DELIVERED VIA EMAIL

July 15, 2013

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

c/o

Anne-Marie Beaudoin, Corporate Secretary
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and

The Secretary
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Dear Canadian Securities Administrators:

Periscope Capital Inc. – Comments on CSA Notice and Request for Comment – Proposed Amendments to Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids* and National Policy 62-103 *Take-Over Bids and Issuer Bids* and National Instrument 62-103 *Early Warning System and Related Take-Over Bid and Insider Reporting Issues*

Periscope Capital Inc. ("**Periscope Capital**" or "**we**") appreciates the opportunity to submit this comment letter on Canadian Securities Administrators (CSA) Notice and Request for Comment – Proposed Amendments to Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids* and National Policy 62-103 *Take-Over Bids and Issuer Bids* and National Instrument 62-103 *Early Warning System and Related Take-Over Bid and Insider Reporting Issues* (the "**CSA Proposal**"). Certain terms used and not defined in this comment letter have the meanings given to them in the Proposed Amendments or in National

Instrument 62-103 *Early Warning System and Related Take-Over Bid and Insider Reporting Issues* ("**NI 62-103**").

A. BACKGROUND ON PERISCOPE CAPITAL

Periscope Capital is registered as a portfolio manager, exempt market dealer, investment fund manager, commodity trading counsel and commodity trading manager in the Province of Ontario and as an investment fund manager and exempt market dealer in other relevant jurisdictions. We provide investment advisory services to institutional and high net worth investors. Our investment strategies focus on the Canadian capital markets and we file reports as an eligible institutional investor under the alternative monthly reporting (AMR) system.

B. ISSUES FOR COMMENT

This comment letter responds to questions 4 through 8 of the Request for Comments.

4. The Proposed Amendments would apply to all acquirors including EIIs.

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

We agree with the CSA that the proposed early warning threshold of 5% should apply to EIIs reporting under the AMR system provided in Part 4 of NI 62-106 for all of the reasons set out in the CSA Proposal under "Substance and Purposes – Reporting Threshold". In our view, the most compelling reason set out in the CSA Proposal is that a 5% threshold for the reporting of equity securities positions has been adopted in most major reporting jurisdictions.[1] It is important for the Canadian securities regulatory regime to keep pace with international standards in order to maintain the integrity and security of Canada's capital markets and, consequently, our competitiveness as a global investment destination.

That being said, if the CSA Proposal is adopted in its current form a significant compliance burden will be imposed on Canadian EIIs which we believe exceeds the compliance burden applicable on regulated investment advisers in leading foreign jurisdictions. For example, we understand that investment advisers registered with the United States Securities and Exchange Commission ("**SEC**") report securityholding percentages of 5% or more only once annually based on their year-end positions, and also file quarterly equity holdings reports on a security-by-security basis which do not require the calculation of partially diluted positions resulting from convertible securities holdings.[2] Similarly, we understand that the Disclosure and Transparency Rules adopted in the United Kingdom require investment managers to report securityholding percentages of 5%, 10% and above, while other securityholders are subject to an initial 3% reporting threshold and must subsequently report every 1% change up to 100%.[3] We submit that the CSA should research the reporting regimes and exceptions available to EIIs and/or registered investment advisers in other jurisdictions with a view to reducing the compliance burden applicable to Canadian EIIs, as discussed in our answer to question 4(b) below.

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[1] Mathias M. Siems and Michael C. Schouten, "The Evolution of Ownership Disclosure Rules Across Countries", Centre for Business Research, University of Cambridge Working Paper No. 393, December 2009.
[2] SEC Rule 13G/D and SEC Rule 13F.
[3] U.K. Financial Conduct Authority, Disclosure and Transparency Rules, DTR 5.1.5R http://fshandbook.info/FS/html/handbook/DTR/5/1.

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(b) Please describe any significant burden for these investors or potential benefits for our capital markets.

