July 12, 2013

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

Anne-Marie Beaudoin, Corporate Secretary
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-and-

The Secretary
Ontario Securities Commission
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E-mail: comments@osc.gov.on.ca

Dear Sirs/Mesdames:

Re: Proposed Amendments to Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids* and National Policy 62-203 *Take-Over Bids and Issuer Bids* and National Instrument 62-103 *Early Warning System and Related Take-Over Bid and Insider Reporting Issues* (the "Proposed Amendments")

The Canadian Advocacy Council[1] for Canadian CFA Institute[2] Societies (the CAC) appreciates the opportunity to comment on the Proposed Amendments.

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[1]The CAC represents the 13,000 Canadian members of CFA Institute and its 12 Member Societies across Canada. The CAC membership includes portfolio managers, analysts and other investment professionals in Canada who review regulatory, legislative, and standard setting developments affecting investors,

As a general comment, the CAC is supportive of regulatory measures designed to provide additional information and increase transparency in the capital markets. We also support global harmonization of regulations across major markets and jurisdictions. That said, we feel that changes to disclosure requirements should be made within an efficient framework that balances increased reporting burdens against the usefulness of additional information to market participants, and should provide clear guidelines for participants to follow.

In the case of the early warning proposals, we have two general concerns that we felt should be addressed in the course of amending the disclosure rules. The first concern is that the existing early warning system currently in place is confusing and difficult to apply. In our experience, even professional investors and compliance personnel have difficulty applying the existing rules to determine if the reporting thresholds have been crossed and/or if a reporting exemption is available. There is a lack of consistency in the filed reports and it is difficult to try to replicate the reported ownership and control thresholds based on public information. As a conjunct to the Proposed Amendments, consideration could be given to providing additional guidance with respect to the threshold calculations. We believe that without additional examples and support, the Proposed Amendments (particularly those related to equity equivalent derivatives) will only add to the confusion and complexity of the calculation, and further decrease the resulting value of the reports to the investing public.

Our second concern is that within the current Canadian market structure, proposed rules may disproportionately affect investors holding less liquid securities or those holding securities of small cap Canadian companies. Under the new rules, such investors may end up having to divulge competitively sensitive information about their holdings that were accumulated without any intent of corporate activism. In such cases, the burden of additional disclosure may not be balanced with the benefit to the market and in fact could be misleading to investors who may assume a takeover intent where there is none. Therefore we feel that in devising the new early warning rules consideration could be given to a tiered approach based on the liquidity and size of securities held. In addition, efforts should be made towards improving clarity in reporting of intentions of investment entities.

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investment professionals, and the capital markets in Canada. See the CAC's website at http://www.cfasociety.org/cac. Our Code of Ethics and Standards of Professional Conduct can be found at http://www.cfainstitute.org/ethics/codes/ethics/Pages/index.aspx.

[2] CFA Institute is the global association of investment professionals that sets the standard for professional excellence and credentials. The organization is a champion for ethical behavior in investment markets and a respected source of knowledge in the global financial community. The end goal: to create an environment where investors' interests come first, markets function at their best, and economies grow. CFA Institute has more than 113,000 members in 140 countries and territories, including 102,000 CFA charterholders, and 137 member societies. For more information, visit http://www.cfainstitute.org/.

The CAC wishes to respond to the following specific potential topics for consideration:

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.

Due to the current size and structure of our market, it is not rare for Canadian investment firms to hold more concentrated positions than investors in other major jurisdictions without any intent of shareholder activism. If in addition these holdings happen to be in one of the numerous less liquid securities on our market, lowering the threshold of additional reporting to 1% could have a disproportionate effect on investors holding such securities and on those securities' market prices.

This is a concern that is based solely on the current market structure in Canada and is not an indication that lowering the threshold to 1% is not appropriate for all holdings or investors in Canada. Within the current structure, we agree with the current proposal to maintain the requirement for further reporting at 2% but suggest consideration could be given to tiered additional disclosure requirements based on the market cap or liquidity of the issue. In such a case holdings in large cap liquid securities would immediately be subject to a 1% threshold and those of less liquid or small cap securities can be subject to a 2% threshold with the expectation that they will migrate to the 1% category as the company grows or liquidity in its securities improves.

Alternatively, consideration could be given to requiring reporting of less liquid securities on a monthly basis, similar to the EII requirements.

2. (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.

In the case where an investor maintains a passive investment intent with regards to the issuer whose securities they have accumulated, and has no plans to influence the issuer or be an active shareholder, we do not feel that the market would benefit from requiring such investors to wait before purchasing any additional shares between a 5% and 10% level. It is possible that the information benefit derived by the market from knowing such an accumulation has occurred would be achieved by a clear passive intention report at the end of the month for all securities where the threshold of 5% was reached during the month.

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

We agree with the reasons set out by the CSA concerning the importance of information about the level of ownership and/or control over securities. We also believe that it is important for the reported ownership information to be meaningful to the market. Therefore, it is important to make a distinction between equity equivalent derivatives which actually provide holders with the ability to vote the underlying securities, and those derivatives which do not.

