INCLUDES COMMENT LETTERS

ALBERTA SECURITIES COMMISSION

Notice and Request For Comment

Repeals and Amendments to Alberta Securities Laws Related to Proposed National Instrument 62-104 *Take-Over Bids and Issuer Bids*

April 28, 2006

Overview

The Alberta Securities Commission (ASC) is publishing this notice in conjunction with the notice/request for comment on proposed National Instrument 62-104 *Take-Over Bids and Issuer Bids* (NI 62-104) and related consequential amendments to National Instrument 62-103 *The Early Warning System and Related Take-Over Bid and Insider trading Issues* (NI 62-103) being published by the members of the Canadian Securities Administrators (CSA).

This notice identifies the proposed repeals and consequential amendments to Alberta securities laws related to NI 62-104. The ASC is publishing the text of the proposed repeals and amendments to Alberta securities laws concurrently with this notice for a 90-day comment period.

Purpose and Benefits

NI 62-104 consolidates and harmonizes the existing requirements and restrictions governing take-over and issuer bids and related early-warning requirements into a single national bid regime governing take-over bids and issuer bids. NI 62-104 would essentially replace most of the take-over bid and issuer bid requirements; restrictions and exemptions currently found in various provincial statutes, regulations and rules in nine jurisdictions and introduce a uniform bid regime in the four jurisdictions that do not currently regulate bids.

The CSA have recommended to their respective governments legislative amendments and rule-making authority that would remove detailed bid provisions from statutes and substitute general "platform" provisions to enable regulators to harmonize, streamline and update bid requirements in a national rule. Provincial and territorial governments have agreed, in principle, with CSA efforts to further harmonize and streamline securities laws and are considering the proposed Act amendments with a target implementation date by the end of 2006.

In addition to the proposed Act amendments, the CSA also intends to concurrently make consequential amendments to NI 62-103 and local securities laws. This should result in reduced transaction costs because market participants will no longer need to expend time and money contending with a collection of differing bid requirements and their associated early warning requirements.

Summary of Key Proposed Amendments to Alberta Securities Laws
The ASC proposes to:

- repeal Part 13, being sections 170 to 181.93, of the ASC Rules (General) - The majority of the take-over and issuer bid requirements, restrictions and exemptions contained in Part 13 of the ASC Rules (General) will be carried over into NI 62-104. The one exception is the valuation definitions and requirements in sections 170 and 171 of the ASC Rules which will not be incorporated into NI 62-104. The text of the proposed amendments to the ASC (General) Rules is set out in **Schedule A** to this notice.

  Sections 170 and 171 of the ASC Rules require that a valuation of the target issuer, its material assets or its securities be obtained for all issuer bids and all take-over bids that are "insider bids" or that involve a "going-private transaction". In these situations, a summary of that valuation and any prior valuation made within the preceding 2 years must be included in the bid circular. Relief from this requirement is often sought and routinely granted, on the grounds that the bidder cannot easily obtain the information needed to prepare a valuation. We also consider the decision as to whether a valuation is appropriate ought to lie with the offeree issuer's directors or special committee of directors as part of their fiduciary duties to their security holders.

- amend ASC Rule 71-801 *Implementing the Multijurisdictional Disclosure System under National Instrument 71-101* (the Implementing Rule) - The proposed amendments to the Implementing Rule would modernize references to Alberta securities laws and replace references to existing take-over bid and issuer bid requirements with the harmonized requirements in NI 62-104. The text of the proposed amendments to the Implementing Rule is set out in **Schedule B** to this notice.

- repeal ASC Notice 4 *Take-Over Bids, Amalgamations, Mergers and Arrangements* - The contents of Notice 4 will be updated and incorporated into Companion Policy 62-104CP (the Companion Policy).

- repeal ASC Notice 62-701 *Implementation of Zimmerman Amendments Relating to the Conduct of Take-Over Bids and Issuer Bids* as it is outdated.

- amend and update the recognition order attached to ASC Notice 21-107.

ASC Recommendations for Amendments to the *Securities Act*
In order to facilitate full implementation of NI 45-106 in Alberta, the ASC has recommended that the Alberta Government repeal the take-over bid and issuer bid provisions contained in Part 14 of the *Securities Act*.

On March 23, 2006 the Alberta Government introduced Bill 25 which provides, among other things, for the repeal of the take-over provisions in Part 14 of the *Securities Act* and the substitution of general provisions that set out streamlined definitions of the key concepts of issuer bid and take-over bid, mandating adherence to the rules governing take-over and issuer bids, and setting out certain powers of the Commission and the courts. Proclamation of the take-

over bid and issuer bid-related *Securities Act* amendments will be coordinated with the implementation of NI 62-104.

The CSA have recommended to their respective governments legislative amendments and rule-making authority that would remove detailed bid provisions from statutes and substitute general "platform" provisions to enable regulators to harmonize, streamline and update bid requirements in a national rule. Provincial and territorial governments have agreed, in principle, with CSA efforts to further harmonize and streamline securities laws and are considering the proposed Act amendments with a target implementation date by the end of 2006.

Questions
If you have questions or require further information, please contact:

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#2102482

Schedule A

AMENDMENTS TO ALBERTA SECURITIES COMMISSION RULES (GENERAL)

PART 1 REPEAL OF PART 13 OF THE ASC RULES (GENERAL)

1.1 Repeal - Part 13 of Alberta Securities Commission Rules (General) is repealed**.**

PART 2 EFFECTIVE DATE

2.1 Effective Date - This amendment is effective [*], 2006.

Schedule B

AMENDMENTS TO
ALBERTA SECURITIES COMMISSION RULE 71-801
Implementing the Multijurisdictional Disclosure System
under National instrument 71-101

PART 1 AMENDMENTS TO ASC IMPLEMENTING RULE 71-801

1.1 Amendment - Alberta Securities Commission Implementing Rule 71-801 is amended as follows:

(a) in section 1.1

(i) add the following definitions before the definition of "NI 71-101" and renumber that definition as (iii):

(i) "NI 51-102" means National Instrument 51-102 *Continuous Disclosure Obligations*;

(ii) "NI 62-104" means National Instrument 62-104 *Take-Over Bids and Issuer Bids*;

(ii) in paragraph (b), repeal "has the meaning ascribed to it" and substitute "has the same meaning as it has"

(iii) add the following after paragraph (b):

(c) A term defined or interpreted in NI 62-104 has the same meaning as it has in NI 62-10.

(b) in section 2.1

(i) in paragraph (a), strike "sections 82 and 84" and substitute "sections 111 and 112";

(ii) in paragraph (b), strike "sections 85 and 89" and substitute "sections 114 and 115";

(iii) in paragraph (c), strike "sections 90(2), (2.1) and (4) and 91" and substitute "sections 116(2), (3) and (4) and 117"; and

(iv) in paragraph (d), strike "section 97" and substitute "section 121;

(c) in section 2.2, strike "Section 54" and substitute "Section 75";

(d) in section 2.3, strike “Section 81” and substitute “Section 110”;

(e) in section 3.1, strike “Section 94” and substitute “Section 117”;

(f) in section 4.1

(i) in paragraph (a), strike “sections 134, and 134.1 of the Act” and substitute “sections 2.2 to 2.5 of NI 62-104” and strike “section 134.1(2) of the Act” and substitute “section 2.4(1) of NI 62-104” ;

(ii) repeal paragraph (b) and substitute the following:

“sections 2.23, 2.25 to 2.31 and 3.2 of NI 62-104;”

(iii) in paragraph (c), strike “sections 135.1 and 136 of the Act” and substitute “sections 2.21, 2.22 and 2.24 of NI 62-104”;

(iv) in paragraph (d), strike “sections 137 and 137.1” and substitute “sections 2.8, 2.9 and 2.10 of NI 62-104”;

(v) in subparagraph (d)(i), strike “section 137(1)” and substitute “section 2.8(1)”;

(vi) in subparagraph (d)(ii), strike “section 137(2)” and substitute “2.9(1)” and strike “section 137(3)” and substitute “section 2.9(2)”;

(vii) in subparagraph (d)(iii), strike “section 137.1(1)” and substitute “section 2.10(1)”;

(viii) in paragraph (e), strike “section 137.2 of the Act” and substitute “sections 2.8(1), 2.9(4) and 2.10(2) of NI 62-104”;

(ix) in paragraph (f), strike “section 140 of the Act” and substitute “sections 2.8(3) and (4) and 2.11 of NI 62-104” and strike “sections 140(1) and (2)” and substitute “section 2.11”;

(x) repeal paragraph (g);

(xi) in paragraph (h), strike “section 177 of the rules” and substitute “section 4.1 of NI 62-104”;

(xii) in subparagraph (h)(i), strike “Form 31” and substitute “Form 62-104F1” and strike “section 177 of the rules” and substitute “section 4.1 of NI 62-104”;

(xiii) in subparagraph (h)(ii), strike “Form 31 prescribed under section 177 of the rules” and substitute “Form 62-104F1 prescribed under section 4.1 of NI 62-104”;

(xiv) in paragraph (i), strike “section 180 of the rules” and substitute “section 4.2 of NI 62-104” and strike “Form 34 prescribed under section 180 of the rules” and substitute “Form 62-104F2 prescribed under section 4.2 of NI 62-104”;

(xv) in paragraph (j), strike “sections 181.1, 181.3, 181.9 and 181.92 of the rules” and substitute “sections 2.10(5) and 4.5 of NI 62-104”;

(g) in section 4.2

(i) in paragraph (a), strike “sections 138, 139 and 139.1 of the Act” and substitute “sections 2.15 to 2.18, 4.3 and 4.4 of NI 62-104”;

(ii) in subparagraph (a)(i), strike “section 138(1)” and substitute “section 2.15(1)”;

(iii) in subparagraph (a)(ii), strike “section 138(5)” and substitute “section 2.16(1)”;

(iv) in subparagraph (a)(iii), strike “section 139(3)” and substitute “section 2.18(3);

(v) in paragraph (b), strike “section 140 of the Act” and substitute “sections 2.17 and 2.18 of NI 62-104”;

(vi) in paragraph (c), strike “sections 178, 179, 181.2, 181.9 and 181.92 of the rules” and substitute “sections 2.8(3) and (4), 2.17, 2.18(4), 4.3 and 4.5 of NI 62-104”;

(h) in section 5.1(a), strike “sections 120, 121 and 122 of the Act” and substitute “sections 4.1, 4.3 and 4.6 of NI 51-102”;

(i) repeal section 5.2;

(j) in section 5.3, strike “section 124 and Part 12 (other than sections 130 of the Act and of section 162 and Part 12 (other than section 168) of the rules” and substitute “section 9.1 of NI 51-102”;

(k) in section 5.4, strike “Sections 147 and 150” and substitute “Sections 182 and 183”;

(l) in section 6.1, strike “section 118 of the Act” and substitute “section 7.1 of NI 51-102”;

(m) in section 7.1, strike “Section 70(3)(b)” and substitute “Section 92(3)”.

PART 2 EFFECTIVE DATE

2.1 Effective Date - These amendments are effective [*], 2006.

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LIST OF COMMENTERS

Proposed National Instrument 62-104
Take-Over Bids and Issuer Bids
Request for Comment April 28, 2006

	COMMENTER	NAME	DATE
1.	e-globe x-change inc.	Robert Hudson	June 25, 2006
2.	RS Market Regulation Services Inc.	James Twiss	June 29, 2006
3.	CFA Societies of Canada	Blair Carey	July 26, 2006
4.	Davies Ward Phillips & Vineberg LLP	Philippe C. Rousseau	July 28, 2006
5.	Fasken Martineau DuMoulin LLP	Richard J. Steinberg	July 28, 2006
6.	Fraser Milner Casgrain LLP	Ralph Shay	July 28, 2006
7.	McCarthy Tetrault	Graham P. C. Gow	July 28, 2006
8.	Ogilvy Renault LLP	Tracey Kernahan	July 28, 2006
9.	Ontario Bar Association	Richard Lococo	July 28, 2006
10.	Osler LLP	Dana Easthope	July 28, 2006
11.	Torys LLP	Sharon Geraghty	July 28, 2006
12.	Teacher's Pension Plan	Michael Padfield	August 4, 2006
13.	Stikeman Elliott LLP	Simon A. Romano	October 10, 2006

Robert Hudson
robert@investment.com

June 25, 2006 By e-mail

Alberta Securities Commission
British Columbia Securities Commission
Manitoba Securities Commission
New Brunswick Securities Commission
Securities Commission of Newfoundland and Labrador
Registrar of Securities, Department of Justice, Government of the Northwest Territories
Nova Scotia Securities Commission
Registrar of Securities, Legal Registries Division, Department of Justice, Government of Nunavut
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Re: Request for Comment: Proposed National Instrument 62-104 *Take-Over Bids and Issuer Bids* and Related Forms and Companion Policy 62-104CP *Take-Over Bids and Issuer Bids* and Proposed Amendments to National Instrument 62-103 *The Early Warning System and Related Take-Over Bid and Insider Reporting Issues* and Proposed Repeal of CSA Policy 62-201 *Bids Made Only in Certain Jurisdictions*

Thank your for the opportunity to comment on the above-noted proposals. We will restrict our comments to proposed National Instrument 62-104 *Take-Over Bids and Issuer Bids* (NI 62-104) and its companion policy.

e-globe x-change inc. (egX)

egX is a subsidiary of Global Financial Group Inc. (GFG). We are developing an exchange specializing in the listing and trading of real estate backed securities. Our goal is to commoditize real estate and provide investors, who currently have limited access to revenue-producing commercial and industrial property investments, with a regulated, transparent and liquid marketplace for real estate. On May 15, 2006, we submitted documents to the British Columbia Securities Commission (BCSC) in support of our application for recognition to operate **egX** as an exchange.

Once GFG receives a recognition order from the BCSC, it will seek exemptive relief from the other securities regulatory authorities in Canada to allow **egX** to operate across the country. As **egX** achieves market acceptance and growth, GFG intends to expand the business model internationally.

Communicating with holders of securities

Section 2.6 of NI 62-104 requires an offeror to send a bid to all holders of the class of securities subject to the bid who are in the local jurisdiction, based on the last address as shown on the books of the offeree issuer. Section 3.4 of NI 62-104 imposes an obligation on issuers to furnish to a person making or proposing to make a take-over bid a list of holders of the class of securities subject to the bid, if the issuer is not otherwise required by law to furnish such a list.

As you know, most securities are shown in the books of issuers as being held by intermediaries on behalf of beneficial owners. National Instrument 54-101 *Communication with Beneficial Owners of Securities of a Reporting Issuer* (NI 54-101) has established a process for communicating with the beneficial owners of securities.

We encourage the CSA (if CSA staff have not already done so) to consider how NI 62-104 can work together with NI 54-101 to identify, and communicate with, beneficial owners of securities subject to a bid in a local jurisdiction (see, for example, Parts 6 and 7 of NI 54-101).

Exchange issuer bid exemption

An issuer bid made through the facilities of a *recognized* exchange is currently exempt from certain requirements, provided the bid is made in accordance with the bylaws, rules and other regulatory instruments or policies of the exchange (e.g., see sections 99(e) and 100 of the *Securities Act (*British Columbia)).

We are pleased that section 5.10 of NI 62-104 would continue this exemption. However, we have a concern with the definition of "recognized exchange".

"Recognized exchange" is defined in section 1.1 of NI 62-104 as meaning either the Toronto Stock Exchange (TSX) or the TSX Venture Exchange (TSX-V). **egX** staff are in the process of drafting policies to include in its listing manual to govern normal course issuer bids and "substantial" issuer bids. We are concerned:

a) about the mechanics of recognizing an exchange, and

b) that this definition does not contemplate other "recognized exchanges".

Amending a national instrument, including amending a definition in a national instrument, is a time-consuming process and a barrier to competition. Alternatively, we suggest using the approach taken currently, i.e., of setting out recognition by way of a local instrument, order or other means which can be amended in a timely manner. In British Columbia, section 2(d) of BC Instrument 21-501 *Recognition of Exchanges, self regulatory bodies, and jurisdictions* (BCI 21-501) recognizes the TSX and TSX-V for the purposes of section 99(e) of the *Securities Act* (British Columbia).[1] This will permit more flexibility for future exchanges, like **egX**.

[1] See also Ontario Securities Commission Recognition Order 62-904 *In the Matter of Recognition of Certain Jurisdictions*.

We urge the CSA to reconsider the manner in which exchanges will be recognized for the purposes of NI 62-104, to ensure that appropriate amendments can be made in a timely manner.

Take-over bid made through the facilities of a recognized exchange

A take-over bid made through the facilities of a *recognized* exchange is currently exempt from certain requirements, provided the bid is made in accordance with the bylaws, rules and other regulatory instruments or policies of the exchange (e.g., see sections 98(a) and 100 of the *Securities Act* (British Columbia)).

In British Columbia, section 2(d) of BCI 21-501 recognizes the TSX and TSX-V for the purposes of sections 98(1)(a) of the *Securities Act* (British Columbia).

We understand that the exemption has not been carried forward in NI 62-104 because, for example, not all jurisdictions have recognized exchanges for the purposes of the exemption. We encourage the CSA to set out in a notice, or otherwise, the reasons for not carrying the exemption forward.

Definition of "person"

"Person" is defined in section 1.1 of NI 62-104 to include an individual, corporation, etc. We are pleased to see this broad definition as it is similar to the definition that **egX** proposes to use in its Listings Manual and Trading Rules.

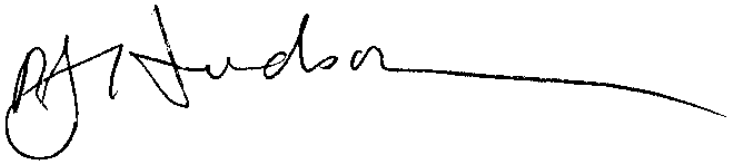
Companion Policy

Section 2.9 of Companion Policy 62-104CP *Take-Over Bids and Issuer Bids* refers to the definition of "board lot" in the Rules of the TSX rules and TSX-V Policy 1.1. In addition to concerns about incorporating definitions from specific exchanges into a companion policy, we note that the Universal Market Integrity Rules (UMIR) have adopted "standard trading unit" as a term to replace "board lot".

We encourage the CSA to consider using "standard trading unit" as defined in UMIR, in place of exchange-specific references to "board lot".

If you have any questions, please do not hesitate to contact me.

Yours truly,



Robert Hudson
Regulatory Affairs
Global Financial Group

cc: Angela Huxham, President, **egX**
Susan Toews, General Counsel, **egX**

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Market Regulation Services Inc.

Services de réglementation du marché inc.

James E. Twiss
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June 29, 2006.

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Registrar of Securities, Legal Registries Division, Department of Justice, Government of Nunavut
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c/o Marsha Manolescu
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- and -

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Dear Members of the Canadian Securities Administrators:

Re: Request for Comment – Proposed National Instrument 62-104 – Take-over Bids and Issuer Bids

Introduction

Market Regulation Services Inc. ("RS") has been recognized as a self-regulatory organization by the Alberta Securities Commission, British Columbia Securities Commission, Manitoba Securities Commission, Ontario Securities Commission and, in Quebec, by the Autorité des marchés financiers (the "Recognizing Regulators") and, as such, is authorized to be a regulation services provider for the purposes of the National Instrument 21-101 (the "Marketplace Operation Instrument") and National Instrument 23-101 ("CSA Trading Rules").

As a regulation services provider, RS administers and enforces trading rules for the marketplaces that retain the services of RS. RS has adopted, and the Recognizing Regulators have approved, the Universal Market Integrity Rules ("UMIR") as the integrity trading rules that will apply in any marketplace that retains RS as its regulation services provider. Presently, RS has been retained to be the regulation services provider for: the Toronto Stock Exchange ("TSX"), TSX Venture Exchange ("TSXV") and Canadian Trading and Quotation System ("CNQ"), each as a recognized exchange ("Exchange"); and for Bloomberg Tradebook Canada Company ("Bloomberg"), Liquidnet Canada Inc. ("Liquidnet") and Perimeter Securities Inc. ("BlockBook"), each as an alternative trading system ("ATS").