EIIs invest significant resources in compliance with the AMR system due to the requirements to complete manual calculations, follow antiquated issuer notice procedures and complete all compliance processes on a monthly basis. If the reporting threshold is lowered from 10% to 5%, all of these compliance obligations will apply to a much larger number of positions for each EII, resulting in an exponential increase in compliance obligations. We discuss each compliance issue below and suggest ways to simplify and streamline the current process to reduce the burden which would otherwise apply in the event that the threshold is lowered:

(i) Manual calculations

Although it is possible for an EII to automate a rough calculation of securityholding percentages for its positions, some manual work is often required. For example, the "issued and outstanding" numbers available from Bloomberg or other data services must be verified against the issuer's continuous disclosure record to ensure accuracy. In addition, the calculation of "partially diluted" securityholding percentages which reflect positions in convertible securities often involves a manual component. Moreover, the CSA Proposal increases the complexity of these calculations by requiring the inclusion of derivatives and related financial instruments and clarifying the requirement to include securities lending arrangements. We do not propose to change the basis for determining the securityholding percentage, however, the requirement to complete manual calculations is a significant contributor to the compliance burden.

(ii) Reporting frequency

EIIs must calculate their securityholding percentages, prepare and file AMRs and copy issuers on such filings on a monthly basis. If it were possible for EIIs to automate this process, monthly frequency would not be a significant issue. However, as explained above, calculation of securityholding percentages invariably requires some manual work, and the AMR filing and issuer notice requirements are fairly laborious and costly. We submit that the compliance burden would be significantly lessened if the frequency of AMR filings was reduced to quarterly (i.e. if the AMR system became the AQR system). This reporting frequency would be consistent with certain U.S. securities position reporting requirements and with the financial reporting requirements applicable to reporting issuers. We submit that in the case of reporting issuers which are investment funds, the frequency of AMR filings could be reduced even further to semi-annually, in line with the financial reporting requirements applicable to investment funds, in recognition of the fact that shareholder communications and market transparency are less relevant in the context of investment funds than reporting issuers engaged in active businesses.

(iii) Duplicative reporting triggers

Both the current NI 62-103 and the CSA Proposal include disclosure triggers for "control and direction" **and** "beneficial ownership" of a securityholding percentage which crosses the applicable reporting threshold (i.e. currently 10%, under the CSA Proposal 5%). We understand the policy rationale for including both disclosure triggers, since both categories of securityholder may provide relevant information to reporting issuers and other market participants. However, in cases where control and direction is separated from beneficial ownership, such as under discretionary investment management agreements, these two triggers may generate overlapping and confusing disclosure. This problem rarely occurs under the current disclosure threshold of 10%. However, once the threshold is lowered to 5% and disclosure of "substantially equivalent" equity derivative positions is required, there is greater

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potential for multiple reporting obligations to be triggered by a registered portfolio manager with "control or direction" over a securityholding percentage of 10% or more managed on behalf of two or more underlying client funds or accounts with "beneficial ownership" of securityholding percentages of 5% or more.

We submit that the CSA Proposal should include an exemption from the requirement to report beneficial ownership of a securityholding percentage in cases where: (i) the beneficial owner has no discretion to vote, buy or sell the securities; and (ii) control and direction over the securityholding percentage is held by a registered portfolio manager or other regulated investment adviser which qualifies to report under the AMR system. This exemption is appropriate for the following reasons:

- In cases where control or direction of a reportable securityholding percentage is held by a registered portfolio manager, identity of the beneficial owner is not meaningful to market participants because the beneficial owner lacks any power to vote, buy or sell the securities.

- Application of both the "control and direction" and "beneficial ownership" trigger may lead to duplicative reporting of the same position by multiple parties, presenting confusing information to market participants.

- Under the 5% reporting threshold, mutual funds which do not qualify as eligible institutional investors will be required to report beneficial ownership of positions under the Early Warning System, even though the portfolio managers of such funds are entitled to report control and direction of their positions under the AMR system. Subjecting the underlying mutual funds to more frequent reporting eliminates the benefits which the AMR system was designed to provide.

