release should be eliminated. While we understand that, historically, the issuance of a news release may have been the best way to disseminate such information to the market, this requirement has long been superseded by electronic filings and other technological advances (including most recently, near real-time accessibility of documents filed on the System for Electronic Document Analysis and Retrieval (SEDAR)).[1] If there are concerns regarding issuers having to rely on SEDAR filings to obtain such information then a concurrent issuer notification requirement would, in our view, be a more appropriate alternative. To the extent that the requirement is retained, we strongly urge the CSA to streamline the disclosure in the news release given the significantly accelerated proposed filing deadline to require the filing

[1] See CSA Staff Notice 13-318 Changes to www.SEDAR.com issued on March 28, 2013.

"promptly" and "no later than the opening of trading" on the following business day, particularly given that issuance of a news release must be coordinated through third-party service providers. In that respect, we submit that the news release (if any) should require only a statement notifying that an early warning report has been filed and referring to that report for further information. We do not believe this will result in any disadvantage from a disclosure perspective given that detailed information will be available in the corresponding early warning report. It will in fact help to streamline the disclosure process by eliminating what amounts to duplicative disclosure.

Section 5.2 (1) and (2). We raise the question as to how reference to "securities convertible into voting or equity securities" is to be interpreted in light of the deemed 60-day beneficial ownership rule that currently applies. Under the deemed 60-day beneficial ownership, a person is only deemed to own securities that are convertible, etc., within 60 days. However, a reporting obligation applies to the acquisition of beneficial ownership, control or direction of any convertible securities (and not just those convertible within 60 days, and conceivably, if not convertible within 60 days such securities would not be factored into any subsequent calculation of the acquiror's holdings). We make the same comment in respect of the reference to "convertible securities" in s. 5.3(1).

Section 5.2 (1) (b). We submit that to be consistent with s. 5.2(1)(a), this should require the filing of the report "promptly, but no later than the second business day following the date of acquisition." This comment also applies to s. 7.1(b) of OSC Rule 62-504.

5.2(2)(b) – In our view, the concept of a change in a "material fact" contained in a previously filed report leads to inconsistencies in interpretation and application. The definition of "material fact" under securities laws is not necessarily readily applicable to the context of the early warning report, leading to uncertainty and inconsistency in determining the types of changes that would trigger a further filing obligation. This issue would be further exacerbated under the proposed amendments given that the content and level of detail required in the early warning report is proposed to be significantly expanded.

Section 5.3(1). The moratorium provision currently and as proposed only prohibits offers to acquire beneficial ownership of securities of the requisite class. We urge you to clarify whether omission of reference to control or direction (or the power to exercise control or direction, in the case of Ontario) is an intentional omission. We also note that currently, the moratorium restriction does not apply during a take-over bid. With the proposed decrease of the reporting threshold to 5% this distinction appears to have been eliminated with no corresponding explanation as to the reason for this change.

Section 5.3(1). It should be clarified whether, for the purposes of calculating the 20% threshold, an acquiror is required to include reference securities underlying an equity equivalent derivative. We understand that such securities would not be

included for take-over bid purposes. However, given the proposed deeming provision under s. 5.1(4), it is not clear whether that such securities would be excluded in the calculation.

Section 5.4. In light of electronic filing on SEDAR and broad dissemination of a press release, we question the utility of having the acquiror send a copy of the report to the reporting issuer. This comment also applies to s. 7.3(3) of OSC Rule 62-504.

**NI 62-103**

Section 3.1 – Contents of the News Release and Report. To the extent the requirement for a news release is retained, the permitted omissions in the news release should also include proposed new sections 3.7, 3.8, 3.9, 3.10, Item 5 and Item 6. These represent significant expansions of the disclosure that is currently required and, in our view, would unnecessarily complicate the news release and make it more costly and time consuming for acquirors to disseminate, particularly as the news release is required to be issued promptly and is often priced based on word count. As discussed above, if the news release continues to be required, it should be streamlined to allow the issuer and other market participants to focus on the most significant information only. Since the early warning report is also publicly available and filed shortly after the news release is published, we do not see any disadvantage in permitting such omissions.