Specific Comments

RS is pleased to have the opportunity to comment on Proposed National Instrument 62-104 (the "Proposal"). As the regulation services provider for all of the marketplaces in Canada that trade listed securities, quoted securities or foreign exchange-traded securities, RS will limit its comments to the impact of the Proposal on decisions related to the marketplace on which various transactions will be executed.

Section 1.1 - Definition of "recognized exchange"

The Proposal defines a "recognized exchange" as the TSX and TSXV. In the view of RS, the term should be defined more broadly to include all exchanges which have been recognized for the purposes of Marketplace Operation Instrument. If the broader definition is adopted there would be a consistency between the various National

Instruments. Since RS provides monitoring of all of the current exchanges and applies the same market integrity rules to trading in each of those marketplaces, there would not appear to be any public policy reason to exclude CNQ or any future exchange from the definition. The artificial nature of the distinction between the exchanges is highlighted if one considers that a number of the securities which are or have been listed on CNQ are or have been inter-listed with the TSXV or the TSX.

Section 1.1 – Definition of "published market"

The Proposal while consider a "published market" to include trade prices from any marketplace (as defined by the Marketplace Operation Instrument) that regularly disseminates prices electronically or which has the information published in a newspaper or business or financial publication of general and regular paid circulation. Under the Marketplace Operation Instrument, each marketplace must provide post-trade transparency of trade information by providing the information to an information processor (if one has been recognized) or otherwise to an information vendor that meets the requirements of a regulation services provider. In the view of RS, the trade data which must be considered should be tied to the marketplaces which must provide "post-trade" transparency in accordance with the Marketplace Operation Instrument.

While the term "marketplace" used in the Marketplace Operation Instrument refers only to markets in Canada, the term "published market" as used in the Proposal contemplates references to markets outside of Canada (for example, section 5.1 on the determination of the "market price" of a particular security.) In the view of RS, for a foreign market to be considered a published market it should be an "organized regulated market" that publicly disseminates information on trading activity. The definition of "published market" should therefore specifically recognize both the domestic ("marketplace" under the Marketplace Operation Instrument) and foreign ("organized regulated market" that publicly disseminates trading information) components.

Section 2.2 – Restrictions on acquisitions during take-over bid

Section 2.4 – Restrictions on pre-bid acquisitions during take-over bid

Under UMIR, a dealer that is acting as agent for a client has an obligation to execute on the marketplace with the "best price". Since RS presently provides monitoring for each marketplace trading listed or quoted securities and applies UMIR to trading on those marketplaces, in the view of RS there is no public policy reason to restrict "normal course" purchases of securities to trades made through the facilities of the TSX and TSXV. In the view of RS, "normal course" purchases should be permitted on any marketplace trading the particular security (including marketplaces such as Liquidnet, Bloomberg and BlockBook if the person making the purchase has direct or indirect access to that marketplace).

If the intention of the CSA is to limit the type of securities for which the exemption is available, RS would suggest that it may be more appropriate to provide that the purchase must be of an "exchange-listed security" as defined for the purposes of the Marketplace Operation Instrument. Limiting the exemption to an "exchange-listed security" would permit purchases to be made on any marketplace at the "best price" but would exclude securities that are a "foreign exchange-traded security" which may trade on an ATS but for which there may not be a regular or established trading pattern.

Section 5.9 – Normal course issuer bid exemption

Under the proposed section 5.9, an issuer bid will be exempt from the requirements of Part 2 of the National Instrument if purchases are made on a "published market". Purchases under this section may be made at the "market price at the date of acquisition as determined in accordance with section 5.1" plus reasonable brokerage fees or commissions. Under section 5.1, the "market price" is determined as the simple average of the closing price of the securities on the Canadian marketplace with the greatest value of trading in that particular security in the preceding 20 business days.

It is the view of RS that purchases under a normal course issuer bid should not impact the prevailing price for a security at the time the purchase is executed. As such, in the view of RS, purchases should not be permitted above the last sale price of the security. For example, if the prevailing market price is less than the "market price", purchases under the normal course issuer bid could be used to support the current price of the security by moving the price up to the average price of the closing during the previous 20 business days. To preclude the possibility that purchases under a normal course issuer bid could affect the market, RS would suggest that the maximum purchase price for permitted purchases should be the lesser of the "market price" and the last sale price.

With the advent of multiple marketplaces trading the same security, the concept of "last sale price" takes into account trades which have been executed on any of the marketplaces (and not just the price of the last sale on the marketplace on which the order is entered). A person may have to undertake extensive monitoring of the various marketplaces to ensure compliance with a "last sale price" requirement. As an alternative, RS would suggest that consideration be given to adopting a restriction that the purchase order entered on a marketplace under a normal course issuer bid must, at the time of entry, be at a price which is at or below the "best ask price". Orders entered on a marketplace at that level are not an attempt to use the purchases to increase the market price (and do not require an on-going monitoring effort to ensure that the trade price does not exceed the "last sale price")

Thank you for providing us the opportunity to comment on the Proposal. If you have any questions regarding any of our comments, please contact me at 416.646.7277.

Yours truly,

"James E. Twiss"
James E. Twiss,
Chief Policy Counsel

cc. Tom Atkinson, President and CEO
Rosemary Chan, Vice-President Market Policy and General Counsel
Maureen Jensen, Vice-President Market Regulation, Eastern Region

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British Columbia Securities Commission
Manitoba Securities Commission
New Brunswick Securities Commission
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Dear Mesdames & Gentlemen

Re: Proposed National Instrument 62-104 *Take-Over Bids and Issuer Bids*, Related Forms and Companion Policy 62-104 CP.

The Canadian Advocacy Committee of the CFA Societies of Canada (the CAC) is pleased to respond to the request for comments on the CSA's proposed National Instrument 62-104 *Take-Over Bids and Issuer Bids* (NI 62-104 or the Instrument). The CAC represents the 11,000 Canadian members of CFA Institute[1] 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, investment professionals, and the capital markets in Canada.

[1] With headquarters in Charlottesville, VA, and regional offices in Hong Kong and London, the CFA Institute is a non-profit professional organization of over 83,000 financial analysts, portfolio managers, and other investment professionals in more than 125 countries. Its membership also includes 134 member societies. The CFA Institute is internationally renowned for its rigorous curriculum and examination program leading to the Chartered Financial Analyst designation. http://www.cfainstitute.org/aboutus/index.html

General Comments

The CAC supports the CSA's proposed NI 62-104, which seeks to harmonize the existing requirements governing take-over bids and issuer bids that are presently set out in various provincial statutes. All participants in the Canadian capital markets benefit from the consolidation and harmonization of the securities regulatory regime as this makes the market more efficient. We urge the CSA to continue working towards a single set of securities regulations in Canada.

We also note that the full implementation of the Instrument will require amendments to the existing securities legislation in several jurisdictions. While the specific amendments are not set out, we trust that they will be drafted to support the goals of additional harmonization and enhanced efficiency.

Enhancing Investor Protection.

As members of the CFA Institute, the members of the CAC are obliged by the Code of Ethics[2] to promote the integrity of and uphold the rules governing the capital markets. The CAC is in favour of initiatives such as the proposed NI 62-104 that improve the standards of investor protection as they enhance the integrity of the marketplace in Canada.

The guiding objectives set out in the Companion Policy appropriately stress the primacy of the interests of the affected security holders of the target company and that all are entitled to equal treatment. We assume that these principles will be applied by all concerned parties when making decisions in the course of a bid, and in particular by the CSA when considering exemption applications.

We support the proposed change to the existing regime to limit the ability of a bidder to amend the terms of the bid in a way that negatively affects the interests of the holders of the target company's securities that are subject to the bid. All of these security holders should receive sufficient time and information about the terms of a bid to allow for a full evaluation, and the CSA rightly notes that changes during the course of a bid may not allow time for such reasoned evaluation.

The CSA is also to be complimented on the proposed easing of the rules regarding Canadian investor participation in bids involving foreign controlled issuers.[3] In a global marketplace, more and more Canadians hold securities issued and primarily traded abroad, and all should have an opportunity to participate in transactions that may confer significant economic benefits. The requirements to receive the same information as other security holders and to participate on terms that are no less advantageous appropriately balances the Canadian investors' interests in participating in the bid, the regulators' goal of investor protection and the bidder and target companies' interests in managing the compliance costs of being involved in a takeover bid.

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2 The CFA Institute Code of Ethics and Standards of Professional Conduct can be found at http://www.cfainstitute.org/centre/ethics/code/pdf/english_code.pdf

3 Sections 5.5 and 5.12.

Gap in the Rule:

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

- Equal treatment of offeree issuer security holders
- Provision of adequate information to offeree issuer security holders; and
- An open and even-handed bid process that does not unfairly discriminate among or exert pressure on offeree issuer security holders.

These are laudable principles and appropriate for transactions that may be of great economic significance to the security holders affected. However, the Instrument does not achieve the first two objectives in one area. The Instrument still only requires that the information regarding the bid from the bidder and the target company be sent to the holders of that class of securities "whose last address as shown on the books of the offeree issuer is in the local jurisdiction", that is, registered security holders.

The CSA is well aware that the vast majority of the security holders of public companies, both in Canada and globally, are not registered holders, but hold their securities through one or more intermediaries, such as brokers or custodians. National Policy 41 *Shareholder Communication* was created in 1987 by the CSA to facilitate communication with these beneficial owners. In 2002, NP 41 was replaced by National Instrument 54-101, *Communications with Beneficial Owners of Securities of a Reporting Issuer* (NI 54-101). NI 54-101 establishes a process for getting materials from issuers to their investors and requires issuers to send proxy-related materials to beneficial owners. The process is available for other communications, such as the transmission of bid materials, but its use is not obligatory. Beneficial owners may not receive bid information unless the bidder, target or beneficial owner's intermediary voluntarily assumes the task and associated costs.

We understand that the Instrument was primarily intended to bring the existing disparate provincial systems into harmony, without making any significant policy changes. However, given the importance of the kinds of transactions the Instrument is regulating, and the preponderance of beneficial owners in this country, we believe that the Instrument expressly should require the disclosure information from both the bidder and target company to be sent to all holders of the securities subject to the bid, whether they are registered or beneficial owners. The use of the process set out in NI 54-101 should be made mandatory.

The CSA did amend these provisions in one area. Knowing that issuers structured other than as corporations may have no statutory obligation to provide a list of security holders to a bidder, the CSA added such an obligation to the Instrument. However, this change may not achieve much in practice, as the obligation parallels that for corporate issuers and only requires delivery of the list of registered holders. Many issuers formed in recent years, such as income trusts, may have no registered owners other than the nominee of the central depository.

Independent Director Approval of Employee Benefit.

Subsection 2.22(3) provides three exceptions to the general prohibition on collateral agreements that provide additional consideration to a security holder over and above that offered to all affected security holders under the bid. One of these exceptions relates to employment contracts

and is conditional on an assessment of the value of the contract by an independent committee of directors of the target company.

No specific definition of independence is set out in the Instrument. However, section 2.3 of the Companion Policy states that the directors are to be "disinterested in the bid or any related transactions". We assume by disinterested the CSA means the directors do not have a material financial stake in the target company. However, the term is capable of being interpreted widely and might in fact be read as including any director who was also an investor of any size in the target company. As current governance practices at many issuers require directors to acquire a not inconsiderable block of securities in the company to align their interests with those of the other security holders, this interpretation would effectively make the exemption useless in practice, as no one would be independent.

Ambiguities reduce efficiency and increase costs for all market participants. It would therefore be helpful to provide a definition of 'independence' for the purpose of this exception. The CSA already has a multilateral instrument that contains a definition of independence for directors – MI 52-110 *Audit Committees*, s.1.4 – that could be incorporated expressly or by reference. Alternatively, the appropriate guidance should be provided in the Companion Policy.

Exemption from Proportionate Take-Up

Under s. 2.23(1), if a bid is made for less than all of a class of securities and more securities are tendered to the bid, the bidder is obliged to take up and pay for the securities pro-rata. Subsection 2.23(2) provides an exemption from this pro-rata requirement for issuer bids if the securities would constitute an odd lot. We assume the intention is to permit the issuer in this case to acquire the whole of the odd lot, even if strict pro-rata allocation would result in the take up of less than the entire holdings of that investor. The language is somewhat ambiguous and might be read to permit the issuer to acquire none of the odd lot. Savvy investors avoid odd lots as they know that these generally are less liquid and cannot be disposed of except at a discount to market price. Requiring proportionate purchases would just make this situation worse. Given that odd lot owners are likely to be small investors, it might be more in keeping with investor protection principles for the CSA to require bidders to purchase the whole of an odd lot in these circumstances, rather than leaving the language as permissive.

Closing Remarks

We appreciate the opportunity to comment on the CSA proposal to harmonize the rules governing take-over bids and issuer bids in Canada. If you have any questions, please do not hesitate to contact Blair Carey at 416-367-3352.

Sincerely,

(signed) Blair Carey, CFA
Co-Chair, CAC

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July 28, 2006

BY E-MAIL

Alberta Securities Commission
British Columbia Securities Commission
Manitoba Securities Commission
New Brunswick Securities Commission
Securities Commission of Newfoundland and Labrador
Registrar of Securities, Department of Justice,
Government of the Northwest Territories
Nova Scotia Securities Commission
Registrar of Securities, Legal Registries Division,
Department of Justice, Government of Nunavut
Ontario Securities Commission
Prince Edward Island Securities Office
Autorité des marchés financiers (Québec)
Saskatchewan Financial Services Commission
Registrar of Securities, Government of Yukon

Request for Comments on Proposed National Instrument 62-104, Companion Policy 62-104CP and Related Amendments to National Instrument 62-103

We are writing in response to the request of the Canadian Securities Administrators (the "**CSA**") for comments in respect of the proposed National Instrument 62-104 – Take-over Bids and Issuer Bids (the "**Instrument**"), Companion Policy 62-104CP (the "**Policy**") and the related amendments to National Instrument 62-103 – The Early Warning System and Related Take-over Bids and Insider Reporting Issues, all as published on April 28, 2006. We also commented on a previous version of the Instrument by e-mail memorandum of April 4, 2006 to the Ontario Securities Commission (the "**OSC**").

We strongly support the CSA's objectives of consolidating and harmonizing the take-over bid and issuer bid regimes and related early-warning requirements in a single national instrument. This approach would, in our view, greatly reduce the frequency and complexity of provincial regulation and rule-making initiatives, which have imposed an undue burden on those involved in bids having a national or global perspective rather than a provincial or regional one. The national regime to be established under the Instrument would facilitate the planning and launching of bids by offerors and the response thereto by offeree issuers. By providing for more

consistent regulatory overview of bids and the use of exemptions, the Instrument should assist in making Canadian capital markets more efficient and accessible. This initiative will also provide for a more consistent regulatory overview of bids and the use of exemptions. These advantages will, of course, depend to a considerable extent on the individual jurisdictions exercising restraint in the exercise of their powers to make local amendments.

The Instrument, however, also makes major substantive changes in existing take-over bid law – in respect of the private agreement exemption, acting "jointly or in concert" and permissible bid variations – that we believe are unwarranted and unfortunate, as discussed further below. Without doubting the power of the CSA (at least in respect of Ontario securities legislation) in effect to amend securities legislation by rule-making, we think it unwise to make major amendments to existing statutory law without amending the statute, especially in an area as historically rich in repeated and considered industry and legal practitioner published commentary as take-over bids.

1. Definitions and Interpretation

Bid vs. Circular

As a general comment, many of us find the distinction between the "bid" as a document to be delivered separate from the "circular" confusing and unnecessary. In our view, it would be more intuitive for offerors and offeree issuers if "bid" referred to the economic fact of a particular offer being made and "circular" referred to the disclosure document relating to that bid. In practice, the bid is typically announced and then at a later date a formal disclosure document is mailed to securityholders, with one part of that document being referred to as the "bid" (or offer) and the other part as the "circular". It is still not clear from the proposed definition of "bid" and the use of such term in the Instrument that it includes a document separate from the circular (although delivered with the circular, as required in section 2.8(1)). For example, section 2.8(4) refers to the filing of a "bid" (but not a circular) but section 2.9(1) refers only to changes in the information contained in a "circular" (but not in a bid). We would suggest that the Instrument streamline these concepts and refer to the documentary requirements in a consistent manner as the "circular".

Offeree Issuer and Offeror

In the proposed definitions of "offeree issuer" and "offeror" in section 1.1, we would suggest replacing the references to "take-over bid" and "issuer bid" with a reference to a "bid", which includes both concepts under the proposed definition of that term. We also question the appropriateness of the reference to "a take-over bid, an issuer bid or other offer to acquire" in the proposed definition of "offeror" given that a single reference to an "offer to acquire" would simplify the wording and include all of the concepts intended to be included in the proposed definition.

Take-over Bid and Issuer Bid

The proposed concepts of "take-over bid" and "issuer bid" in section 1.1 of the Instrument would be triggered if securityholders of an offeree issuer "are" in the local jurisdiction, while there is no guidance to determine how this relatively vague criterion should be applied. In particular, the current definitions of these terms in the *Securities Act* (Ontario) (the "**OSA**") specifically refer to "security holder of the offeree issuer whose last address as shown on the books of the offeree issuer is in Ontario". The proposed approach in section 1.1 of the Instrument also appears inconsistent with the approach in sections 2.6(a), 5.5 and 5.12 thereof dealing with the mailing of the bid, and foreign take-over bid and *de minimis* exemptions, which make reference to a determination based on the address of securityholders shown on the books of the offeree issuer (which address is to be determined in the manner described in section 2.7 of the Policy). We believe it would be helpful and eliminate uncertainty in the preparation and launching of bids if the CSA were to provide clear guidance regarding the manner in which offerors, especially those making unsolicited offers, where there is no access to the books of the offeree issuer at the outset, should determine when security holders "are" in a particular jurisdiction for the purposes of the proposed definitions of "take-over bid" and "issuer bid". There is some guidance for issuers on this point in section 1.15 of the Companion Policy to National Instrument 45-102 – Resale of Securities, but the applicability of that guidance to unsolicited offerors in bid situations is not self-evident.

Recognized Exchanges and Published Market

Given the global scope of many merger and acquisition transactions, we believe it is important to expand the concept of "recognized exchange" to include major stock exchanges in commercially sophisticated non-Canadian jurisdictions, in addition to the Toronto Stock Exchange and the TSX Venture Exchange.

With respect to normal course purchases that are permitted in the pre-bid and post-bid periods, the concept of "recognized exchange" in section 2.4(4) of the Instrument is not as broad as the current concept of "published market" referred to in section 94(7) of the OSA. In our view, normal course purchases on major exchanges in the United States, Europe or in other recognized jurisdictions commonly recognized by the CSA in connection with exemptive relief applications should be permitted for these purposes.

Voting Securities

Although "voting securities" is used in the definition of take-over bid, it is not defined in the Instrument or in National Instrument 14-101 – Definitions. It is defined in section 1 of the OSA but it would appear to us to be appropriate to define "voting securities" in the Instrument either as now defined in the OSA or to mean securities to which are attached the right to vote for the election of directors of the issuer in any and all circumstances or in circumstances that have occurred and are continuing.

Controlled Entities

In section 1.3 of the Instrument, we suggest that the proposed meaning of "controlled entities" be modified to reflect the broader meaning found in section 1.3 of National Instrument 45-106 – Prospectus and Registration Exemptions. In particular, the definition of "director" in that instrument should also be included in the Instrument to capture persons acting in such capacities for unincorporated entities.