- Registered portfolio managers maintain robust compliance procedures which will ensure timely and accurate disclosure by the party with control and direction over the reportable securityholding percentage.

- Absent this exemption or other aggregation relief under NI 62-103, registered portfolio managers will be required to track securityholding percentages for all of their clients on an ongoing basis, which as discussed above, involves manual calculations on a monthly basis.

- Absent this exemption or other aggregation relief under NI 62-103, discretionary investment management clients will be required to aggregate beneficial ownership positions managed by different portfolio managers for the purpose of determining their total beneficial ownership positions. In some cases, clients do not receive sufficient information from their portfolio managers to enable them to complete these calculations on a monthly basis. Even if they do have sufficient information, most discretionary investment management clients would prefer not to calculate their own positions.

- There is no compelling policy rationale for discretionary investment management clients to publicly disclose their identities in cases where they exercise no discretion over decisions to vote, buy or sell the reportable securities.

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(iv) Issuer notice

After completing its monthly calculations, preparing and filing all necessary AMRs on the System for Electronic Document Analysis and Retrieval (SEDAR), an EII is required to "immediately send a copy of each filing to the reporting issuer"[4]. To comply with this "immediate" obligation, best practice requires the EII to send an electronic copy of the AMR by facsimile or email to the reporting issuer with a hard copy to follow by mail. This sounds like a minor administrative requirement, however it takes approximately 30 minutes per AMR to satisfy the issuer notice obligation. Many small EIIs rely on their external counsel to file AMRs on SEDAR and then deliver issuer notice, resulting in legal fees in the range of $250 to $700 per AMR filing. If the reporting threshold is lowered to 5%, the number of AMR filings will increase dramatically, as will these compliance costs. We submit that reporting issuers are capable, and should bear the onus, of accessing SEDAR and/or news reporting services to identify new EIIs and AMRs which must be filed within ten days of each month-end. Alternatively, we submit that: (i) all reporting issuers should be required to include an email address in their SEDAR profile; and (ii) the issuer notice requirement applicable to EIIs using the AMR system should be simply to email the reporting issuer a link to the AMR which has been filed on SEDAR.

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

We are uncertain of the policy rationale for omitting public mutual funds from the definition of EII. In our view, qualification to use the AMR system should depend on whether the institutional investor is activist or passive, and therefore a passive public mutual fund should be permitted to use the AMR system.

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?

We agree with the CSA's approach. Requiring the inclusion of partial-exposure instruments would add another layer of complexity to the calculation of the securityholding percentage without contributing to the policy rationale for the early warning reporting system. Partial-exposure instruments would not provide the holder with voting rights in respect of the underlying security, nor would the counterparty hedge of such a derivative position be likely to "tie up" the stock, as discussed in the CSA Proposal under "Hidden Ownership and Empty Voting".

[4] NI 62-103, Section 2.2.

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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?

We agree with the CSA's approach, particularly the provision of examples of total return swaps and contracts for difference as instruments that are "substantially equivalent to the economic interest the party would have if….[holding] the securities directly". For the sake of clarity and ease of compliance with the CSA Proposal, we suggest that you seek to identify as many examples of "equity equivalent derivatives" as possible, although we understand that an exhaustive list would invite market participants to avoid the disclosure requirement by developing new types of derivatives which fall outside of the list. In addition, for the sake of clarity and ease of compliance it might be helpful to include a list of partial-exposure exposure instruments which are explicitly excluded from the definition of equity equivalent derivative.

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.

We agree that an EII who solicits or intends to solicit proxies from security holders should be disqualified from using the AMR system. In our view, the inclusion of this disqualification in the CSA Proposal draws a clear line between activist shareholders and passive EIIs.

C. CONCLUSION

Thank you for providing us with this opportunity to comment on the CSA Proposal. We would be pleased to provide further detail regarding our comments upon request from the CSA.

Best Regards,

"Lori Stein"

Lori Stein
General Counsel & Chief Compliance Officer

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