Section 4.2. We submit that the CSA should consider whether proposed s. 4.2(c) should be triggered only where the matter subject to the solicitation would result in the eligible institutional investor or a joint actor possessing effective control, as is the case under s. 4.2(b). Otherwise, an eligible institutional investor who proposes or intends to propose a merger, etc., that would not result in possession of such effective control would not be disqualified from relying on the alternative monthly reporting regime, whereas an eligible institutional investor who solicits proxies for a similar matter would.

Part 6. For consistency and ease of application and interpretation, we urge the CSA to conform the exemption available for "issuer actions" under Part 6 of NI 62-103 with the similar exemption available from insider reporting under Part 8 of NI 55-104 in respect of "issuer events".

Section 9.1. Given the proposed change the title no longer needs to refer to "Decrease Reports."

Form 62-103F1 (with comments equally applicable to Form 62-103F2 and Form 62-103F3)

Item 1. This item should require identification of the head office of the issuer (which information is publicly available on SEDAR) as the acquiror may not know the address of the "principal office".

Section 2.3. We submit that it is not appropriate, including from a privacy perspective, or necessary to require disclosure of the principal occupation or employment of an individual acquiror or of the principal business of a non-individual acquiror.

Section 3.2. In our view, given the proposed deeming provision to deem ownership, control and direction to exist over reference securities underlying an equity equivalent derivative, we question whether it is necessarily to clarify that ownership or control includes "control that is deemed to exist under the law." If the reference is to the deeming provision under the early warning reporting requirements, in our view, it is not necessary given the deeming provision would apply to any reference to beneficial ownership, control or direction. Express inclusion in s. 3.2 also raises the question as to whether the proposed deeming provision applies where it is not expressly stated. If the reference is to some other law this should be clarified (and in such case, preferably in the rule itself and not in the form of report). We make the same comment with respect to the words "is deemed to have control" under s. 3.6. As stated above, it is also not clear why the reference in the report is to deemed control when the early warning reporting rules also include a concept of deemed beneficial ownership as well. It is also not clear where reference securities underlying an equity equivalent derivative would most appropriately be disclosed under s. 3.6.

Section 3.7. In our view, this section is confusing given that under the proposed amendments only an interest in an equity equivalent derivative is disclosable and/or is to be considered in calculating the disclosure threshold. Related financial instruments are otherwise not generally disclosable or required to be considered. This item therefore appears to expand the disclosure requirement in the report with no corresponding disclosure requirement in the rule itself. It is also not clear how the disclosure required under s. 3.10 would differ from the disclosure required under s. 3.7. We also reiterate the same comment with respect to s. s. 3.10 in that it appears to expand the reporting obligation beyond what is required under the rule itself.

Section 4.1 and 4.2. It is not clear how these provisions would apply to disclosure of the acquisition or disposition of an equity equivalent derivative given that no consideration would have been paid or received in connection with an actual acquisition or disposition of securities. To the extent that disclosure will be required of any premium paid to the market price, NI 62-103 should also set out how market price is to be determined.

Item 6. – The disclosure required should apply in respect of "material" contracts, agreements, commitment or understandings that are entered into other than in the ordinary course. Otherwise, it may inadvertently trigger disclosure in respect of a wide range of contracts or agreements, etc., that are not relevant for these purposes, including rights or obligations that may exist under employment agreements, compensation plans and other similar arrangements, margin arrangements with securities dealers, etc. Further, as is the case under instruction

(iii), Item 3.10, we do not believe it is necessary to require disclosure of the counterparties to such contracts or arrangements. Such counterparties will often be individuals or entities that are not otherwise subject to any public disclosure obligation and we do not believe their identities should be subject to disclosure through an early warning reporting obligation applicable to their counterparty. In particular, disclosure should also not be required in respect of pledgees that are exempt from making disclosure under Part 8 of NI 62-103. Finally, we note since the types of contracts or arrangement described in this item may but subject to disclosure under other items of the form (such as Item 3.10), the instructions should clarify that disclosure is required to the extent it has not been made in response to any other item in the form.

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We thank you for the opportunity to express our views on these matters. Please do not hesitate to contact the undersigned if you have any questions in this regard.

This letter represents the general comments of certain individual members of our securities practice group (and not those of the firm generally or any client of the firm) and are submitted without prejudice to any position taken or that may be taken by our firm on its own behalf or on behalf of any client.

Yours truly,

*(Signed) "Ramandeep K. Grewal"*
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