Deemed Beneficial Ownership

Section 1.6(1) of the Instrument by its terms applies only in connection with the determination of "beneficial ownership" of securities and essentially has the effect of counting as securities beneficially owned by the offeror or a joint actor any securities which the offeror or the joint actor has the right to acquire within 60 days. However, the definition of "offeror's securities" in section 1.1 includes securities of "an offeree issuer beneficially owned, or over which control or direction is exercised ... by an offeror or any person acting jointly or in concert with the offeror."

This raises the question of whether convertible securities over which an offeror has control or direction, but not beneficial ownership, are intended to be treated differently for the purposes of determining whether the offeror has crossed the 20% threshold. For example, on a technical reading of section 1.6(1), common shares underlying purchase warrants over which an offeror has control or direction would not count towards determining whether the offeror has reached the 20% threshold with respect to an issuer's common shares. In contrast, if the warrants were beneficially owned, they would be counted on an as-converted basis.

If this distinction is inadvertent, it could be remedied by adding before the words "an offeror" in the first line of section 1.6(1) the phrase: ", or the control or direction over securities exercised by," and adding in the third line after the words "to acquire" the phrase "beneficial ownership of, or direction or control over".

We also find subsection (2) of section 1.6 unclear as to exactly what securities are deemed to be outstanding, whether just the ones the offeror and its "in-concert" parties have the right to acquire or all securities that could be acquired by exercise of the same class of convertible or exchangeable securities by all holders. We submit that clarity would be promoted by deleting subsection (2) and altering the last line of subsection (1) to read as follows:

> "within 60 days by a single transaction or a series of linked transactions is deemed to be a security of <u>that</u> particular class <u>and all securities of that class obtainable by the holders of instruments enabling such securities to be so acquired within 60 days shall be deemed to be outstanding.</u>"

<u>OR</u>

> "within 60 days by a single transaction or a series of linked transactions is deemed to be a security of that particular class and all securities of that class so obtainable by the offeror and persons acting jointly or in concert with the offeror shall be deemed to be outstanding."

Acting Jointly or In Concert

This is one of the relatively few areas of substantive change, as opposed to streamlining and clarification, in the Instrument. As previously indicated, we are opposed to major change by way of CSA initiative, absent a demonstrated need. Nowhere does the Instrument suggest any inadequacy in the existing law on this matter. Ultimately, whether or not a person is acting jointly or in concert ought to remain a question of fact.

Substantively, we think that section 1.7(2)(b) goes too far. The existing law and the Instrument leave open the question whether a shareholder will be found to be acting jointly or in concert with the offeror solely because the shareholder has entered into a lock-up agreement in respect of the bid. In OSC Rule 61-501 – Insider Bids, Issuer Bids, Business Combinations and Related Party Transactions, the position is clear that such a shareholder's votes may be counted as part of the minority for a second stage transaction but that context is not necessarily the same as the "jointly or in concert" inquiry for purposes of regulating take-over bids. In some circumstances, in order to be effective a lock-up agreement may have to contain a covenant from the granting shareholder that it will vote its shares against potential defensive tactics, e.g., poison pills, adopted by the target. We submit that that kind of covenant does not result in the granting shareholder acting "in concert" with the offeror. If, on the other hand, a shareholder enters into an agreement to vote in concert with the bidder *after completion of the bid*, that suggests that the shareholder will not be tendering but rather will be part of the ownership group after the bid, and such a shareholder should definitely be considered an "in concert" party with the bidder. We would not, however, so label a shareholder whose voting commitment related solely to accomplishment of the bid to which it was locking up.

It also appears to us that there might be circumstances where a shareholder has an agreement with other shareholders on voting, for example, with respect to the election of directors of the issuer but should not be deemed to be acting jointly or in concert with other parties to the agreement. However, assuming a number of shareholders are parties to such an agreement with respect to a particular issuer, it is perfectly possible that one of them, independently of the others, will make its own take-over bid independently. In fact, there is no commitment by the others to act concertedly with respect to the one shareholder's bid.

In sum, it does not seem to us to be a step in the right direction to prescribe a non-rebuttable rule that may produce a legal categorization contrary to the facts, when a rebuttable presumption would lead to the correct outcome. Nor do we think it a good idea to prescribe an inappropriate rule and then say that one can apply for exemptive relief. Exemptive relief applications can be expensive and time consuming and their outcomes are, naturally, unpredictable.

Assuming the definition is retained in the form of a list of rebuttable presumptions rather than deeming provisions, we would urge the Commission to consider including in the list of presumed in concert parties every person or company that enters into any collateral agreement, commitment or understanding that contravenes the collateral benefit prohibition in section 2.22(2) of the Instrument.

2. Conduct of Bids

Restrictions on Pre-Bid and Post-Bid Acquisitions

It is not clear in section 2.4(1) of the Instrument, nor is it clear at present in section 94(5) of the OSA, whether purchases by a person acting jointly or in concert with an offeror set the minimum bid price for an offeror making a formal bid. The addition of the word "or" in section 2.1(c) (which is not currently in the corresponding provision of the OSA) suggests that each offeror would be treated separately for the purposes of sections 2.2 to 2.5 of the Instrument, as opposed to their activities being aggregated.

In many circumstances, it makes sense that an offeror under section 2.1(a) would be required to make its offer at a bid price that is no lower than the price paid by an offeror under section 2.1(b), (c) or (d) in the previous 90 days. For example, purchases by a control person of the offeror making the bid should clearly be counted. However, it does not appear that the bid price of an offeror should be required to be at least equal to the price of an earlier purchase by a person acting jointly or in concert with the offeror making the bid if those earlier purchases were made before the person began acting jointly or in concert with the offeror.

In particular, under the proposed language of section 1.7, persons acting jointly or in concert are deemed to include any persons, including members of the management of the offeree issuer, who enter into support agreements with the offeror. Should purchases by such individuals prior to entering into those support agreements be purchases that could impact the minimum bid price of an offeror?

If such a result is not intended (and we submit it ought not be), section 2.4(2) could be revised to add the following exception:

> "(c) a trade made by a person who is an offeror referred to in paragraph 2.1(b) or (d) but who was not at the time of the transaction acting jointly or in concert with an offeror referred to in paragraph 2.1(a) or with a control person of an offeror referred to in paragraph 2.1(a)."

In section 2.4(3), which deals with post-bid acquisitions, the words (which are not present in the corresponding provision of the OSA, section 94(6)) "on terms identical to those under the bid" should be deleted as they establish an impossible condition to the making of normal course market acquisitions. The bid is by definition over and done with and the transactions in question are normal market transactions. They therefore cannot be subject to identical terms as in the bid.

The extent to which subsection (4) of section 2.4 is intended to modify subsections (1) and (3), to which it refers, would, we submit, be clearer if the text were replaced by the following:

> "For the purposes of subsections (1) and (3), a transaction will be deemed to be generally available on identical terms to holders of a class of securities if it is made in the normal course through the facilities of a recognized exchange and the conditions set out in clauses (e), (f) and (g) of subsection 2.2(3) apply."

Date of Information in Bid Circular

In section 2.14(2) of the Instrument, we are concerned about the date as of which the information in a bid circular must be current. Given the complexity of ascertaining the accuracy of information through various business units in different jurisdictions, the policy objective of this provision would be better served by requiring the date of the bid and circular to be no later than three business days prior to the date of commencement of the bid. The provision in section 2.14(2) which deems a bid circular to be dated as of the date the circular was sent to the persons entitled to receive it seems overly burdensome and misleading and does not take into account the fact that printing a circular or submitting an advertisement will normally involve a business day or two prior to launch.

Notice of Change

We note with approval the change proposed in section 2.9(1) that would require a bidder, where a change has occurred in the information in the bid circular that would reasonably be expected to affect the decision of a security holder to accept or reject the bid, to *promptly* issue a press release and *promptly* deliver a notice of change. The current provision is inadequate to ensure that timely information is made available to target shareholders during the course of a bid, particularly in circumstances where the bid remains open but unconditional so that the bidder is obligated to take up and pay for tendered shares.

In section 2.16(2), we would suggest replacing the word "it" with "a directors' circular or a notice of change to a directors' circular".

Extensions of Bids

We read section 2.10(4) of the Instrument as now allowing that, where a variation is solely a waiver of a condition in a cash bid, the offeror may also extend the bid to a date that is less than 10 days from the notice of variation. We think this change is positive since there is no prejudice to shareholders if the offeror should voluntarily extend its bid for less than 10 days. We would also be in favour of an additional exception to section 2.10(3) that would allow variations consisting solely of extensions of less than 10 days.

Variations in Bid Terms

The proposed limitation in section 2.21(3) on the ability of an offeror to amend an existing bid appears to us to go too far, again absent any demonstration of a need for change in the existing law.

Even the prohibition against reducing consideration offered by way of notice of variation, which at first blush is "motherhood", can have what appears to us an improper result. An example that comes to mind is an unsolicited bid followed by a defensive extraordinary dividend. If the bidder still wishes to acquire the target (*albeit* at a reduced price to account for the dividend) the practical effect of the rule change could be to increase the effectiveness of the defensive tactic since the bidder has to start all over again. Even though it is possible to "draft around" the problem in terms of the original bid conditions, the new limitation on variations seems to us cumbersome, expensive for the bidder and not in the best interests of shareholders. The requirement to commence a new bid could also raise complications with the pre-bid integration rules if the offeror made purchases during the course of the first bid. The concern expressed by the CSA is that shareholders should have more time to consider a reduction in the bid price. We are not sure that this is a real issue since typically shareholders closely follow developments during the course of a take-over bid and it is uncommon for shareholders to tender until the final days of the bid. As a result, the obligation to issue a press release and mail a notice of variation should be sufficient to protect shareholders. If this is considered to be inadequate, then the Instrument should simply require, for variations that are reductions in consideration, a period longer than the normal 10 days prior to the expiry of the deposit period.

As for the prohibition against changing the form of consideration in subsection (b), while we would support a prohibition against varying a bid by offering a new class of securities, a prohibition against all changes of "form" is too broad. Why should a bidder not be able to vary by changing the consideration from securities to cash? Also, is one changing "the form" of consideration if one alters the proportions of cash and securities in a combination bid? These types of changes are not fundamental and should not require bidders to go back and start all over again.

We also oppose the blanket prohibition against adding conditions in subsection (d). We have recently had an occasion to review substantially all notices of variation filed in respect of Canadian take-over bids since 1999. Our review did not reveal any evidence that the current ability of offerors to add conditions has been abused. To the contrary, conditions have almost always been added in one of the following circumstances, which demonstrate that the ability to add conditions is beneficial to offerors, offeree issuers and shareholders:

(a) in a hostile bid, an offeror varies its bid by adding conditions responsive to a tactical shareholder rights plan or other defensive measure adopted by the offeree directors after the commencement of the bid;

(b) in a hostile bid that turns friendly, conditions are routinely added at the instance of the offeree issuer as a condition to the directors' support for the offer (for example, a new condition may require a higher minimum deposit). In these situations, it is also common to add conditions relating to the continued effectiveness of the support agreement entered into between the offeror and the offeree issuer; and

(c) in an amendment to a bid to increase the consideration offered, conditions may need to be added related to the increase (for example, a condition that the offeror's shareholders approve the increase as may be required by the laws of the offeror's home jurisdiction or the rules of any stock exchange on which it is listed (e.g. NYSE)). In addition, it is possible that an increase in consideration would require the addition of a condition relating to regulatory approval under the *Competition Act* (Canada) if the higher consideration causes the transaction to exceed the applicable thresholds.

We also note that the review of the regulation of take-over bids conducted in 2000 by the Take-Over Bid Team at the Ontario Securities Commission expressed some concern that "the level of conditionality of bids in Canada may be increasing to the point of concern".[1] The predictable result of the proposed prohibition against the addition of new conditions to a bid will be a great increase in the conditionality of bids, as offerors will attempt to anticipate every contingency and include a longer list of conditions to their bids in an effort to avoid having to recommence their bids if a new condition is required.

Withdrawal Rights

The OSA and the Instrument do not clearly articulate the relationship between withdrawal rights and the ability of an offeror to take up securities deposited under the bid. The only place where withdrawal rights and the ability to take up are reconciled is in section 2.29(6) of the Instrument (and currently section 95(12.1) of the OSA), and there it is only in a narrow context. We recommend that a provision be added to the Instrument that clarifies that the take-up of any securities is prohibited for the period that withdrawal rights are extended pursuant to section 2.27(1)(b). We believe that practitioners currently understand this to be the case and conduct themselves accordingly. However, the current language of the OSA is not perfectly clear, leaving open an argument that an offeror could take up securities upon the waiver, for example, of a minimum tender condition and thereby foreclose withdrawal rights.

Along the same lines, we suggest that the Instrument could benefit from a general provision stating that an offeror may not take up securities deposited to the bid at any time when the

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[1] Take-Over Bid Team, *Submission of the Take-Over Bid Team at the Ontario Securities Commission in Connection with the Five-Year Review of Securities Legislation in Ontario* (August 11, 2000) at 14.

conditions of the bid have not been satisfied or waived. Again, we do not believe that this would be a change to the current practice, but merely a clarification of the language.

In section 2.27(2), the Instrument is not clear (nor is section 95(5) of the OSA) as to whether a variation that consists of an increase in consideration of a cash bid together with a waiver of conditions would extend withdrawal rights. Section 2.27(2)(b) uses the word "only" suggesting that it is not available if the variation also includes a waiver. However, as drafted, an offeror in a cash bid could in effect make two sequential variations a day apart, first waiving a condition, then increasing the consideration of the bid, and thereby avoiding the extension of withdrawal rights. We do not think this is objectionable and suggest that section 2.27(2) be revised to clarify that an offeror may accomplish this in a single variation.

In section 2.27(2)(c), we would suggest replacing the words "one of the terms" with "one or more of the conditions" to avoid ambiguity in the interpretation of this provision.

Collateral Agreements

Section 2.22(3)(a) appears unnecessary since, if we assume there are many holders of the class of securities in question, it is obvious that a payment equally available to all security holders is not a collateral benefit. By the same token, however, if management were the only holders of securities of the class, such a payment might well be a disguised collateral benefit. Therefore we would suggest elimination of the exemption.

We believe that the proposed exemption in section 2.22(3)(c) of the Instrument regarding certain permitted payments to employees is appropriate since, where the payments are permitted by the Instrument, the current requirement to seek exemptive relief will no longer apply. With respect to such exemption:

(a) we would suggest expanding the proposed exemption to include also incentive plans that are in place for a period of time prior to the bid (12 months) and possibly if there is a delay (six months) in the individuals participating in the incentive plan;

(b) we note the difference in approach for offeree issuers that have an independent committee and those that do not and question the rationale for applying clauses (i) through (iv) of section 2.22(3)(c) even in circumstances where there is an independent committee;

(c) we also note that the requirement in the proposed exemption relating to approval by an independent committee would not be effective in the context of hostile take-over bids as independent committees are often ineffective in that context and we would recommend that section 2.22(3)(c) reflect such distinction;

(d) in clause 2.22(3)(c)(iv)(B)(I), we suggest replacing the word "consideration" with "benefit";

(e) in clause 2.22(3)(c)(iv)(B)(II), the reference back to "clause (A)" appears to be an error, since that clause has no reference to value, and we think what is intended is a reference to clause (i). In any case, this particular requirement appears unduly restrictive, at least where there is an independent committee. In our view, the concept of "collateral benefit" in OSC Rule 61-501, which allows employee shareholders (who hold more than a *de minimis* 1%) to vote with the minority if an independent committee determines that the value of the benefit is less than 5% of the consideration to be received for the employee's shares, is not applicable in the take-over bid context. This concept is relevant in the context of minority approval in OSC Rule 61-501, as an employee who holds a significant number of shares could distort the minority vote if the quantum of the employee benefits to be received by the employee in the subject transaction is sufficient to outweigh the employee's economic interest in his or her shares. However, for the purposes of allowing collateral benefits for employees in connection with a bid, the same concept should not apply. The traditional analysis in the bid context has been directed at ascertaining whether a collateral agreement is for the purposes of increasing consideration, on the one hand, or for "a clearly established business or financial purpose related either to the terms upon which the offeror is prepared to acquire the target company or its ongoing operations", on the other (*Re CDC Life Science Inc.*). Although the CSA may regard a tender to a bid as in effect a 'vote' towards a minimum tender condition, bids can be made without a minimum tender condition. In our view, the analysis should remain focussed on whether the employee benefits are or are not for the purposes of increasing the consideration payable for their shares, rather than comparing the value of the benefit to the value of the share consideration to be received. Instead of the proposed requirement, we would suggest a requirement that the board (or the bidder in a hostile bid) determine that the employee benefit is on reasonable commercial terms (and the relevant bid circular should include a statement to that effect); and

(f) there will be circumstances where payments that do not fall within the proposed thresholds in section 2.22(3) should be permitted and we would welcome guidance from the CSA with respect to the criteria to be applied in connection with future exemptive relief applications.

Lock-up and Support Agreements

We support the CSA's approach, in section 3.2 of the Instrument, to compel disclosure of support and lock-up agreements in the context of take-over bids and issuer bids. We believe that targets should also be required to file the text of any agreements that could be characterized as "defensive tactics".

3. Exempt Bids

Private Agreement Exemption

There is little discussion in the release announcing the Instrument of the policy reasons behind limiting the private agreement exemption to once per lifetime of the offeror, as has been done in section 5.3(2). This limitation seems to us extreme in light of the obvious fact that circumstances can change over time and, once again, there is no discussion of any history of abuses in this area.

The sort of change proposed raises to its highest level our concerns with changing well-established statutory take-over bid law by way of CSA initiative. The private agreement exemption has been part of Canadian take-over bid legislation from the beginning, in 1967. Although it raises fairly obvious policy concerns, it has been justified (see, *e.g., Report of the Committee to Review the Provisions of The Securities Act (Ontario) Relating to Take-Over Bids and Issuer Bids,* September 23, 1983 (the "**Practitioners' Report**")) on the basis that Canadian public companies tend to be controlled to a much higher degree than elsewhere and major shareholders have a legitimate interest in maintaining some liquidity for their positions and also on the basis that a perverse effect of having no private agreement exemption would probably be a tendency for public issuers, of which there are not an excessive number in Canada, over time to become wholly-owned subsidiaries. Both the Practitioners' Report and the contemporaneous Securities Industry Committee report on *The Regulation of Take-Over Bids in Canada: Premium Private Agreement Transactions* (November 1983) approached the topic in a gingerly fashion, although both recommended modifications to the then-existing law. Modifications were made as a result. It may well be that further modifications ought to be made, even though no such case appears from or has been attempted in the CSA publications surrounding the Instrument, but if so we would hope and expect that they would be the outcome of a sustained and focussed consideration of the relevant issues by a group that included industry professionals and legal practitioners. We do not think that major change in this area is suitably introduced as a by-product of a regulatory harmonization initiative.

Foreign target exemption

With respect to the exemption in section 5.5 of the Instrument, we would recommend clarifying the exemption to provide that the consideration need not be identical or in the same form. For example, in the United States, an exemption is added to the identical treatment requirement to permit cash-only consideration in the United States where the cash is substantially equivalent in value to the consideration given to other holders.

It appears to us that the requirement that securityholders be entitled to participate in the bid on terms at least as favourable as the terms that apply to the "general body of securityholders" would be more clearly expressed if it referenced "holders of the same class of security".

De minimis exemption

With respect to section 5.6 of the Instrument, we recommend that an offeror should be entitled to presume that the *de minimis* exemption is available in local jurisdictions based either on publicly-available information or, in the context of an unsolicited offer, where a friendly bidder with access to the offeree issuer's books has relied on the same exemption.