Investors who have the power to vote, or contractually have the power to direct such voting, should be required to disclose such holdings at the same threshold levels as investors holding the underlying securities directly and the moratorium provision should apply only to those investors. Investors with only a synthetic position in a security should not be required to disclose their positions, or be prevented from adding exposure to those positions, as there would be no value to such information to other persons investing in the ordinary course.

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

To the extent investors intend to comply with the existing early warning reporting requirements and are correctly interpreting the rules and the complex calculations required to determine if the 10% threshold has been crossed, we believe the current moratorium is effective in encouraging those investors to file reports on time.

We believe the 20% threshold exception is justified, as such level of ownership or control is significant enough to warrant its own set of rules.

3. 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.

We agree that within the current market structure the proposed thresholds for reporting do not need to be further accelerated in the context of a take-over bid. We do not believe that lowering the threshold further would provide additional valuable information to the market with respect to the intentions of the acquiror.

(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.

Please see our response to 3 (a) above.

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.

As a condition to the use of AMR system, EIIs must be passive investors. As a result, information on holdings between the 5% and 10% level would not in and of itself provide significant additional information to the marketplace, provided the EII maintains a passive intent with respect to those securities.

The CAC agrees that there is a benefit to market participants in knowing when an issuer's securities are held by large institutional investors. In our response to #4(b) below we propose an approach that would allow this information to be released to the market without negatively impacting passive investors in small cap and less liquid securities.

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

In our response we would like to make a distinction between those EIIs who are passive investors by virtue of following a specific public benchmark, and those that are passive with regards to their intention towards the issuer whose securities they have accumulated.

EIIs that are passive investors required to closely adhere to holding weights of a public benchmark would be affected through an increase in reporting obligations, and therefore increased systems, manpower and infrastructure costs would be required. The additional information provided by such reporting to the market would be negligible, as benchmark weights are generally well publicized.

Other EIIs are passive investors in the sense that their accumulation of an issuer's securities at 5% was a result of a bottom-up or top-down investment strategy in combination with the size of the issuer and liquidity of its securities, and not as a result of a takeover or change of control strategy. For such EIIs, revealing their holdings publicly would mean disclosing their long term investment strategies, with the result that such strategies can be taken advantage of by short term investors and speculators. Such result would not be beneficial for our capital markets. If the reporting threshold is lowered to 5%, EIIs wishing to avoid publicizing their proprietary strategies and to preserve returns for their clients would likely be forced to reduce the maximum holdings of each individual small cap issuer in their portfolio to below 5%, resulting in an increased number of issuers held.

For these EIIs, the additional costs could involve adding and training personnel to research and analyze more investments within the Canadian market that satisfy their investment policies, increased reporting costs, as well as investment costs such as the opportunity cost of increased diversification if their strategy called for a concentrated portfolio. Assuming as we did above that there was no takeover intent, providing information about such EII's holdings would not provide additional useful information to the market beyond the security of knowing that a larger and more sophisticated investor has enough confidence in the issuer to accumulate a large position in its securities.

As noted in our introductory comments, while we support increased transparency and disclosure, such additional requirements should not unnecessarily impede the management of an investment portfolio in a material way. The CAC agrees that there is a benefit to market participants in knowing when an issuer's securities are held by large institutional investors. In that regard, the CAC proposes a potentially novel approach of requiring EIIs to report at a 5% ownership threshold, but be permitted to maintain anonymity until the 10% threshold is reached as long as a clear explanation of passive intentions is provided at the time of reporting the 5% holding. Proposals such as these might achieve some of the objectives of alerting the market to a significant shareholder, without requiring the EII to disclose a proprietary strategy.

If EIIs (or other investors) are required to report at a 5% threshold, we believe it would be preferable for there to be a transition period prior to the introduction of the requirement, to permit such investors to set up the appropriate compliance procedures, hire more personnel, and safely divest of any less liquid holdings above threshold.

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.

As set out in our response to #4 above, we recognize that there is a benefit to market participants and issuers' boards of directors in knowing that there is a significant institutional shareholder and understanding their intentions. However, we believe that in the case of mutual funds, such benefit would not be significant.

Mutual funds almost always have a passive investment intent, in a sense that the size of their holdings in securities of a particular issuer is a result of an investment strategy rather than a takeover or change of control strategy. Therefore, requiring mutual funds to report at a lower threshold would not generally provide more useful information to the marketplace with respect to investor intent.

Mutual funds that are reporting issuers generally maintain an investment in an issuer that is less than 10% of its voting or equity securities for regulatory and/or tax reasons. Therefore while such funds have the infrastructure and systems in place to monitor the size of their holdings, they would be unlikely to have experience with respect to early warning reporting requirements.

One potential solution would be to treat such mutual funds as EIIs subject to the reporting regime suggested above. Alternatively, given the passive investment intent of such funds, a reporting regime which required a form-based simplified disclosure report could be utilized. This would provide the market and issuers with clear understanding of the mutual fund's investment intent without adding substantial new reporting burdens to mutual funds.