Private Agreement Issuer Bid Exemption

Given the line of exemption orders which has established the basis upon which a "private agreement" issuer bid may be conducted, it would be appropriate to build into the Instrument a statutory exemption reflecting the common elements of those orders.

4. Companion Policy 62-104

We are concerned about the general approach of section 2.1 of the Policy which sets out broad principles and suggests that those involved in bids should conduct themselves in a manner consistent with these objectives. While it can be helpful for the Policy to set out the policy objectives of the Instrument, it does not seem appropriate for the Policy to impose (or suggest) standards of conduct for those involved in bids. Among other things, it takes the approach to take-over bid regulation in the direction of much greater uncertainty and lack of consistency across various standards of practice. Vague hortatory language can effectively work against the certainty objective that we hope and assume is a major objective of the Instrument.

Early Warning

In section 2.10 of the Policy, the words "under an exempt offering" should be deleted in order to avoid creating the impression that the purchase of treasury securities in a public offering cannot trigger the early warning reporting obligation.

Early Warning Reporting

We note that the obligation to file an "amending" early warning report arises upon the occurrence of a "material change in the information contained in the report". The term "material change" under the OSA has meaning only "in relation to an issuer" and not in relation to information. Section 6.2(3) of the Instrument appears to establish a standard for amendment not found elsewhere in the OSA. For example, the test in section 2.9 of the Instrument for delivery of an amended bid circular is the occurrence of a change in the information that would reasonably be expected to affect the decision of security holders to tender. In the prospectus context, the test is the occurrence of any material change; and in the existing early warning reporting provisions of the OSA the test is the occurrence of a change in any material fact in the report. Rather than establishing a new (and difficult to apply) standard of a "material change in information", we recommend that section 6.2(3) merely reflect the test in existing section 101(2).

Acquisitions During Bid by Person Other than Offeror

Section 102 of the OSA, which reduces the early warning reporting threshold to 5% once the bid has been made, is carried forward in section 6.3 of the Instrument. This provision has merely served as a trap for the unwary and, in our view, has not served the purpose for which it was originally intended. Our recommendation is that it be dropped from the Instrument.

Copies of News Release and Report

Section 6.5 of the Instrument would require the offeror to send the early warning news release and report to the reporting issuer. This requirement does not advance the purpose of the early warning reporting regime which is to notify the *marketplace* of the accumulation of securities of a reporting issuer so as to alert the market to the possibility of a change of control transaction. It was not designed to "warn" reporting issuers in particular of stock accumulations. The policy justification for imposing this burden on shareholders is not apparent.

Please do not hesitate to contact Mark Connelly (416.863.5526), Philippe Rousseau (416.863.5589) or Patricia Olasker (416.863.5551) if you wish to discuss any of our comments.

Yours very truly,

Davies Ward Phillips & Vineberg LLP

Davies Ward Phillips & Vineberg LLP

cc. Marsha Manolescu
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Anne-Marie Beaudoin
Autorité des marchés financiers (Québec)

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July 28, 2006

To: Alberta Securities Commission
British Columbia Securities Commission
Manitoba Securities Commission
New Brunswick Securities Commission
Securities Commission of Newfoundland and Labrador
Registrar of Securities, Department of Justice,
Government of the Northwest Territories
Nova Scotia Securities Commission
Registrar of Securities, Legal Registries Division,
Department of Justice, Government of Nunavut
Ontario Securities Commission
Prince Edward Island Securities Office
Autorité des marchés financiers
Saskatchewan Financial Services Commission
Registrar of Securities, Government of Yukon

Dear Sirs/Mesdames:

Re: Proposed National Instrument 62-104 *Take-over Bids and Issuer Bids* ("NI 62-104") and Related Forms and Companion Policy 62-104CP *Take-over Bids and Issuer Bids*

This submission is made to the Canadian Securities Administrators (the "CSA") in reply to the request for comments (the "Request for Comments") published April 28, 2006 on the proposed NI 62-104, related forms and the companion policy.

I am fully supportive of the CSA's initiative to harmonize the take-over bid and issuer bid rules and related early-warning requirements across Canada through national instruments.

My comments on the CSA proposals are as follows:

1. **Acting jointly or in concert**

I believe it make sense to maintain the existing regime in the *Securities Act* (Ontario) (and that of most other provincial and territorial securities acts) relating to those parties who are presumed to be acting jointly or in concert with an

offeror. In particular, deeming affiliates to be acting jointly or in concert with an offeror, as NI 62-104 proposes to do, may not always be warranted and may lead to unintended consequences. In addition, differentiating between the treatment of affiliates and associates (a deeming provision for the former category compared to a rebuttable presumption for the latter) seems akin to splitting hairs. The existing regime, which employs a rebuttable presumption for certain classes of parties, appears to accomplish the CSA's policy objectives while maintaining the benefit of flexibility in unusual or extenuating circumstances.

2. Restrictions on variations of bids

I agree generally with the restrictions on the variations of bids proposed in NI 62-104. However, I disagree with the proposal in subsection 2.21(3) that, insofar as such subsection relates to take-over bids, an offeror may not add new conditions to a bid after the bid has been commenced.

The conditions under which an offeror is prepared to take up and pay for securities of an offeree issuer must, to some extent, remain flexible in order for the offeror to be able to deal effectively with changing circumstances. For example, during the currency of a take-over bid, an offeree issuer may take certain actions that were unanticipated by the offeror and were not reflected in the offeror's existing conditions relating to the take-up and payment for securities of the offeree issuer. In such circumstances, the offeror should be entitled, through a notice of variation, to add new conditions to the bid in order to respond to actions taken by the offeree issuer. If the CSA are concerned about offerors adding new bid conditions in a frivolous or unmeritorious manner, the CSA can always exercise its public interest jurisdiction to intervene in the bid process. I am also not aware that the addition of new conditions to an existing take-over bid has become sufficiently problematic as to require a legislative change in the take-over bid regime in Canada.

3. Filing of agreements

I am supportive of the proposed filing requirements in section 3.2 given the policy objectives articulated by the CSA in the Request for Comments. However, given that an offeror may not be aware of all agreements that could affect the control of the offeree issuer, and given the importance of these agreements to the market (including the bidder and the offeree issuer security holders), I suggest that there be a similar obligation on the part of the offeree issuer to file copies of those agreements referred to in clause (d) of subsection 3.2(1) that have not been previously filed by the offeree issuer under Part 12 of National Instrument 51-102

(given the timing requirements for filing such agreements and the scope of such filing requirements) or the offeror under section 3.2.

4. Private agreement exemption

Although there has always been some degree of uncertainty relating to the serial availability of the private agreement exemption and other interpretive issues, the one-time only proposal (other than for intra-group transfers) set out in section 5.3, while having the merit of simplicity, may not be warranted in the Canadian context. A significant percentage of public companies in Canada have controlling shareholders and additional limitations on the disposition of control blocks may lead to reduced liquidity for all security holders and depressed share prices. Moreover, the one-time use of the exemption, together with the proposed requirement in clause (b) of subsection 5.3 that all of the purchases be negotiated at approximately the same time and completed within six months of the first purchase, might lead prospective purchasers to "maximize" the use of the exemption than they otherwise would by arranging for multiple vendors to sell their securities to the purchaser at approximately the same time, with the potential for leaks in the marketplace relating to such arrangements. It is not clear what policy objectives are being upheld by allowing a purchaser to purchase any number of securities over a six-month period at a 15% premium to current market prices while prohibiting a purchaser from purchasing the same or a lesser number of securities in a series of transactions completed over a longer period of time.

In the Request for Comments, the CSA state, as one of the justifications for the proposed changes to the private agreement exemption, that permitting an offeror to make continuous exempt purchases of a small number of securities effectively drains the control premium from minority security holders. If the proposed changes to the private agreement exemption are in fact aimed at preventing the "draining" of the control premium, then the CSA should consider lowering the existing maximum permitted premium of such purchases (115% of the market price of the securities at the date of the acceptance of the bid) to a lower premium (or even no premium at all), rather than limiting the availability of the exemption to a single instance.

Also worth mentioning is that issuers who are concerned that the serial availability of the private agreement exemption would "drain" the control premium from minority security holders could adopt a shareholder rights plan, which would require a purchaser, once it crosses a certain threshold of security ownership (typically 20% of the issued and outstanding securities), to make a take-over bid to all security holders, or trigger the dilutive effects of the plan.

In lieu of adopting the proposed changes to the private agreement exemption in section 5.3 and given the historical interpretative difficulties with the private agreement exemption, I suggest that interpretive guidance on the serial availability of the private agreement exemption be included by the CSA in the companion policy to NI 62-104.

5. Other matters

(a) *Section 2.2 - Restrictions on acquisitions during take-over bids*

Subsection 2.2(3) allows an offeror to purchase securities of the class that are the subject of a take-over bid and securities convertible into securities of that class beginning on the third business day following the date of the bid until the expiry of the bid if certain conditions are satisfied. One of these conditions is that purchases be made in the normal course through the facilities of a recognized exchange. A "recognized exchange" is defined as either the Toronto Stock Exchange or the TSX Venture Exchange. Given the number of inter-listed Canadian public issuers, and assuming compliance of the trade with the securities laws of any other applicable jurisdiction, why should the recognized exchanges be limited to the Toronto Stock Exchange and the TSX Venture Exchange?

(b) *Section 3.2 - Filing of agreements*

Consider adding the words "of the offeree issuer" after the words "security holder" in the first line of clause (a) of the subsection 3.2(1).

(c) *Companion Policy 62-104 CP*

Section 2.1 states that NI 62-104 is designed to establish a clear and predictable framework for the conduct of bids in a manner that achieves three primary objectives and that those involved in a take-over bid or issuer bid are encouraged to conduct themselves in a manner consistent with those objectives. Among the objectives articulated is an open and even-handed bid process that does not unfairly discriminate among, or exert pressure on, offeree issuer security holders. I suggest that the reference to "that does not unfairly discriminate among, or exert pressure on, offeree issuer security holders" be deleted. First, given that the first objective is the equal treatment of offeree issuer security holders, it is difficult to understand how a bid could be conducted so as to achieve equal treatment of all offeree issuer security holders, while simultaneously unfairly discriminating against those same security holders. In addition,

the reference to "exert pressure on" is unnecessary and not particularly helpful, as it could lead offeree issuers to challenge take-over bids that are made in full compliance with the legislative framework on the basis of the offeree issuer's allegation that the bid exerts pressure on or "unfairly" exerts pressure on security holders. Of course every take-over bid exerts some degree of "pressure" on security holders, as they are required to make an investment decision concerning whether or not to tender to the bid within a limited timeframe.

Yours truly,

Richard J. Steinberg

Encls.
RJS/ssp

FRASER MILNER CASGRAIN LLP

July 28, 2006

Alberta Securities Commission
British Columbia Securities Commission
Manitoba Securities Commission
New Brunswick Securities Commission
Securities Commission of Newfoundland and Labrador
Registrar of Securities, Department of Justice, Government of the Northwest Territories
Nova Scotia Securities Commission
Registrar of Securities, Legal Registries Division, Department of Justice, Government of Nunavut
Ontario Securities Commission
Prince Edward Island Securities Office
Autorité des marchés financiers
Saskatchewan Financial Services Commission
Registrar of Securities, Government of Yukon

Dear Sirs/Mesdames:

Subject: Proposed National Instrument 62-104 *Take-over Bids and Issuer Bids* – Response to Request for Comments

We are pleased to have the opportunity to respond to your request for comments on proposed National Instrument 62-104 (the "Instrument").

We are very supportive of this initiative and the motivations behind it. Moving the bid requirements from the acts to a national instrument will enable the securities regulatory authorities to respond to future changes in market dynamics by making any necessary amendments to the bid requirements in a much more timely manner. The time it took to implement the "Zimmerman" amendments illustrated the need for the proposed instrument. In addition, the amendments will provide needed clarification to a number of areas that have given rise to uncertainty in the past. We commend the CSA for the quality of this project and for the considerable work that has obviously gone into it.

In this letter, we will first address the areas that you have highlighted for specific comment. We will then comment on specific provisions.

1. *Acting Jointly or in Concert*

We agree that affiliates of an offeror should be deemed to be acting jointly or in concert with the offeror, and that there should be a rebuttable presumption that associates of an offeror are acting jointly or in concert with the offeror. From an investor confidence standpoint, it is likely that the general public will virtually always perceive affiliates to be acting in concert with each other in regard to securities acquisitions and voting, since they are under the same control. The same is not necessarily true for associates. However, we think the current legislation and section 1.7 of the Instrument lack sufficient precision to enable a user to properly interpret the concept of "jointly or in concert" except in the clearest of situations.

Our understanding is that the intent of including the concept of "acting jointly or in concert" in take-over bid and issuer bid legislation is to prevent two or more persons who collude to accumulate or vote securities together from avoiding certain prohibitions and reporting requirements that would apply if their activities were carried out by one person. These are the activities covered in clauses (a) and (b) of subsection 1.7(2) of the Instrument, and this is how "acting jointly or in concert" should be defined. The problem with section 1.7 is that it has the additional open-ended "question of fact" reference in subsection (1), which indicates that the concept can be applied in a virtually unlimited manner. This has caused uncertainty in the past and, in hostile bid situations, the vagueness of the concept has led to much legal wrangling.

For example, an offeror and its chief executive officer may have no agreement or understanding that they will acquire or vote securities together, and in that case they should not be considered to be acting jointly or in concert with each other. If the legislators had not intended this to be the case, there would have been a presumption provision in the legislation for a chief executive officer, as there is for associates and affiliates. Yet, with an open-ended definition, most people would say that a chief executive officer <u>always</u> acts jointly or in concert with the company, since that is his or her job. The same could be said for other senior officers and directors, who could not unreasonably be characterized as "acting jointly or in concert" with the offeror by virtue of subsection 1.7(1) of the Instrument because of their positions, rather than any agreements or understandings regarding trading or voting. This should not be the case.

This problem can be addressed by removing subsection 1.7(1) from the Instrument, making subsection (2) the first subsection of section 1.7 and starting it with: "For the purposes of this Instrument, a person "acting jointly or in concert" with an offeror means any of the following:". This would add considerable clarity to the concept. Then, as consequential drafting changes, we would suggest changing "every person that" to "a person who" in clauses (a) and (b), and changing "every" to "an" in clause (c).

2. *Restrictions on Variation of Bids*

We agree with the proposed restrictions. When a take-over bid or issuer bid is made, the investing public has a reasonable expectation that the bid constitutes a firm, *bona fide* offer to purchase, subject only to its stated conditions. Investment decisions are made on the basis of that expectation, and bidders should not be permitted to arbitrarily make a bid less attractive (and less

likely to succeed), which essentially amounts to a withdrawal, once the bid has been launched. In our view, the rationale is similar to the one underlying the bid financing requirement.

3. *Collateral Benefit Prohibition*

The new collateral agreement provision is an improvement on the existing law, and it will eliminate the need for many applications for exemptive relief. However, we feel that it falls short of addressing the fundamental interpretation problem that has existed in this area ever since the collateral benefit concept was introduced into the legislation.

The problem lies in the use of the term "consideration of greater value", which has been the subject of a variety of interpretations as to its application. Some lawyers are of the view that if there is a collateral agreement in which the security holder is providing full value in exchange for the consideration it is receiving from the bidder, there is no violation of the prohibition and no application for exemptive relief is required. Others believe that there is a requirement to apply for exemptive relief if there is any collateral agreement, even if it is clear that it is a full value for value transaction. Still others are unsure of what the legislation means, so they apply for relief to be on the safe side.

As an example, in negotiations for a friendly take-over bid, the major shareholder of the target may agree to purchase an asset of the target that the bidder does not want. Does this mean that the major shareholder is receiving "consideration of greater value" in the bid? Is exemptive relief required? What if there is independent evidence that the major shareholder is paying full value for the asset? Does that mean no exemptive relief is required, or just that the independent evidence may be used as a basis for obtaining exemptive relief?

There are numerous other examples where the application of the legislation is unclear. The Instrument, while providing a helpful safe harbour, does not resolve the ambiguity for circumstances in which the safe harbour does not apply. The Companion Policy appears to suggest in an indirect way that, unless the safe harbour applies, an application for exemptive relief is <u>always</u> required if there is any agreement whatsoever between a shareholder and the bidder in the context of a bid (apart from an agreement to tender into the bid). If this is the intention of the legislation, it should be stated clearly. If it is not the intention, there should be a clear statement as to when exemptive relief is or is not required.

A possible way to address the ambiguity and eliminate the need for costly and time-consuming exemption applications in almost all cases would be to

- change the last words of subsection 2.22(2) to "... of providing a security holder of the offeree issuer with a benefit, which for this purpose includes participation in any transaction.";

- change the introductory words of subsection (3) to "Subsection (2) does not apply to:"; and

- add a fourth alternative, paragraph (d), to subsection (3). The conditions in new paragraph (d) would be the same as conditions (i), (ii) and (iii) in paragraph (c), and with the additional conditions that

    - an independent committee determines that the security holder is providing at least equivalent value for what it is receiving in the collateral transaction,

    - if the security holder and its associates own or control one per cent or more of the outstanding securities of any class of securities of the offeree issuer, the independent committee's determination is confirmed by an independent, qualified person, and

    - the determination of the independent committee and, if applicable, the independent person, are disclosed in the applicable circular.

Much of section 2.3 of the Companion Policy could then be eliminated.

If and when the United States adopts amendments to its "tender offer best-price rule" as is currently proposed, we recommend that consideration be given to harmonizing the Canadian legislation with that of the United States in this area to the extent practical. If harmonization is chosen but the United States amendments do not address non-employee matters in a concise fashion, it may be necessary to supplement the Canadian legislation to fill the gap.

4. *Filing Agreements*

We agree with the new requirements and the stated rationale for introducing them.

5. *Private Agreement Exemption*

The proposal provides needed clarity to the exemption and, in our view, aligns the exemption with its originally intended purpose. A reasonable alternative to the proposal would be to eliminate the permitted 15% premium and restrict the exemption's use to once every two years per offeror per issuer, rather than once ever. Given that one of the primary objectives of the Instrument, as set out in the Companion Policy, is equal treatment of offeree issuer security holders, the logic for continuing to permit a 15% premium for some security holders to the exclusion of others may be somewhat strained.

6. *Early Warning System*

In our view, the early warning requirements should not be split between two different national instruments. The split in the current legislation might be rationalized on the basis that the basic early warning requirements are in the acts, which are difficult to amend or override. This rationalization will no longer apply if all the requirements are national instruments.

Ideally, all the trade reporting requirements, both early warning and insider trading, should be in a single location so a user can readily see how they interact. If this is considered too major a step to take at this time, at least all of the early warning requirements should be together. However, if

the early warning requirements are not in the Instrument, it would be desirable for the Companion Policy to specify where they are located.

COMMENTS ON SPECIFIC PROVISIONS

Section 1.1

7. In the definition of "issuer bid", "those persons" should be replaced with "any person in the local jurisdiction". Otherwise, "those persons" could be construed to mean only the persons to whom an offer is made, which would defeat the purpose of that part of the definition.

8. In the definition of "offeror", we suggest inserting ", except as provided in sections 2.1 and 6.1," after "means". A person who does not have familiarity with the Instrument and wants to check the meaning of a term used in the Instrument should be able to rely on the general definition section without having to search elsewhere for possible alternative definitions of the same term. If it is impractical to have the alternative definitions in the general definition section, then the general definition section should at least guide the user to the locations of the other definitions.

9. It is unclear to us as to why clause (c) in the definition of "issuer bid" would not also apply to the definition of "take-over bid".

Section 1.6

10. We suggest adding a subsection that states that a person is not a beneficial owner of securities solely because the holder of the securities has agreed to deposit them under a take-over bid, not exempt under Part 5, made by the person. Otherwise, circular bid lock-up agreements for 10% or more of the outstanding securities may technically require an early warning report, which should not be the case.

Section 1.7

11. In addition to our earlier comments under the heading *Acting Jointly or in Concert*, we recommend, in subsection (3), the insertion of ", in the absence of evidence to the contrary," or similar wording after "presumed", as is done in other securities legislation such as in the definition of "distribution" or "control person". In the absence of those words, many readers will not readily identify the distinction between "deemed" and "presumed".

12. In subsection (4), we suggest changing the last words, starting with "to be deemed", to "considered to be acting jointly or in concert with the offeror in connection with the bid solely by reason of the agency relationship." As a minimum, the reference to "presumed" should be dropped, since it is not relevant in this context.

Section 2.2

13. We suggest moving clause (3)(d) to its more logical location at the end of the subsection.

Section 2.3

14. We suggest deleting "making an issuer bid" near the beginning of subsection (1).

Section 2.4

15. In subsection (3), we suggest inserting "or offer to acquire" after "acquire".

Section 2.10

16. The effect of subsections (4) and (6) is that in an all-cash bid, if the offeror waives a condition that is not specifically stated in the bid as being waivable at the sole option of the offeror, there must be a notice of variation but the bid does not need to be extended. We do not think this reflects the intention of the provisions. In any event, bid circulars virtually always state, and the investing public generally understands, that bid conditions are waivable. We suggest streamlining section 2.10 by deleting subsection (6) and incorporating most of its contents into subsection (4). Possible wording for subsection (4) could be "Subsections (1) and (3) do not apply to a variation in the terms of a bid consisting solely of the waiver of a condition in the bid where the consideration offered for the securities consists solely of cash, but in that case the offeror must promptly issue and file a news release announcing the waiver." The reference to an extension of the bid resulting from the waiver should be deleted because the effect of the subsection is that there is no extension.

Section 2.22

17. In addition to our earlier comments under the heading *Collateral Benefit Prohibition*, in our view the disclosure referred to in subclause (3)(c)(iii) and the in the last words of subclause (3)(c)(iv) should, in the case of a take-over bid, be in either the take-over bid circular or the directors' circular. The offeree issuer may not have been involved in the collateral agreement. More importantly, Items 15 and 23 of Form 62-104F1 would appear to require the disclosure to be in the take-over bid circular. Apart from the requirements of the Form, section 2.22 presumably requires the disclosure because it might be relevant to the tendering decision, and therefore it is arguably preferable for it to be in the take-over bid circular if this is practical. The option of having it in the directors' circular is probably most appropriate if, at the time of the commencement of the bid, the collateral agreement does not yet exist or an independent committee of the offeree issuer's board has not yet determined that the benefit is allowed under the 5% test. Possible wording to correct this is: "full particulars of the benefit are disclosed in the bid circular, or in the directors' circular in the case of a take-over bid".

18. In subclause (3)(c)(iv)(A), "associated entities" should be changed to "associates".

19. In our view, it is preferable for the definition of "independent committee" to be in the Instrument rather than the Companion Policy, particularly since independence is defined differently in other instruments such as MI 52-110.

Section 2.23

20. In subsection (1), the hyphen should be removed from "take-up".

21. Subsection (2) completely removes the requirement to take up proportionately from the entire issuer bid, including the non-odd lot portion, if odd lot purchases are included, which is clearly not the intention. Possible revised wording to correct this is: "Subsection (1) does not apply to an issuer's acquisitions, under the terms of an issuer bid, of securities that, if not acquired...".

22. Similarly, subsection (3) should not completely remove the requirement to take up proportionately from the entire modified Dutch auction issuer bid. It should only allow the bidder not to take up securities that are ineligible for take-up as a result of the modified Dutch auction process and to exclude those securities from the proportionate take-up calculation. Possible wording is:

    "If, under the terms of an issuer bid

    (a) security holders who deposit securities under the bid are entitled to elect a minimum price per security, within a range of prices, at which they are willing to sell their securities under the bid, and

    (b) a security holder elects a minimum price that is higher than the price that the offeror pays for securities under the bid

    then the securities deposited under the bid by that security holder are deemed not to have been deposited for the purposes of subsection (1)."

Section 2.26

23. The hyphen should be removed from "take-up".

Section 2.27

24. In clause (2)(c), we suggest inserting "offered in the bid" after "consideration".

Section 2.29

25. Regarding subsection (5), the offeror will not know, at the time it takes up securities, the maximum number of securities it can take up without contravening section 2.21 or 2.23 if more securities can subsequently be deposited under the bid. A possible way to correct the subsection would be to add the following to the end of it: ", or without potentially contravening either of those sections in the event that additional securities are subsequently deposited under the bid."

Section 2.30

26. The hyphen should be removed from "take-up".

Section 3.1

27. Subsection (3) should refer to subsection (2) as well as (1), and it should refer to the de minimis exemptions (sections 5.6 and 5.13) as well as the foreign exemptions.

Section 3.2

28. In clause (1)(a), we suggest inserting "of the offeree issuer" after the first "holder" and deleting "made by the offeror".

29. We suggest changing the last words of clause (1)(d) to "… regarded as material to a security holder in deciding whether to accept the bid".

Section 3.3

30. We are unclear as to the need for the first three subsections of this section, since the signing requirements are in the forms, which are part of the Instrument. For completeness, subsection (1) would need to address the possibility that an offeror in a take-over bid may be an individual, as in Form 62-104F1, but we suggest that subsections (1), (2) and (3) be deleted.

Section 5.1

31. Subsection (6) should be deleted because all of the references in the exemptions to "market price" apply only to a bid for securities for which there is a published market.

Section 5.2

32. Near the end of clause (b), we suggest deleting "the requirements in".

Section 5.3

33. See our earlier comments under the heading *Private Agreement Exemption*.

Section 5.5

34. In clause (e), for purposes of clarity, we suggest inserting "to holders of securities of the class subject to the bid" after "offeror".

35. Clause (f), which should cover the publication in a foreign jurisdiction of information that is <u>not</u> sent to security holders, should not refer to paragraph (e), which only covers materials that <u>are</u> sent to security holders. We suggest the following possible wording to begin clause

(f): "all of the information relating to the bid that is published by or on behalf of the offeror outside of Canada is published in Canada in a manner… ".

Section 5.6

36. For consistency with other provisions of the Instrument, we suggest changing "a" to "the" before "local" in the introductory words.

37. Clause (d) should be aligned with clause 5.5(e). We suggest deleting the second "of securities" and changing the last words to "sent to security holders whose last address as shown on the books of the offeree issuer is in the local jurisdiction and filed."

Division 3 – All Sections

38. We suggest removing "the requirements of" from the first part of each section. The take-over bid exemptions do not have those words.

Section 5.8

39. The issuer bid exemption that is currently in section 2.29 of National Instrument 45-106 should be incorporated into section 5.8 of the Instrument. It is unclear to us why the Instrument, which is intended to consolidate the take-over bid and issuer bid requirements, would omit an issuer bid exemption that is in another instrument that deals with different subject matter.

Sections 5.9 and 5.10

40. In our view, the order of these two sections should be reversed, and their names should be changed to "Normal course issuer bid exemption – through a recognized exchange" and "Normal course issuer bid exemption – not through a recognized exchange". A "normal course issuer bid" is the generally recognized term for purchases by an issuer of its own securities through a stock exchange, and it must comply with the stock exchange rules which are not the same as the requirements in section 5.9 of the Instrument. It would be misleading for users of the Instrument to see the heading "Normal course issuer bid exemption", followed by a set of rules that are different from the stock exchange requirements. In addition, the exemption in section 5.9 is only applicable to acquisitions on a published market other than the Toronto Stock Exchange or the TSX Venture Exchange, and is therefore rarely used.

41. Near the end of clause (b) of section 5.9, we suggest deleting "the requirements in".

42. Since section 5.9 only applies to bids not made through a recognized exchange, subsection 5.9(3) should be moved to the recognized exchange exemption, and "this section" in subsection 5.9(3) should be changed to "any exemption in this Division" as in the current legislation.

Section 5.12

43. Our earlier comments regarding clauses (e) and (f) of section 5.5 apply also to the same clauses of section 5.12.

Section 5.13

44. Our earlier comments regarding clause 5.6(d) apply also to clause 5.13(d).

Part 6 – Title

45. The definition of "early warning requirements" under current NI 62-103 does not include the news release described in section 6.3 of the Instrument. As discussed later in this submission under "Amendments to NI 62-103", NI 62-103 should not be amended to include section 6.3 acquisitions in the definition of "early warning requirements", as proposed, since this would result in several substantive changes to the operation of NI 62-103, not just consequential changes. To avoid confusion, we suggest changing the title of Part 6 to "Reports and Announcements of Acquisitions" and changing the heading above section 6.2 to "Early Warning".

Section 6.2

46. In subsection (1), the words "that has made a bid" indicate that no early warning report is required by any offeror that has made a circular bid, even if that offeror acquires more than 10% of the outstanding securities after the circular bid has been unsuccessful and is no longer outstanding. Possible revised wording to begin the subsection, using similar language as in sections 3.2 and 3.4 of the Instrument, could be: "Every offeror that, other than under or during a take-over bid made by that offeror under Part 2, directly or indirectly acquires… ".

47. Clause (1)(c) makes no reference to subsection 3.1(2) of NI 62-103, which is a fundamental exception regarding the contents of the news release. Accordingly, the cross-reference should not be to Appendix E unless subsection 3.1(2) is also referenced. Our suggestion is just to change "set out in Appendix E" to "required by section 3.1".

48. In clause (1)(d), "new" should be "news".

Section 6.3

49. We suggest changing "in compliance with" to "under", for consistency with sections 3.2 and 3.4 of the Instrument.

50. In subsection (1), we suggest deleting "an offeree issuer that is".

Section 6.4

51. We have some difficulty with this section. Firstly, since no report is required under section 6.3, there is no such thing as an "earlier report", and there should be no reference to a report in the section. Secondly, the interpretation of the section depends on whether "promptly", in section 6.2, is earlier or later than "prior to the opening of trading on the next business day", in section 6.3. Those who interpret "promptly" as the earlier of the two will issue only an early warning news release. Those who interpret "promptly" differently may issue only a section 6.3 release. This is obviously an unsatisfactory way to address the duplication issue. Our recommendation is to simply not require a news release under section 6.3 if one is required under section 6.2 on the same facts.

Section 6.5

52. To reflect the fact that no report is required under section 6.3, and for clarification, we suggest changing "and" to "or" both times, and changing "the news release or report" to "each filing", as in section 2.2 of NI 62-104.

FORM 62-104F1

Item 12, Clause (c)

53. We suggest changing the first word to "that", since the clause repeats a legal requirement. The word "whether" implies otherwise.

54. We suggest deleting "reasonably", since it implies that it is possible for an offeror to have a belief that it considers to be unreasonable, which is a contradiction in terms. Deleting "reasonably" would not negate the Instrument's requirement for the belief to be reasonable.

55. We suggest inserting "of the take-over bid" after "conditions", as in subsection 2.24(2) of the Instrument.

Item 15

56. In the introductory words, we suggest inserting "relating to the take-over bid" after "issuer", as in section 3.2 of the Instrument.

57. We are unclear as to why "the value attributed to it" is included under this item. Attributed by whom? Why and how would a value be attributed to a security holder's agreement to tender to the bid? If the intention is to help security holders determine whether there has been compliance with the collateral benefit provisions of the Instrument, the required disclosure is already covered by those provisions, and assigning a value is only necessary under a restricted set of circumstances. We suggest either deleting this part of the item or adding clarity to what it means and when it applies.

Item 16

58. The heading of this item appears to only partly reflect the contents. An alternative heading could be "Other Arrangements Relevant to the Bid".

59. We suggest changing the last words to "regarded as material to a security holder in deciding whether to accept the bid".

Item 18

60. In the second paragraph, the words "If a valuation is otherwise provided" are somewhat vague. For example, does "provided" mean that the valuation is reproduced in the circular, or that a valuation has been "provided" to the bidder? If a bidder is provided with a valuation, is there an obligation to disclose it in the circular if the bid is not an insider bid? What is the meaning of "valuation" in this context? There is also a question of whether prior valuations are covered and what constitutes a "prior valuation". Rather than devoting a large part of the form to addressing these various areas of uncertainty, we suggest eliminating the second paragraph. It is extremely rare for an independent valuation to be obtained for a take-over bid that is not an insider bid. If a valuation is not legally required, the universal practice for a bidder wishing to demonstrate fairness from an independent perspective is to obtain a fairness opinion and reproduce it in the bid circular.

Item 19

61. In order not to discourage unsolicited securities exchange bids by making them unduly onerous, subsection (2) should also exclude information, including pro forma financial information, that can only be derived from disclosure to which the offeror does not reasonably have access regarding the offeree issuer or any of the offeree issuer's assets. If there is concern that this would be a self-policing exception, there could be a provision that the exception can only be used with the consent of the regulator in the jurisdiction where the target's head office is located, or in any jurisdiction if the target's head office is outside of Canada. In the context of a take-over bid, where timing can be critical, a formal exemption application should not be required in this circumstance.

Item 23

62. The meaning of "already disclosed" is unclear. We suggest changing "already" to "previously generally" or similar wording, as in Item 29 of Form 62-104F2 and the current legislation.

63. For consistency with the other forms, we suggest changing "might reasonably" to "would reasonably be expected to".

FORM 62-104F2

Item 1

64. We suggest deleting "Offeree" in the title of the item and the two times it appears in the body of the item.

Item 2

65. After "number of securities" in the first paragraph, we suggest inserting ", or principal amount of debt securities,", as in the current legislation.

Item 7, Clause (c)

66. Our comments above regarding clause (c) of Item 12 of Form 62-104F1 apply here as well, with appropriate modifications.

Item 8

67. In the second paragraph, we suggest inserting "one or both of" after " rely on".

Item 10

68. We suggest that this item be changed so that it is aligned with Item 13 of Form 62-104F1.

Item 17

69. Our comments above regarding Item 15 of Form 62-104F1 apply also to clause (a) of this item, with appropriate modifications.

70. In clause (b), we suggest inserting "other" after the first "any".

Item 20

71. We suggest deletion of the second paragraph for reasons similar to those discussed above regarding Item 18 of Form 62-104F1.

Item 28

72. In the introductory words, "jurisdiction" should be plural.

FORM 62-104F3

Item 13

73. As in Item 23 of Form 62-104F1, we suggest changing "already" in the first sentence to "previously generally" or similar wording.

74. In clauses (a), (b) and (e), "securityholder" should be two words as in the rest of the Instrument.

75. Clause (c) needs to be a little more specific. Possible wording is "any external valuation or fairness opinion obtained by the directors of the offeree issuer for the purpose of evaluating the take-over bid".

76. As Item 13 is drafted, it is unclear whether all matters described in clauses (a) to (e) must be disclosed regardless of whether they would reasonably be expected to affect the decision of the security holders to accept or reject the offer. Most of those matters would meet that test in any event, but this is not necessarily true of "or other transaction" in clause (d). Also, since a going private transaction would always be a material change, clause (d) should be rephrased. Possible wording might be: "any plans or proposals for material changes in the affairs of the offeree issuer, including a going private transaction or other business combination".

FORM 62-104-F4

Item 12

77. As in Item 23 of Form 62-104F1, we suggest changing "already" in the first sentence to "previously generally" or similar wording.

FORM 62-104F5

Item 3

78. We suggest combining subclauses (i) and (ii) into a single clause (i) that reads "the take-over bid circular or issuer bid circular".

79. Subsection (2) has been skipped in the numbering of the subsections.

TAKE-OVER BID LEGISLATION THAT IS NOT IN THE INSTRUMENT

80. In addition to the issuer bid exemption in section 2.29 of National Instrument 45-106 (discussed under "Section 5.8" above), the aggregation and pledgee relief for bids in NI 62-103 should, in our view, be in the Instrument so that all the legislation directly related to bids would, to the extent practical, be in one location.

COMPANION POLICY

Section 2.3

81. See our comments above under the heading *Collateral Benefit Prohibition* and our last comment on section 2.22 of the Instrument suggesting that the definition of "independent committee" be in the Instrument rather than the Companion Policy.

82. In our view, the Companion Policy should acknowledge and address the possibility of a collateral agreement arising in the context of an unsolicited take-over bid, in which case the independent committee process contemplated in the Instrument may not be available. Reference might be made to section 3.2 of the Companion Policy to OSC Rule 61-501 for possible wording.

Section 2.7

83. The heading should be changed to "Determination of Security Holdings".

84. "Canada" should be followed by "or the local jurisdiction" in the three places it appears in the section.

Section 2.10

85. For the reasons discussed above under "Part 6 – Title", we suggest changing the title of this section to "Reports and Announcements of Acquisitions".

86. Since no report is required under section 6.3 of the Instrument, this section needs to be adjusted. One possibility would be to delete the passage beginning with "obligation" and ending with "6.2 and 6.3" and substituting "disclosure and filing obligations of section 6.2 or 6.3".

87. For completeness, we suggest including a reference to a private acquisition from a security holder as a method of triggering the requirements. It is unclear why only two methods would be mentioned. Alternatively, if the point of the section is to alert readers to the fact that a treasury issuance can trigger the requirements, "market purchases" could be changed to "purchases from security holders".

88. The words "under an exempt offering" at the end of the section should be deleted because the triggering threshold may be crossed as a result of purchases under a prospectus.

AMENDMENTS TO NI 62-103

89. In subclause (a)(ii), "or company" should be deleted since the Instrument does not contain the word "company".

90. In subclause (a)(iii), "the take-over bid" should be replaced with "the take-over provisions".

91. Under subclause (a)(v), the acquisition announcement provisions would become part of the "early warning requirements" which would be a change from current NI 62-103. This would make all the references to the acquisition announcement provisions in NI 62-103 redundant, since they all appear together with references to the early warning requirements. More importantly, it would also substantively change NI 62-103, since several requirements that currently apply only to the 10% early warning requirement would also apply to the 5% acquisition announcement requirement. These changes would go beyond "consequential amendments". Unless further changes are made to address these problems, we suggest

changing the proposed definition of “early warning requirements” by substituting “section 6.2” for “Part 6”.

92. In clause (a)(viii), the first “provision” should be plural.

93. In clause (b), “or under” at the beginning of the first quoted passage should be deleted. Also, in spite of the words “most recently” in subsection 2.1(1) of NI 62-103, we suggest that the second quoted passage in clause (b) of the amendments not be removed from the subsection, since the passage clarifies that the most recent information as between a material change report and the information provided under section 5.4 of National Instrument 51-102 information should be used.

94. In clause (c), the reference to section 6.3 should be deleted. Among other reasons, section 6.3 does not require a report.

95. Clause (e) does not appear to refer to the right part of section 1.7 of the Instrument or reflect the fact that there is a presumption, not a deeming provision, for associates. Possible corrective wording could be: “in paragraph 5.1(b), strike all the words commencing with "the presumption" and replace them with "paragraph 1.7(2)(c) and subsection 1.7(3) of NI 62-104 which respectively provide that an affiliate of an offeror is deemed, and an associate of an offeror is presumed, to be acting jointly or in concert with the offeror"”.

96. Regarding subclause (j)(i), we are unclear of the purpose of the proposed new paragraph (e.1). It appears to duplicate paragraph 1(i) of Appendix E, except that it does not exclude trades on a stock exchange or other published market. In this context, “offered” would not appear to be the right terminology, since presumably the price actually paid would be the required information. However, there could have been several open market purchases at different prices and at various times. The paragraph appears to require the price only for the single trade that brought the offeror over the applicable threshold, which will not be meaningful. This also does not seem to be a “consequential” amendment but a substantive one, and perhaps should be considered instead as part of any comprehensive review of NI 62-103 that may take place in the future. We recommend deleting this amendment.