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?*

Instead of focusing on the level of exposure to the reference securities, the Proposed Amendments could more explicitly require reporting of derivatives that immediately confer voting rights on an investor, no matter their name or type. If the rules name specific types of derivatives that are expected to be reported and those that are not, market participants could try to elude reporting by structuring ownership through creative use of derivatives that are not specifically named in the rules.

There is no benefit of requiring investors to disclose their derivative strategies to the market if the vote ownership information that is conveyed in the disclosure is not clear and easy for market participants to interpret. Otherwise, there is a possibility that the requirement to disclose such positions would have the opposite effect of what is intended; namely, it could mask the actual ownership and control over voting securities.

As an example, under one interpretation of the Proposed Amendments, if an investor owned 11% of the securities of Company A as an owner of record, but also held a total return swap with -2% exposure to the securities of Company A, the Proposed Amendments (based on the current 10% reporting threshold) would result in no reporting by the investor as their net position would be less than 10%. To avoid such an interpretation, the Proposed Amendments would have to provide that if the actual ownership of securities was greater than 10% (or 5% if that Proposed Amendment moves forward), the investor would have to report on those securities <u>as well as</u> any derivative holdings, and not report on a net exposure basis. Similarly, if the actual ownership of securities was less than 10% (or 5%, as applicable), but crossed the threshold when added to positive derivatives exposure, the Proposed Amendments would have to be worded such that a report would be required. Such a rule could quickly become difficult for market participants to apply and would not consistently provide the intended information benefits to the market.

The CSA should also consider the interaction between the Proposed Amendments and the discussion papers circulating with respect to the regulation of over-the-counter derivatives. In the event derivatives such as total return swaps are required to be cleared through a central counterparty, there is an even lower likelihood that the derivatives would lead to any significant level of control, and an exception for centrally cleared derivatives might be warranted.

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 believe that the only early warning information that is important for investors in this case, and thus the only relevant criterion for an equity equivalent derivative holding that needs to be reported, should be whether or not it confers voting rights. If it does, the counterparty with control over the voting rights of the securities (or the ability to direct the voting) should disclose such control.

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 the AMR system should only be available to passive investors, however we question the ability to clearly define and identify an "intention" to solicit proxies. We note that it would be rare for an institutional investor such as a pension plan or a mutual fund to actively solicit proxies and canvass other investors on their views. However, it is quite common for institutional shareholders to enter into lock up agreements for corporate reorganization transactions, or otherwise make their views on a matter slated for consideration at a shareholder meeting known to the public through a press release. Such actions should be permitted and encouraged as a matter of shareholder democracy and good corporate governance, and the Proposed Amendments should clarify that such actions do not indicate an "intention" to solicit proxies.

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

Consistent with our response to #7 above, we believe that reporting requirements should be based on the ownership of voting rights. Therefore, lenders that retain control over the voting rights of the securities or have ability to direct the voting can be exempt from the early warning reporting requirement relating to a decrease in ownership.

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

We agree with the proposed definition of a specified securities lending arrangement.

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?

We agree that persons that borrow securities under securities lending arrangements should disclose their positions so that investors with control over a sufficient number of voting securities can not remain anonymous.

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?

In order to help lessen the possibility of confusion in the event both lenders and borrowers report ownership and control over the same securities, borrowers should be explicitly required to disclose if the securities they have borrowed may be recalled by the lender. The filing format or presentation of such information could be required to be distinguished in the report from other information such that it is prominent and easy to review.

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?

We believe additional study is warranted with respect to the liquidity and size of venture issuers prior to making a determination as to whether all of the Proposed Amendments should apply to venture issuers. We suspect that given the small size and illiquid nature of many venture issuers, requiring a lower threshold for real time reports of acquisitions and dispositions of securities of such issuers may give rise to the concerns specified in our introductory remarks. It is possible that a longer transition period may be required for investors holding venture issuers securities to transition to the new threshold levels and that this sector of the market would benefit from short delays in disclosure of reaching the thresholds.

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?

Parties that maintain solely an economic equivalency and who do not intend to acquire the referenced securities should not be required to report as if they did have ownership or control over the securities. Such reporting would lead to over-reporting of total positions.

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 acquirors 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?

The Proposed Amendments could lead to potentially confusing over-reporting that might reduce transparency. If global market participants are required to disclose on the basis of synthetic positions, it is possible that the total number of securities "owned" may significantly exceed the number of outstanding securities. Persons who rely on early warning reports for information will then be required to decide which of those persons reporting may be able to exercise control, and which persons have only an economic interest, which could be complicated for an investor to decipher, even with explanations in the report.

Concluding Remarks

We thank you for the opportunity to provide these comments. We would be happy to address any questions you may have and appreciate the time you are taking to consider our points of view. Please feel free to contact us at chair@cfaadvocacy.ca on this or any other issue in future.

(Signed) *Ada Litvinov*

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