97. Regarding subclause (j)(iii), we suggest that consideration be given to designating new paragraph (k) as one of the items that, under subsection 3.1(2) of NI 62-103, is not required to be in the news release if it is in the report.

98. We suggest that there be a consequential amendment to paragraph 9.1(1)(a) of NI 62-103 by changing “has filed” to “files”, to reflect the fact that insider reports must now be filed within 10 days of the trade, rather than 10 days after the end of the month following the trade. As the paragraph now reads, section 9.1 technically has no meaning because, for any trade other than on the last day of a calendar month, the insider trading report is due before the due date for the eligible institutional investor report.

Thank you for considering these comments. If you wish to discuss any of them or have any questions, please contact Ralph Shay at 416-863-4419 or ralph.shay@fmc-law.com after July 31st.

Yours truly,

FRASER MILNER CASGRAIN LLP

Barristers & Solicitors
Patent & Trade-mark Agents

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July 28, 2006

VIA E-MAIL

Alberta Securities Commission
British Columbia Securities Commission
Manitoba Securities Commission
New Brunswick Securities Commission
Securities Commission of Newfoundland and Labrador
Registrar of Securities, Department of Justice, Government of the Northwest Territories
Nova Scotia Securities Commission
Registrar of Securities, Legal Registries Division, Department of Justice, Government of Nunavut
Ontario Securities Commission
Prince Edward Island Securities Office
Autorité des marchés financiers
Saskatchewan Financial Services Commission
Registrar of Securities, Government of Yukon

c/o Alberta Securities Commission
400 - 300 - 5th Avenue S.W.
Calgary, Alberta
T2P 3C4

Attention: Marsha Manolescu

c/o Autorité des marchés financiers
Tour de la Bourse
800, square Victoria
C.P. 246, 22e étage
Montréal, Québec
H4Z 1G3

Attention: Anne-Marie Beaudoin, Directrice du secrétariat

Dear Sirs/Madams:

Re: Proposed National Instrument 62-104 – *Take-over Bids and Issuer Bids*

This letter is in response to the Request for Comments relating to Proposed National Policy 62-104 – *Take-over Bids and Issuer Bids* (the "Proposed Rule") published by the Canadian Securities Administrators (the "CSA") on April 28, 2006. We are pleased to have this opportunity to provide our comments on the Proposed Rule.

General Comment

We commend the CSA for their efforts to introduce a harmonized take-over bid and issuer bid rule across all Canadian jurisdictions. This initiative seeks to eliminate duplication and inconsistencies in existing take-over bid regimes and to codify discretionary exemptions that are routinely granted by the Commissions. We support any and all initiatives in this direction.

Restrictions on Acquisitions during Take-Over Bid

Section 2.2(3) of the Proposed Rule continues the current provision in Section 94(3) of the Ontario *Securities Act* that permits a bidder to purchase 5% of the outstanding shares of a target in the market after a take-over bid has been commenced provided that the appropriate disclosure is made in the take-over bid circular. We recommend that the CSA take this opportunity to amend that provision.

We believe that Section 94(3) continues to make sense in the circumstance where a bidder has relatively few shares of the target company and the trading price of the target shares in the market is below the bid price. In that circumstance, allowing the bidder to acquire up to 5% of the outstanding shares through ordinary course transactions provides liquidity to shareholders who would like to exit the investment immediately and not await the conclusion of the take-over bid. If the bidder accumulates 5%, and pays less than the bid price for the shares, we believe this is helpful to the capital markets.

On the other hand, the current take-over bid by Xstrata for Falconbridge demonstrates the circumstance where this rule should not apply. Where the bidder already owns 20% of the target company, and the stock is trading at a significant premium to the bid price, the only rationale for a bidder to acquire more shares in the market is to solidify its ownership position in an effort to obtain a blocking position and discourage competing bids. We submit that in such circumstances, the bidder should not be entitled to acquire additional shares. We also note that it is very likely that in the future, target companies will use rights plans in the same way that Falconbridge did to hold off a 20% shareholder. Not all public companies have rights plans, however, and regulating this issue through the use of rights plans is not ideal in any event.

We recommend that Section 94(3) be amended to restrict its use to circumstances where (i) the bidder and any joint actors will, following any purchases under the exemption, own an aggregate of not more than 20% of the outstanding shares of the target and, (ii) the bidder pays no more for shares purchased under the exemption than the bid price.

Convertible Securities

The current definition of a take-over bid refers to an offer to acquire outstanding "voting or equity securities". The concept does not extend to an acquisition of a convertible debenture or a stock option that is convertible or exercisable into a voting or equity security. There is a decision of the Ontario Securities Commission effectively prohibiting Noranda from purchasing convertible debentures of Falconbridge on the theory that to do so would be contrary to the policies behind the take-over bid rules. We recommend that the CSA consider taking this opportunity to clarify how the take-over bid rules work with respect to convertible securities. We acknowledge that Ontario Securities Commission staff raised this point with the Five Year Review Committee, which chose not to address the issue.

Our understanding is that at the moment this issue is left to be addressed by the very general wording of Section 92 of the Ontario *Securities Act* which refers to a "direct or indirect offer to acquire" securities. That does not provide much guidance as to how, for example, the private agreement exemption works in the context of the purchase of a convertible security.

Bid Consideration

Section 2.21(3) of the Proposed Rule provides that after a bid has been commenced, an offeror is restricted from making certain changes in its bid. We would urge some further consideration of this provision.

Subparagraph (a) would prohibit the lowering of the consideration offered under the bid. Every take-over bid includes a condition that the bid can be withdrawn if there is a material adverse change at the target. Typically there is also language about reducing the offer price by the amount of any dividend or other distribution out of the target. If a dividend were to be declared or a material adverse change were to happen, we do not see any harm in allowing the bidder to lower its consideration in the existing bid rather than withdrawing one bid and commencing another.

Similarly, subparagraph (b) would prohibit the bidder from changing the form of consideration offered under the bid. If Inco had wanted to change its stock and cash take-over bid for Falconbridge into an all cash offer, why should securities regulations prohibit that? It seems to us that the current rule which requires that shareholders be notified of variations in the bid, together with sufficient time to digest the information, is sufficient.

We note that we do not see any rule expressly stating that a bid cannot be withdrawn after it is commenced unless a condition is not satisfied at the expiry of the bid. Many practitioners believe this is implicit in our current rules (otherwise, why make the bid subject to conditions?) but there may be merit in stating this expressly in the Proposed Rule. Otherwise, it is arguable, based on basic principles of contract law, that an offer may be withdrawn at any time before it is accepted by the offeree.

Collateral Agreements

We believe the proposed changes concerning collateral agreements make sense except in one respect. Subsection 2.22(3)(c)(iv)(B) empowers an independent committee of the board of the target to decide that the "value of the benefit" is less than 5% of the "value referred to in clause (A)". We have two comments here. First, should the reference to "(A)" be a reference to "(l)"? There is no reference to value in (A) but there is in (l). Secondly, we do not understand how the independent committee will determine the value of the employment benefit. Presumably the CEO will be receiving a salary, some stock options, and various other employment benefits that will extend out for an indefinite period into the future. Is the board expected to put a present value on all of that based on some assumptions that will be very hard to make? If the idea is that the independent committee would review the employment arrangements and confirm that they look fair in the circumstances, this would make more sense to us.

Return of Deposited Securities

We would suggest a drafting change in Section 2.30 of the Proposed Rule to make it clear that this concept applies immediately after the expiry of a bid, and not during the course of a bid. It might be better if the section read something like "If, **following the expiry of a bid,** an offeror knows that it will not take up securities deposited under the bid, the offeror must promptly issue and file a news release to that effect and return the securities to the security holders."

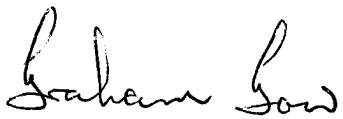
Private Agreement Exemption

Our understanding is that the proposed change to the private agreement exemption has generated a significant amount of comment and that the CSA is considering this further. We are not aware of a compelling need to change this rule. Have there been a series of abusive transactions seeking to rely on this exemption? The rule is clear and has been in place for a long time. We would suggest that if it ain't broke, perhaps there is no need to fix it.

Thank you for the opportunity to comment on the Proposed Rule. We would be pleased to discuss any of the above with you.

Yours truly,

McCarthy Tétrault LLP



Graham P. C. Gow

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SENT BY E-MAIL/ORIGINAL BY MAIL

Toronto, July 28, 2006

Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Manitoba Securities Commission
New Brunswick Securities Commission
Securities Commission of Newfoundland and Labrador
Registrar of Securities, Department of Justice, Government of the Northwest Territories
Nova Scotia Securities Commission
Registrar of Securities, Legal Registries Division, Government of Nunavut
Ontario Securities Commission
Prince Edward Island Securities Office
Registrar of Securities, Government of Yukon
Saskatchewan Financial Services Commission

To the attention of:	
Ms. Marsha Manolescu Alberta Securities Commission 400-300- 5th Avenue S.W. Calgary, Alberta T2P 3C4 e-mail: marsha.manolescu@seccom.ab.ca	Ms. Anne-Marie Beaudoin Directrice du secrétariat Autorité des marchés financiers Tour de la Bourse 800, Square Victoria C.P. 246, 22e etage Montréal, Québec H4Z 1G3 e-mail: consultation-en-cours@lautorite.qc.ca

Dear Sirs/Mesdames:

RE: Comments on Proposed National Instrument 62-104 – *Take-over Bids and Issuer Bids*

This letter is in response to your CSA Notice and Request for Comments on proposed National Instrument 62-104 *Take-over Bids and Issuer Bids* ("NI 62-104") and its related forms and

Companion Policy. We thank you for the opportunity to comment on the proposed harmonization of Canadian take-over laws. We strongly support the concept of a national harmonized rule on take-over bids as contemplated by NI 62-104. However, we would caution the CSA against making changes to the existing rules that are unnecessary or would create interpretational uncertainty. This is an area of securities law where the old adage "if it ain't broke, don't fix it" should apply.

We have the following comments on NI 62-104 and, in particular, on the specific questions raised in the CSA Notice:

1. Acting Jointly or in Concert

The proposed language of subsections 1.7(2)(a) and (b) of NI 62-104 is based on the current wording of subsection 91(1) of the *Securities Act* (Ontario) (the "Act"). However, unlike the current provisions of the Act, NI 62-104 proposes introducing a provision which deems persons caught by these subsections to be acting jointly or in concert with the offeror. In subsection 91(1) of the Act, there is merely a presumption which is generally considered to be rebuttable based on the particular factual context.

We are of the view that introducing a deeming provision in the place of the current presumption will create significant uncertainty for offerors and putative joint actors as to the application of the take-over bid rules and will increase the need to seek exemptive relief from the securities regulatory authorities. For example, subsections 1.7(2)(a) and (b) are broadly drafted to catch "any agreement, commitment or understanding" that effects a prescribed result (being, an offer to acquire or acquisition of securities of the same class or intention to vote securities in concert). However, these provisions are less than clear as to their application with respect to past or transitory joint or in concert activity or "soft" support alliances. The current wording of subsection 91(1) of the Act allows offerors and putative or transitory joint actors the ability to analyze the factual context of these relationships at any point in time to determine whether the presumption is applicable or may reasonably be rebutted in the particular circumstances. Transforming this provision into a rigid deeming provision (which also applies to "chain" relationships between joint actors of joint actors) will raise uncertainty as to the application of the take-over bid rules that will necessitate seeking exemptive relief as a matter of prudence given the seriousness of the consequences of non-compliance. In the absence of demonstrated abuse in this area, we would not advocate making the proposed change. The CSA has the ability to clarify, by way of policy statement, their interpretation of the circumstances in which the presumption may or may not reasonably be rebutted. The securities regulatory authorities may also challenge any particular conduct under their existing remedial powers.

We are further of the view that, if implemented, section 1.7 should contain a specific exemption for lock-up agreements entered into between the offeror and security holders of the target issuer. This is consistent with the policy underlying the exception regarding lock-up agreements

contained in the definition of "joint actors" in OSC Rule 61-501 – *Insider Bids, Issuer Bids, Business Combination and Related Party Transactions* as well as in subsection 2.3(2) of Policy Q-27 – *Protection of Minority Security holders in the course of certain Transactions* of the Autorité des marchés financiers.

2. Restrictions on Bid Variation

Part 2 of NI 62-104 provides that an offeror will not be able to vary the terms of an offer in certain circumstances after a bid has commenced. In lieu of a notice of variation to the existing bid, a new bid must be commenced. The proposed circumstances where a new bid must be commenced are where the amount of the consideration offered has been reduced, the form of the consideration has been changed, the portion of outstanding securities for which the bid is made has been lowered or new bid conditions have been added. The CSA Notice accompanying NI 62-104 states that the CSA are concerned that such variations would not provide security holders of the target issuer with sufficient time or disclosure to consider these types of changes and, as a result, the changes are so fundamental that they should trigger a new bid.

We are of the view that these restrictions are neither appropriate nor necessary to meet the policy concerns of the CSA. We are also concerned that these changes could upset the balance which the take-over bid rules were designed to strike between the competing interests of bidders and targets. For example, a special dividend or distribution declared by a target issuer's board in response to a hostile bid or the release of unfavourable information by the target issuer during a hostile bid, which, in either event, may affect the value that a bidder is prepared to pay for the target's shares, may become an effective defensive tactic since the bidder could not adjust its bid price downwards to reflect the diminished value of the target issuer's shares without having to relaunch its bid. In our view, this should not be the intended result in these circumstances.

By way of further example, if a bidder wishes to improve its bid by: (i) converting a securities exchange or mixed consideration bid to an all cash bid, (ii) adding a cash component to a securities exchange bid, or (iii) adding a securities component to an all cash bid, the bid would have to be recommenced. However, in a competitive bidding situation this result may place the bidder at an untenable competitive disadvantage and may perversely dissuade bidders from enhancing their bids, which is clearly not in the interests of the target's shareholders.

If the concern of the CSA is that shareholders should have more than the 10 day period prescribed by subsection 2.10(3) to consider such a variation (which we would argue is unnecessary given the rapid media dissemination of such information), the CSA should consider amending this restriction to provide that where certain material changes are made to the terms of the bid, the security holders will be given an additional period of time to consider the change (e.g., increase the period from 10 to 15 days). In addition, where a variation to the terms of a take-over bid is made, NI 62-104 requires that the variation be fully disclosed in plain language

in a notice of variation as prescribed in Form 62-104F5. Therefore, if there are concerns as to the level of disclosure, the appropriate place to deal with these would be in Form 62-104F5.

Introducing a provision which automatically recommences the bid period would not, in our view, be in the best interests of shareholders ultimately.

3. Private Agreement Exemption

NI 62-104 proposes to amend the private agreement exemption currently contained in subsection 93(1)(c) of the Act to restrict its use to once in a lifetime for offerors and their joint actors and to require that the negotiations with the selling security holders are conducted approximately at the same time and all purchases are completed within six months of the first purchase. The stated purpose of these amendments is that they are necessary to give effect to the original purpose of the exemption which was to allow control block and other large security holders to liquidate their positions. Concern has been expressed that the exemption may be used to effect "creeping" take-over bids without compliance with the requirements of the Act.

We are of the view that the one time use restriction is not necessary and that, depending on the security holdings of a particular issuer, an offeror should be entitled to purchase securities privately from several security holders in unrelated transactions. The protection for minority security holders lies in the restriction on the premium that may be paid to such security holders.

We note that the CSA proposed to amend the private agreement take-over bid exemption in 1990[1] in a similar manner as is currently proposed. We are of the view that CSA members are better equipped to police trading activity in respect of the exemption in today's world of instant communication than in the 1990s. There was no implementation of legislative amendments sixteen years ago and no reason justifies the proposed change now. Securities regulatory authorities have the current means to intervene and challenge offensive transactions on the basis of recognized principles of transactional integration.

4. Filing Requirements

We recognize the need to file support and lock-up agreements as these may be of critical interest to security holders considering a take-over bid. However, we are concerned that the wording of subsection 3.2(1)(d) of NI 62-104 is very broad and may require agreements to be filed which were not intended to be caught by the filing requirement. For example, would an agreement pursuant to which a take-over bid is financed be an agreement which "affects control of an issuer"? NI 51-102 – *Continuous Disclosure Obligations* ("NI 51-102") provides guidance in

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[1] (1990), 13 OSCB 2297, p. 3

the Companion Policy as to what agreements need to be filed. We would suggest that guidance would also be appropriate in the Companion Policy NI 62-104CP.

In addition, we have particular concerns that the filing of certain agreements may give rise to confidentiality concerns. In particular the filing of employment arrangements which is required under subsection 3.2(1)(d) could be problematic. That section requires copies of "all agreements between the offeror and the offeree issuer's directors and officers". The number of employment agreements required to be filed could be significant (particularly in the case of bids by private equity and other financial bidders) and, by operation of the definition of "officer" contained in the Act, may well include persons who are not senior officers of the target issuer. We would suggest that, at the very least, an exemption from the filing requirement be included in the section where an employment agreement falls within the proposed collateral benefit exemption contained in subsection 2.22(3) of NI 62-104.

In addition, the proposed version of NI 62-104 does not provide the offeror with any ability to redact parts of an agreement. We would therefore suggest that a redaction right, similar to that contained in subsection 12.2 of NI 51-102, be included in the instrument.

5. Drafting and Other Issues

We also wanted to raise the following drafting and other concerns with NI 62-105:

(a) If the deeming provision for joint or in concert activity is retained in subsection 1.7(2), it would seem that subsection 1.7(1) should be expressly subject to subsection 1.7(2).

(b) If subsection 1.7(2) is retained, when read in conjunction with subsection 1.7(4), does this mean that a registered dealer who acts in an agency capacity for an offeror but who also executes principal transactions, will be deemed to be a joint actor of the offeror? This could have serious implications for investment dealers as it would subject their pro-trading activities in the target's shares to the take-over bid rules.

(c) We question why the definition of "offeror" in section 2.1(a) doesn't also exempt an offeror making a bid that is exempted under Part 7 of NI 62-104. The same comment applies to bids to which subsection 2.2(2) applies.

(d) It is unclear whether the timeframe for the purchases that are required to be disclosed by subsection 2.2(3)(d)(v) and (vi) has been changed. The current requirements require this disclosure only for purchases made during the currency of the bid.

(e) We note that the current counterparts to the conditions contained in subsections 2.2(3)(e), (f) and (g) only apply to pre-bid integration and post-bid acquisitions. These are proposed to be extended to acquisitions made by offerors during a take-over bid and we question the policy reason for this change. For example, we query how the condition in paragraph (e) will apply where the broker is also an advisor to the bidder or is the dealer-manager of the bid (both of which may be considered to be services beyond "customary broker's functions").

(f) The exception to "permitted purchases during take-over bid" under subsection 2.4(4) should be "on a published market" as opposed to "through the facilities of a recognized exchange" to be in line with the current exception provided in subsection 94(7) of the Act.

(g) We note that subsection 2.7(1)(a) requires that an advertisement contain a "summary" of the bid, as opposed to the current requirement in subsection 100(7) of the Act that the advertisement contain a "brief summary". However, subsection 2.12(1)(a) requires that an advertisement contain only a "brief summary" of a change or variation to a bid. Unless the CSA has concerns with current disclosure practices, we question the reason for the changed language in subsection 2.7(1)(a) and why a distinction is made between the bid and changes or variations to the bid.

(h) The proposed definition of "collateral benefit" has been modelled on OSC Policy 61-501. It uses the term "associated entities" which is defined in OSC Policy 61-501 but is not defined in NI 62-104. A definition should be included of this term.

(i) The exception contained in subsection 2.22(3)(a) refers to distributions per "equity security" (as this is the language used in OSC Policy 61-501). However, the take-over bid rules apply equally to equity securities and to voting securities that need not be equity securities. We suggest the word "equity" be deleted.

(j) We question the addition of the qualification in subsection 2.22(3)(c)(i) that the benefit not be provided for the purpose of "providing an incentive to tender to the bid". We would suggest that most such agreements, at least in some general sense, constitute "incentives to tender" to a bid.

(k) We note that the required disclosure in subsection 2.22(3)(c)(iii) is beyond an offeror's control and creates possible timing concerns for offerors, unless the directors' circular is mailed contemporaneously with the take-over bid circular. Otherwise, an offeror will not be able to verify, until after the fact, whether its collateral agreements qualify for the exemption.

(l) In subsection 2.22(3)(c)(iv)(B)(II) the amount of 5% is referenced to subsection 2.22(3)(c)(iv)(A) which on its face would appear to incorporate the value of 1% of the outstanding securities of the class of equity securities. This creates confusion where a security holder holds less than 1%. If the intention of the CSA is to restrict the amount to 5% of the amount received under the offer as in OSC Policy 61-501 the correct reference in subsection 2.22(3)(B)(iv)(II) should be to subsection (I). This requires clarification.

(m) Subsection 2.22(3)(c)(iv)(B)(III) refers to the necessary disclosure being made in the issuer bid or directors' circular. Form 62-104F3 – *Directors' Circular* should be amended to clarify this item of disclosure (see item 17, Form 62-104F2 – *Issuer Bid Circular*).

(n) Subsection 2.23(2) uses the term "odd lot" which is not defined in NI 62-104. A definition should be included of this term.

(o) There is some uncertainty as to the actual affect of subsection 2.23(4) on the application of the pro ration factor for a partial bid and the ability of the seller in the pre-bid transaction to participate in the bid. For instance, should the securities sold in the pre-bid transaction also be deemed to have been taken up under the bid for purposes of determining the number of shares that the seller may also sell under the bid under the proportionate take up rule? Otherwise the rule would appear to reduce the relative number of shares that other shareholders can have taken up under the bid.

(p) We question the jurisdictional basis for imposing a requirement that all "issuers" furnish a security holders list to a bidder or prospective bidder. We are of the view that this provision could well be unenforceable, at least insofar as it applies to non-reporting issuers.

(q) In subsections 5.5(a) and (b) of the foreign take-over bid exemption, we would suggest that persons who have entered into lock-up agreements with the offeror should be excluded from these calculations since these persons have already made their investment decision in respect of the bid and, thus, should not be included in the threshold calculations.

(r) In subsection 5.5(c) of the foreign take-over bid exemption, the use of the term "greatest dollar value" should be amended as it would not always be applicable to foreign target issuers.

(s) The normal course purchase exemption has been restricted to where there is a published market for the securities. We are of the view that the prior wording of

subsection 93(b)(ii) of the Act should be retained and that the market price restriction should apply only "if there is a published market".

* * * * * *

This letter has been prepared by the Securities Law Group of Ogilvy Renault LLP but may not reflect the views of all its members. If you have any questions concerning these comments, please contact Michael Lang direct line (416) 216-3939 or by email at mlang@ogilvyrenault.com, Ava Yaskiel direct line (416) 216-3902 or by e-mail at ayaskiel@ogilvyrenault.com or Tracey Kernahan direct line (416) 216-2045 or by e-mail at tkernahan@ogilvyrenault.com.

Yours very truly,

Ogilvy Renault LLP

OR/na

SECTIONS

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July 28, 2006

To: Alberta Securities Commission
British Columbia Securities Commission
Manitoba Securities Commission
New Brunswick Securities Commission
Securities Commission of Newfoundland and Labrador
Registrar of Securities, Department of Justice
Government of the Northwest Territories
Nova Scotia Securities Commission
Registrar of Securities, Legal Registries Division,
Department of Justice, Government of Nunavut
Ontario Securities Commission
Prince Edward Island Securities Commission
Autorité des marchés financiers
Saskatchewan Financial Services Commission
Registrar of Securities, Government of Yukon

Re: Proposed National Instrument 62-104 *Take-over Bids and Issuer Bids*

This submission is made by the Securities Law Subcommittee of the Business Law Section of the Ontario Bar Association (the "**OBA Subcommittee**") to the Canadian Securities Administrators ("**CSA**") in reply to the request for comments published April 28, 2006 on proposed National Instrument 62-104 *Take-over Bids and Issuer Bids* ("NI 62-104").

We fully support the CSA's efforts to harmonize the take-over bid and issuer bid rules and related early-warning requirements across Canada.

Our comments are confined to the CSA proposal to restrict the current private agreement exemption[1] so that it may be used only once in respect of any given target and then only if purchases are negotiated at approximately the same time and are completed within six months of the first purchase made in reliance on the exemption. We agree that, as has always been the case, the current private agreement exemption is not necessarily consistent with the

[1] In Ontario, the current private agreement exemption in section 93(1)(c) of the *Securities Act* (Ontario) exempts an offeror from the requirements relating to formal take-over bids if, among other things, purchases are made from not more than five persons or companies and the value of the consideration, including brokerage fees or commissions, does not exceed 115% of the market price of the securities of that class at the date of the bid.

fundamental policy objective underlying the take-over bid rules, that of equality of treatment of offeree security holders during a formal take-over bid. However, the proposed restriction on the private agreement exemption is, in our view, still not justified.

The original purpose of the current private agreement exemption, that of providing liquidity to control block security holders in circumstances where only a limited premium is paid, continues to be appropriate in the context of the Canadian capital markets, where a significant percentage of public companies have controlling shareholders. Illiquid control blocks tend to depress an issuer's stock price and we are concerned that the proposed restriction will have a negative effect on the marketability of control blocks with consequences to the Canadian capital markets that have not been fully canvassed.

We also are not convinced of the validity of the concern that private agreement purchases are abused to the detriment of minority security holders. We are not aware that abuse of the private agreement exemption has been a significant issue for the Canadian capital markets. Furthermore, there are already legitimate defensive tactics available to targets who are concerned about linked (or creeping) take-over bids. The CSA has made it clear that it will use its public interest jurisdiction to intervene in circumstances where creeping take-over bids subvert the policy objectives of the take-over bid rules, even if the private agreement exemption is strictly complied with.[2] Also, targets have the ability to adopt shareholder rights plans, where the flip-in threshold is typically 20%, as a defensive tactic to prevent creeping take-over bids not supported by the board of directors.[3]

Finally, we are of the view that the proposed restriction on the private agreement exemption is too rigid. For example, under the proposal, an offeror can acquire any number of securities in private agreement transactions from five security holders, and pay a premium, if the transactions are concluded within six months, but cannot acquire the same number of securities in a series of transactions concluded over a longer period. This is an anomalous result that is not supported by any policy objective.

Before codifying this approach, we would urge the CSA to investigate this issue further, possibly in the context of the current debate in Canada as to

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[2] See for example *Re H.E.R.O. Industries Ltd.*, (1990) 13 OSCB 3775.

[3] See for example the recent proceedings before the Ontario Securities involving Falconbridge Limited, Xstrata Canada Inc. and Inco Limited.

whether Canadian take-over bid rules unduly favour bidders over targets generally.

One suggestion is that it would be helpful to practitioners if, in the Companion Policy, there was given some guidance on the circumstances in which the CSA would consider serial reliance on the current private agreement exemption to be abusive such that regulatory intervention would be warranted.

***

The members of the Subcommittee are listed in the attached **Appendix – Members of Securities Law Subcommittee**. Please note that not all of the members of the Subcommittee participated in or reviewed this submission, and that the views expressed are not necessarily those of the firms and organizations represented by members of the Subcommittee. Subject to that caveat, this submission is made by the Subcommittee. A copy of the submission is being provided concurrently to the members of the Business Law Executive of the Ontario Bar Association.

Thank you for this opportunity to comment. If you have any questions, please direct them to Richard Lococo (richard_lococo@manulife.com, 416-926-6620), Janne Duncan (jduncan@tor.fasken.com, 416-868-3357), Aaron Atkinson (aatkinson@tor.fasken.com, 416-865-5492), Philippe Tardif (ptardif@blgcanada.com, 416-367-6060) or Ken Klassen (kklassen@dwpv.com, 416-863-5568).

Yours truly,

Securities Law Subcommittee
Business Law Section
Ontario Bar Association

Appendix A – Members of Securities Law Subcommittee

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Simon Archer, *Barrister & Solicitor*
Aaron J. Atkinson/Janne M. Duncan, *Fasken Martineau DuMoulin LLP*
Timothy S. Baikie, *Canadian Trading and Quotation System Inc.*
Justin Beber/Kenneth R. Wiener, *Goodmans LLP*
Erez Blumberger, *Ontario Securities Commission*
Mary Condon, *Osgoode Hall Law School*
Gil I. Cornblum, *Dorsey & Whitney LLP*
Luana DiCandia/Julie K. Shin, *Toronto Stock Exchange*
Anoop Dogra, *Blake, Cassels & Graydon LLP*
Aaron S. Emes/Cornell C.V. Wright, *Torys LLP*
Eleanor K. Farrell (Secretary), *CPP Investment Board*
Paul J. Franco, *Heenan Blaikie LLP*
Matthew Graham, *TD Bank Financial Group*
Margaret I. Gunawan, *Barclays Global Investors Canada Limited*
Carol Hansell/Kenneth Klassen, *Davies Ward Phillips & Vineberg LLP*
Henry A. Harris, *Gowling Lafleur Henderson LLP*
Barbara J. Hendrickson, *McMillan Binch Mendelsohn LLP*
Michael D. Innes, *Osler, Hoskin & Harcourt LLP*
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Steven R. Kim, *CIBC World Markets*
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July 28, 2006

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Registrar of Securities, Legal Registries Division, Department of Justice, Government of Nunavut
Ontario Securities Commission
Prince Edward Island Securities Office
Autorité des marchés financiers
Saskatchewan Financial Services Commission
Registrar of Securities, Government of Yukon

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Dear Sirs/Mesdames:

Proposed National Instrument 62-104 - Take-over Bids and Issuer Bids

This letter responds to the request for comments regarding the proposed National Instrument 62-104 – Take-over Bids and Issuer Bids (the "Proposed Instrument").

We note that the purpose and expected benefits of the Proposed Instrument are to eliminate duplication and inconsistencies in the take-over bid and issuer bid regimes in Canada and to codify routine discretionary exemptions. These are laudable goals and the Canadian Securities Administrators (the "CSA") should be commended for their efforts in this regard.

Our comments on specific aspects of the Proposed Instrument are set out below.

1. **Restriction on Variation of Bids**

You have asked whether the proposed restrictions on certain variations to the terms and conditions of bids are appropriate. In our experience the actions specified in Section 2.21(3) of the Proposed Instrument are rarely taken by bidders; such actions would be prohibited in bids supported by the target company and hostile bidders usually improve, not diminish, the attractiveness of their bids after launch. Given this fact and the speed at which information regarding bids is disseminated to the marketplace, we question whether it is necessary to restrict bidders in this way.

In particular, we are of the view that the prohibition on lowering the consideration offered under a bid may unfairly disadvantage a bidder in circumstances where the target company adopts "scorched earth" defensive tactics or otherwise distributes value out of the company (*e.g.*, declares a special dividend). In those types of situations a bidder should be entitled to commensurately reduce the consideration being offered under its bid rather than being forced to commence a new bid and thereby surrender any timing advantage that the bidder may have had.

2. **Computation of Time**

Section 1.4(a) of the Proposed Instrument states that a period of days is computed as "ending at 5:00 p.m. on the last day of the period if that day is a business day or ending at 5:00 p.m. on the next business day if the last day of the period does not fall on a business day". We are of the view that the references to "5:00 p.m." should be clarified since ambiguity is caused by the existence of time zones across Canada. The easiest solution to accommodate all provinces and territories would be to refer to "5:00 p.m. (Pacific time)".

3. **Definition of "Offeror"**

The definition of "offeror" set out in Section 2.1 of the Proposed Instrument seems to be an expansion of the current meaning of "offeror" in that it refers to "a control person, or an affiliate of a control person, of an offeror . . ." The term "control person" is not defined for the purposes of the Proposed Instrument, but presumably it would encompass those persons who are described in paragraph (c) of the definition of "distribution" in the *Securities Act* (Ontario) (*i.e.*, those that hold a sufficient number of securities of an issuer

to materially affect control of that issuer, including those holding more than 20% of the outstanding voting securities of the issuer, absence evidence to the contrary).

It is not clear to us why a control person, or an affiliate of a control person, of an offeror should be deemed to be an offeror for the purposes of the Proposed Instrument. We submit that this provision is not necessary given that the concept of "acting jointly or in concert" has been retained and clarified in the Proposed Instrument such that affiliates of an offeror, and any persons that have entered into agreements or arrangements with an offeror concerning the acquisition or voting of securities, will be deemed to be acting jointly or in concert with an offeror.

4. Outstanding Securities

There are numerous references in the Proposed Instrument to "outstanding securities". In those instances where the term "outstanding securities" is used in connection with or in reference to beneficial ownership (such as in the definition of "associate" and in Sections 2.22(3)(c)(iv)(A) and 6.2(1) of the Proposed Instrument), Section 1.6 of the Proposed Instrument provides clarity in deeming certain securities to be outstanding for those purposes.

However, the meaning of "outstanding securities" is not clear where it is used other than in connection with beneficial ownership (such as in the definition of "take-over bid" and in Sections 2.2(3)(b), 5.2(a) and (b), 5.5(a), 5.6(b), 5.9(b) and (c), 5.12(a) and 5.13(b) of the Proposed Instrument). This concern is exacerbated by the reference to "securities of that class that are issued and outstanding" in Section 5.8(1)(b) of the Proposed Instrument which suggests, since the wording is different from "outstanding securities", that it has a different meaning.

Since many of the sections referred to above are exempting provisions, we are of the view that it is particularly important to have certainty in the determination of "outstanding securities" and we are concerned that there is ambiguity in the Proposed Instrument in this regard. We suggest that the meaning of "outstanding securities" be clarified in Part 1 of the Proposed Instrument.

5. Proportionate Take-up and Payment

Section 2.23(4) of the Proposed Instrument states that "[f]or the purposes of subsection (1), any securities acquired in a pre-bid transaction to which subsection 2.4(1) applies are deemed to have been deposited under the bid by the person who was the seller in the pre-bid transaction." The purpose of this provision and its impact on the calculations for the proportionate take-up of securities are not clear to us. If an offeror acquires securities in a pre-bid transaction to which subsection 2.4(1) applies and is subsequently required to proportionately take up securities deposited under its bid, Section 2.23(4) of the Proposed

Instrument could be interpreted as requiring the offeror to return a portion of the securities acquired in the pre-bid transaction to the seller. If that is the intention of this provision, it should be made clear. More importantly however, this provision seems impractical; it would be highly unlikely for the seller in a pre-bid transaction to be willing to repurchase a portion of the securities it sold to the offeror.

6. Language of Bid Documents

Section 3.1(2) of the Proposed Instrument states that "[i]n Québec, the take-over bid circular, issuer bid circular, directors' circular, director's or officer's circular, notice of change or notice of variation required under this Instrument must be in the French language or in both French and English languages." It is not clear to us whether the *de minimis* exemption from the French language requirement currently contained in Québec securities legislation would be retained upon implementation of the Proposed Instrument. If not, it is our view that such exemption should be incorporated into Section 3.1(2).

7. Companion Policy – Identifying the Offeror

We are unable to see the policy rationale for a parent company (referred to as "the primary party" in Section 2.2 of the Companion Policy) being considered a "joint offeror" with a subsidiary or affiliate acquisition entity, and therefore subject to the requirements of the Proposed Instrument, in bids where the consideration offered consists solely of cash. The primary party would be considered to be acting jointly or in concert with the offeror, but in our view that is not a sufficient rationale to deem the primary party to be a joint offeror. Moreover, in Canada bids may not be commenced subject to a financing condition and cash bids do not require prospectus-level disclosure by the offeror. In light of this, we submit that there is little to be gained by subjecting the primary party to the requirements of the Proposed Instrument as a joint offeror, particularly the requirement to certify the bid circular.

8. Companion Policy – Determination of Shareholdings

Section 2.7 of the Companion Policy sets out steps that an offeror should take in determining the number of outstanding voting securities that are owned, directly or indirectly, by residents of Canada for the purposes of the exemptions contained in Sections 5.5, 5.6, 5.12 and 5.13 of the Proposed Instrument. We are of the view that any suggested investigations and/or calculations must be capable of being completed by an offeror without significant expense and must produce consistent results. We question whether the steps set out in the Companion Policy achieve these goals given that, among other things: (i) in the context of unsolicited bids the offeror may not obtain a list of registered shareholders until well after the bid is commenced; and (ii) it appears that some securities would inevitably be double counted as a result of following the steps specified in clauses (a) and (b) of Section 2.7.

With respect to the foreign take-over bid exemption contained in Section 5.5 of the Proposed Instrument, we are of the view that an offeror should be entitled to rely on the list of registered shareholders of the target company as conclusive evidence of the number of outstanding voting securities that are owned, directly or indirectly, by residents of Canada.

9. Drafting Comments

We submit that the interaction of Section 2.4(4) with Sections 2.4(1) and (3) of the Proposed Instrument would be better expressed if the introduction to Section 2.4(4) was revised in the following manner: "~~Despite s~~ Subsections (1) and (3) do not apply to~~, an offeror may make~~ purchases made by an offeror in the normal course through the facilities of a recognized exchange ~~if~~ provided that . . ."

We also note that in Section 6.2(1)(d) of the Proposed Instrument the letter "s" is missing from "news" in the second line.

Finally, we note that the words "of the bid" should be added after the word "conditions" in each of Item 12(c) of Form 62-104F1 and Item 7(c) of Form 62-104F2.

* * * * *

If you have any questions regarding our comments or wish to discuss them with us, please contact Stan Magidson (403-260-7026), Robert Yalden (514-904-8120) or Dana Easthope (416-862-5952).

Yours very truly,

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July 28, 2006

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Registrar of Securities, Legal Registries Division, Department of Justice, Government of Nunavut
Ontario Securities Commission
Prince Edward Island Securities Office
Autorité des Marchés Financiers
Saskatchewan Financial Services Commission
Registrar of Securities, Government of Yukon

Dear Sirs:

Re: Proposed National Instrument 62-104, *Takeover Bids and Issuer Bids* and *Companion Policy 62-104CP*

This is our firm's response to your Request for Comments dated April 28, 2006, regarding Proposed National Instrument 62-104, *Takeover Bids and Issuer Bids* (the "**Proposed Rule**") and the draft Companion Policy.

We support the purpose of the Proposed Rule to harmonize and organize the take-over bid rules of each of the jurisdictions; this is a beneficial endeavour. Our comments relate to the following amendments to the current rules that would be effected by the Proposed Rule:

(i) the limit on the private agreement exemption to a single use;

(ii) the deeming of affiliates to be acting jointly or in concert;

(iii) the post-bid requirement to make offers on the same terms as the original bid;

(iv) the requirement to issue a notice of variation before the bid is mailed, when the bid has been commenced by advertisement;

(v) the requirement to file certain agreements;

(vi) the inclusion of other exempt purchases toward the 5% limit on normal course exempt purchases;

(vii) the new exemption for bids where Canadians hold less than 10% of the class of shares subject to the bid; and

(viii) the principles of regulation stated in the draft Companion Policy.

We also make some technical and drafting suggestions at the end of this letter.

(i) **Private Agreement Exemption**

We believe that the proposal to change to a "single use" private agreement exemption should be reconsidered for the reasons outlined below.

The private agreement exemption provides needed liquidity without permitting a control premium: The principle underlying the private agreement exemption is that a person should be permitted to purchase a significant or controlling block of shares privately, if the sellers do not receive a control premium for their shares. In the context of the smaller Canadian market, which has many public issuers with controlling and large block shareholders, the exemption provides needed liquidity for those blocks without offending the principle that control premiums should be shared with the minority. The exemption represents a balancing act between potentially competing objectives, but we believe it has generally achieved the correct balance. Although the exemption permits purchases at up to 115% of the current market price, the 15% permitted excess was never intended to (and in our view does not) constitute a "control" premium; a control premium would typically be well in excess of 15% of the current market price. The 15% was intended to reflect an accepted deviation from the market price so as not to unduly restrict the price at which the exempt transfer may occur. That excess must include fees and commissions and depending on the market price calculation permits some leeway in terms of calculating market price.

The proposed change has a negative impact without a clear positive regulatory impact: We believe that the proposed change will negatively affect the marketability of large blocks of shares, while accomplishing little from a regulatory perspective. We are not aware of abuses of the private agreement exemption whereby a purchaser has acquired control through creeping private agreement purchases. Nor do we see the logic in allowing a buyer to buy a controlling position privately in a single transaction, but not permitting subsequent reliance on the exemption in similar circumstances. Nor do we see the logic in not allowing a buyer to buy the same position in two or more unrelated exempt purchases. In our view, a buyer should be permitted to buy securities privately from a significant shareholder in more than one transaction if no substantial premium is paid (as contemplated by the existing formulation of the exemption).

Shareholder rights plans can be used to prevent creeping acquisitions: It also remains open to issuers to establish shareholder rights plans that would prevent an accumulation through private agreement or other purchases and numerous issuers do so.

The "one-time use" concept is problematic: The concept of a "one-time use" in the context of a lifetime of an issuer is problematic, because issuers can transform themselves through mergers and reorganizations over the course of their existence.

Parties rely on the existing exemption for corporate reorganizations: We often advise our clients, in connection with corporate reorganizations, that for certain steps they need to rely on the private agreement exemption. Section 5.3(2) of the Proposed Rule recognizes this in part, by providing that the restriction does not apply to transfers between affiliates or to associates. However, reorganizations do not always occur between affiliates or associates (such as transfers involving extended family groups or non-corporate entities).

The concern that the exemption exacerbates the liquidity problem seems unfounded: We understand that the proposed change is designed in part to address a policy concern that the exemption predisposes smaller holders to sell to existing control blocks rather than in the market, exacerbating the liquidity issues the exemption was intended to alleviate. We understand that by limiting the exemption to a single use, the intention is to encourage offerors to use it only for purchases of large blocks. We note at the outset that a substantial shareholder that is purchasing under the private agreement exemption is providing liquidity to the market. Often shareholders with a substantial block of shares (as little as 5%) are not able to sell into the market, either because there are no purchasers for such a block or because doing so would adversely affecting the share price. For these shareholders (who may themselves be financial institutions trading on behalf of clients), the most likely purchaser is an existing control block holder who needs to rely on the private agreement exemption in order to purchase. Accordingly, forcing sales into the market may not in fact create liquidity and may negatively affect all shareholders by depressing the share price.

The existing exemption already discourages its use for small blocks: We believe the existing exemption is already sufficiently restrictive to discourage its use for small blocks in any event. Although the exemption may be used for purchases from up to five purchasers, it may be used only where those purchases are made under a single offer (as the exemption specifically refers to "a" take-over bid being exempt). This means, in our view, that the offer to acquire must be made at the same price and substantially on the same terms and proximate in time. Given the need for a single offer, a purchaser cannot, in our view, use the exemption to purchase shares at different prices from different sellers at different times as part of a concerted or linked buying effort, even if there are five or fewer sellers. We therefore advise clients that any subsequent purchases relying on the exemption would have to be sufficiently separate (for example, in terms of the time between purchases and/or the market conditions at the time of purchase) such that the acquiror would be able to demonstrate that the subsequent purchases were not part of the same buying effort as the previous exempt purchase or purchases. For these reasons, in our experience, offerors do not use the exemption for small purchases or repeatedly, as they wish to ensure it is available for the larger blocks for which it was intended.

Potentially arbitrary and unintended consequences should be avoided by using alternative regulatory approaches: We submit that amending the existing terms of the exemption as contemplated would have potentially arbitrary and unintended effects. If the regulators believe that there is uncertainty on the matters discussed above, they should deal with this through a companion policy or other means. If securities regulators believe that abuses have

occurred in specific circumstances, the preferable approach would be to articulate those circumstances and restrict reliance on the private agreement in those circumstances. Simply prohibiting more than one reliance on the exemption is a blunt instrument that will prohibit reliance on the exemption in many circumstances where there should be no regulatory concern at all.

(ii) **Acting Jointly or in Concert**

Section 1.7(2)(c) would deem every affiliate of the offeror to be acting jointly or in concert with the offeror. Although it may in most circumstances be appropriate to treat affiliates as joint actors, it may not be correct to do so in all cases. For example, a public company that is controlled by the offeror may not be acting jointly or in concert with its parent. The existing provision, which creates a rebuttable presumption that an affiliate is acting jointly or in concert, allows for that type of circumstance and we believe it should be preserved, recognizing that the onus will be on the relevant parties to rebut the presumption.

(iii) **Post-Bid Integration**

Section 2.4(3) of the Proposed Rule would restrict an offeror from acquiring beneficial ownership of securities of the class that are subject to the bid, except by way of a transaction that is generally available to holders of that class *on terms identical to those under the bid.* If the post-bid transaction is generally available to holders, we do not think it is necessary to require that the transaction be on terms identical to the preceding public bid. Under the existing rule, the requirement is merely that identical terms be made available to all holders for the post-bid transaction, not that the terms be the same as those under the original bid. As a practical matter, the Proposed Rule would prevent post-bid purchases from being made in open market transactions, because they would not be on terms identical to those under the original bid (there would have been other terms to the preceding bid, including that it remain open for 35 days). The proposed change would, therefore, amount to a prohibition on post-bid transactions for 20 business days. We do not think that there is a sufficient policy reason for imposing this restriction and suggest that the existing formulation be retained.

(iv) **Notice of Variation before Bid Mailed**

Where a bid is commenced by advertisement, but has not yet been mailed to security holders, the proposed section 2.12(c) requires the offeror to send the bid and notice of change to security holders within the period prescribed by paragraph 2.8(2)(c) (namely, not later than two business days after the receipt of the security holder list). It is not clear to us why this timing constraint should be imposed on the offeror, in light of the practical problems that it could create. For example, the variation may occur just as the bid is being mailed, soon before the expiry of the two day period. In those circumstances, even if a bidder has commenced its bid by way of advertisement, we think a bidder should be permitted to make use of the normal provisions regarding the mailing of a change or variation. A bidder has no interest in not fully disseminating information with respect to a variation of its bid. It would be better to leave flexibility to the bidder in how to deal with a variation in these circumstances.

(v) **Filing Agreements**

We do not object in principle to the requirement that the agreements listed in section 3.2 be publicly filed. However, in some cases there may be confidentiality restrictions in the agreements or information that is competitively sensitive or the disclosure of which would otherwise be prejudicial. Therefore, we propose that the offeror have the same right as issuers under Part 12 of National Instrument 51-102, to redact provisions the disclosure of which would be seriously prejudicial to the interests of the reporting issuer or, in the case of agreements referred to in section 3.2(1)(d), would violate confidentiality provisions (see section 12.2(2) of National Instrument 51-102).

(vi) **Normal Course Purchase Exemption (section 5.2(b))**

The requirement in section 5.2(b) (that purchases over the prior 12 months, together with the exempt purchase, not exceed 5% of the outstanding securities), excludes acquisitions made under a bid that is subject to the requirements of Part 2. The normal course exemption is designed to provide additional liquidity to the market for transactions made at market prices in the normal course. Therefore, we do not see a basis for including in the transactions that count toward the 5% threshold, securities that are acquired pursuant to other transactions that are exempt from the take-over bid requirements (other than those purchases relying on the normal course exemption itself or on the comparable TSX exemption for normal course purchases).

(vii) **"Foreign" Take-over Bid Exemptions (sections 5.5, 5.12)**

We think it would be helpful in these sections to clarify that the issuer in question is *not* required to be a foreign issuer in order to take advantage of the relevant takeover bid and issuer bid exemption. We recognize that the requirements of the exemption would typically be met by a foreign, rather than a domestic, issuer. The heading of the section and the request for comments also suggest that the exemption would be limited to those circumstances. However, there does not seem to be a policy rationale for limiting the exemption in that way and, in fact, the language does not expressly do so. If you agree with this change, the references to "home jurisdiction" in paragraph (f) should either be deleted or the words "if any" should be added after them.

(viii) **Companion Policy 62-104CP**

The draft Companion Policy states that one of the objectives of the Proposed Rule is that it achieve "an open and even-handed bid process that does not unfairly discriminate among, *or exert pressure on*, offeree issuer security holders". It is inherent in any take-over bid that deadlines and choices will be imposed on security holders. As such, the italicized words are problematic and may create uncertainty for bidders as to how the Proposed Rule will be enforced. Bids are permitted to expire in 35 days, to be made on a partial basis, to offer consideration in securities of the offeror that fluctuate in value, to require a choice between competing bids, or to be made by a controlling shareholder without a minimum condition in circumstances where a non-tendering holder's liquidity may be impaired. These are all examples of circumstances in which the offer may "exert pressure" on the holder, but where the regime

provides sufficient regulatory and legal protections to balance that pressure. We believe the italicized words should be deleted or, failing that, be qualified to make clear that pressure exerted by bids that comply with, and are not prohibited by, the rules is not objectionable and that this principle is not intended to address that conduct.

Proposed Technical and Drafting Changes

We also suggest the technical and drafting changes to the Proposed Rule set out below.

Acting jointly or in concert (1.7(2)(a) and (b)): The provisions deeming persons to be acting jointly or in concert with the offeror where they are parties to certain agreement with the offeror, should expressly exclude lock up and support agreements, as is currently the case under OSC Rule 61-501.

Prohibition on acquisitions during bid: The existing and proposed rule both prohibit the acquisition of securities during the bid, where the securities are of the same *class* as those subject to the bid (in 2.2(1) of the Proposed Rule and 94(2) of the Act), but neither expressly prohibits the acquisition of securities *convertible* into that class. This contrasts with the exemption in 2.3(3) of the Proposed Rule and in 94(3) of the Act for purchasers of up to 5% during a bid. We suggest that section 2.2(1) be amended to clarify that the prohibition similarly extends to securities convertible into the same class.

Directors' circular (section 2.15(3)): We suggest that section 2.15(3) be revised for clarity as follows (changes are indicated):

> "If a board of directors has not yet mailed a directors circular and is considering delaying any recommendation to accept or reject the takeover bid until after the directors circular is mailed, it:
>
> (a) must, at the time of sending the circular, advise the security holders of this fact, and
>
> (b) may advise them not to tender their securities until further communication is received from the directors."

* * * * * *

Thank you for the opportunity to comment on the Proposed Rule and draft Companion Policy. Please contact me if you would like to discuss any of these comments.

Yours sincerely,

Sharon Geraghty

SG/smw

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August 4, 2006

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Ontario Securities Commission
Prince Edward Island Securities Office
Registrar of Securities, Department of Justice, Government of the Northwest Territories
Registrar of Securities, Government of Yukon
Registrar of Securities, Legal Registries Division, Department of Justice, Government of Nunavut
Saskatchewan Financial Services Commission
Securities Commission of Newfoundland and Labrador

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and c/o Anne-Marie Beaudoin
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C.P. 246
Montréal (Québec) H4Z 1G3

Dear Sirs:

Re: Proposed National Instrument 62-104

This letter responds to the notice and request for comment dated April 28, 2006 concerning proposed National Instrument 62-104.

Ontario Teachers' Pension Plan Board is one of Canada's largest institutional investors, with net assets of over $96 billion as of December 31, 2005. Ontario Teachers' has significant investments in hundreds of issuers, both in Canada and internationally. It is from this perspective that the following comments are provided.

Proposed amendments to Appendix E of National Instrument 62-103:

The proposal includes a new requirement as item (k), that early warning reports include "a description of the exemption under Part 5 of NI 62-104 being relied on by the offeror". There will be circumstances in which a take-over bid is made that is exempt from Part 2 of NI 62-104 on the basis of more than one of the exemptions in Part 5 of NI 62-104. This requirement should be amended, to expressly indicate whether in such circumstances the acquirer may elect to report only one of the multiple exemptions it could indicate as being "relied on", or whether the acquirer must state all exemptions that the transaction(s) reported on would fit within.

Section 2.1 of Proposed National Instrument 62-104 – definition of Offeror

Paragraphs 2.1(c) and (d) should be deleted. Given the extent of the deeming and presumptive concepts applied to "acting jointly or in concert" in section 1.7 (including in particular subsection 1.7(3)), we believe that paragraphs 2.1(c) and (d) are unnecessary from a policy perspective. They may lead unintentionally to persons who have no relevant connection to the acquisition activities of the actual offeror being "offerors" for the purpose of Division 1 (with significant obligations being imposed on them as a result of that deemed status). We also note that "control person" does not appear to have been defined for the purposes of NI 62-104.

Section 5.3 of Proposed National Instrument 62-104 – private agreement exemption

Paragraph 5.3(1)(b) should not require the purchases to be "negotiated at approximately the same time". In our view this concept is fraught with interpretive uncertainty, and it would be unreasonably difficult for market participants to be confident as to how this standard may be complied with in practice. The six-month limit within which purchases must be completed adequately addresses the policy concern at issue.

As mentioned above, there will be circumstances in which a take-over bid is made that is exempt from Part 2 of NI 62-104 on the basis of more than one of the exemptions in Part 5 of NI 62-104. Subsection 5.3(2) is unclear as to the implications of making a take-over bid which is exempt under subsection 5.3(1) but which is also exempt under another exemption in Part 5. We expect that the intention is that if a take-over bid is made that is exempt under subsection 5.3(1) but under no other exemption in Part 5, another take-over bid cannot be made which is exempt under subsection 5.3(1) but under no other exemption in Part 5. This requires clarification.

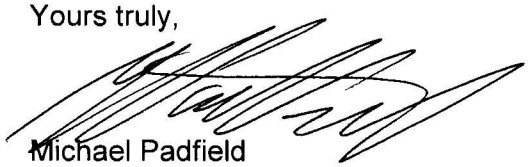
Item 7 of Form 62-104F1

The concept of "other insider of the offeror" should be moved from clause (b) to (c), as it should be subject to a standard of knowledge after reasonable enquiry. For example, an

offeror will not necessarily have knowledge of what (if any) securities of the offeree issuer are owned by a holder of 15% of the common shares of the offeror, and that shareholder is under no obligation to inform the offeror.

Please contact me if you have any questions related to these comments.

Yours truly,



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October 10, 2006

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Dear Sirs/Mesdames:

Re: NI 62-104 Comment Letter

This letter represents my personal and without prejudice comments (and not those of the firm or any client) in connection with your request for comments with regard to NI 62-104. I apologize for the lateness of this letter. My comments (in no particular order) are:

1. The "joint actors" deeming provision in proposed section 1.7(2) should provide expressly for "Chinese wall" carve-outs, as a presumption would provide for.

2. Proposed section 2.21(3) is inappropriate and will in my view discourage bids. A bidder may have to make changes in light of developments beyond its control, including, for example:

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- defensive or other actions of the target (e.g. special or increased dividends) or third parties, and

- changes in laws or market conditions.

If there is a shortness of time concern, we recommend that a longer period be required (e.g. 20 days, instead of 10). Also, we should conform with U.S. tender offer requirements given the frequency of cross-border bids.

3. As in the U.S., a much broader exemption should be provided from "identical consideration/equal treatment" provisions in respect of employment arrangements with officers, as well as employees. This is not clear under proposed section 2.22(3)(c). Also, the limits in (c)(iv) are inappropriate and inconsistent with the U.S.

4. The strict financing requirement in Canada under section 96 of the OSA and proposed section 2.24 of the rule is both inconsistent with the U.S. position and very expensive (e.g. commitment and "ticking" fees payable very early in the process and for an extended period) for a hostile bidder (as well as being difficult absent due diligence access). I recommend that the nature of any proposed financing arrangements be required to be disclosed, but, as with arrangements, that firmly committed financing not be required. This is always a major issue in cross-border transactions, and in my view inappropriately discourages bid transactions.

5. It is not clear that the "private agreement" exemption, which was a carefully balanced provision that arose over many years, has proved problematic in practice and therefore that there is any real cost-benefit justification for these changes, which restrict the freedom of major shareholders. In any event, s. 5.3(1)(e) is very hard to apply, as the price agreed is presumably the value.

6. It is very difficult for a hostile bidder to determine beneficial ownership levels, especially in the case of book-entry only securities. Perhaps sections 5.3 and 5.13 should be based on knowledge, as a solution.

7. Appendix E to NI 62-103 already has a value disclosure requirement in para. 1(i) of Appendix E. New para. 1(e.1) seems duplicative. A description of the take-over bid exemption being relied on and supporting facts should not be required in the press release (as opposed to the formal report). The forms of these press releases are

already very technical. I would in fact suggest greater flexibility in the press release contents, as opposed to the report.

8. The definition of "equity security" has always been hard to apply, as most common shares have no "right" to participate in earnings, residual or otherwise, unless the board so decides.

9. An issuer bid should not include an offer for non-convertible preferred shares, just as it does not include an offer for non convertible debt securities, and just as an insider bid excludes them as they are neither voting nor equity securities. They are also not "affected securities" under OSC Rule 61-501.

10. The cross-reference to NI 21-101 in the definition of the term "marketplace" is difficult, because of para. (d) thereof (which is always difficult to understand and deal with!).

11. If an offeror is a trust, as under U.S. securities laws, the definition of the term "offeror" should not include its trustee(s). They should have no personal liability except akin to that of directors.

12. In section 2.2(3)(b), it is not clear how the 5% test applies to a class of convertible securities. It should be clarified that the 5% test applies to them (and the underlying securities) on an "as converted" basis, especially in light of section 2.28. Also, section 2.2(3)(c) is anti-competitive and should not prohibit purchases via an ATS or in other countries. Sections 2.2(3)(e), (f) and (g) are new and undesirable, as they have increasingly become difficult to work with in other contexts and do not apply today. Also consider whether they are workable under section 2.4(4).

13. Section 2.3(1) should not prohibit purchases under section 5.8 as it may be necessary to deal with departing employees. It is the flip side of section 2.5(3) re employees.

14. Section 2.21 should be expressly limited to Canadian securityholders. Often non-Canadian holders must be offered different consideration.

15. Under sections 5.5(c) and 5.12(c), when is a published market "in Canada" if it is a market that disseminates prices electronically? Is it to be based on the location of the server or of the regulator of the market?

16. The TSX allows for 10% of the public float in a normal course issuer bid. Should this also be provided for in section 5.9(i)(b) and (c)?

17. In sections 6.2 and 6.3, via section 6.1, concert parties should also be excluded.

18. To facilitate joint hearings, as are common in take-over bids, the Commission in Ontario should also be able to grant exemptions.

19. It should be made clear that a bidder offering securities is not required to incorporate any of the target's documents or include disclosure relating to the target, as it is not fair to make an offeror and/or its personnel liable for the target's disclosure record. While financial statements are provided for in item 19(2) of Form 62-104 F1, this should be broadened.

20. Item 15 of Form 62-104 F3 is always worrying, as it may compel premature disclosure.

21. Should para. 2.9 of CP 62-104CP also refer to other exchanges (e.g. the CNQ)?

Yours truly,

Simon A. Romano

SAR/he