McCarthy Tétrault LLP
PO Box 48, Suite 5300
Toronto-Dominion Bank Tower
Toronto ON M5K 1E6
Canada
Tel: 416-362-1812
Fax: 416-868-0673

August 17, 2026

Delivered via email:

To all of the Canadian Securities Administrators:

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
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Office of the Superintendent of Securities, Service NL
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Office of the Yukon Superintendent of Securities
Nunavut Securities Office

and to:

Me Philippe Lebel
Corporate Secretary and Executive Director, Legal Affairs
Autorité des marchés financiers
Place de la Cité, tour PwC
2640, boulevard Laurier, bureau 400
Québec (Québec) G1V 5C1
Fax: 514-864-8381
Email: consultation-en-cours@lautorite.qc.ca

Re: CSA Notice and Request for Comment – Proposed Amendments and Changes to the Issuer Bid, Take-Over Bid and Beneficial Ownership Reporting Regimes

Dear Sirs/Mesdames:

McCarthy Tétrault LLP ("**we**", "**us**" or "**McCarthy**") appreciates the opportunity to comment on the *CSA Notice and Request for Comment – Proposed Amendments and Changes to the Issuer Bid, Take-Over Bid and Beneficial Ownership Reporting Regimes*, published on May 14, 2026 (the "**Notice**"). In the Notice, the Canadian Securities Administrators (the "**CSA**") requested comments on proposed amendments to National Instrument 51-102 – *Continuous Disclosure Obligations* ("**NI 51-102**"), National Instrument 62-103 – *The Early Warning System and Related Take-Over Bid and Insider Reporting Issues* ("**NI 62-103**") and National Instrument 62-104 – *Take-Over Bids and Issuer Bids* ("**NI 62-104**") (collectively, the "**Proposed Amendments**") and proposed changes to Companion Policy 51-102CP – *Continuous Disclosure Obligations* ("**51-102CP**") and National Policy 62-203 – *Take-Over Bids and Issuer Bids* ("**NP 62-203**") (the "**Proposed Changes**" and, together with the Proposed Amendments, the "**Proposals**"). While we appreciate our comments are being submitted slightly past the August 12, 2026 requested deadline, we also understand from our discussions with the Ontario Securities Commission, referred to below, that the CSA welcomed and would accept and take into due consideration comments that could not be provided by the requested deadline.

As the CSA notes in the Notice, comments received are published and cannot be kept confidential; accordingly, this submission identifies our firm on whose behalf it is made and does not include personal information not intended to be made public. The comments set out herein do not represent the individual or personal views of any one member of the firm but, rather, reflect general commentary developed as being relevant to our clients' interests and objectives, which are diverse. Statements set out herein are limited to commentary on the Proposals and should not be used or attributed to any member of McCarthy Tétrault for any other purposes.

Capitalized terms used but not otherwise defined in this letter have the respective meanings given to them in the Notice. Our comments are organized to follow the order of the headings and sub-headings in the Notice. In most cases, we have not sought to address the many specific questions posed in the Notice; rather, our commentary is of a more general nature and focused on key areas and issues that we identified in the Proposals and that we consider warrant further consideration and/or revisiting. Our comments are also consistent with feedback we shared with representatives of the Department of Mergers & Acquisitions of the Ontario Securities Commission, who attended the Toronto office of McCarthy on July 22, 2026 to present to, and engage in discussion with, members across our national M&A and business law practice groups regarding the Proposals.

(I) About McCarthy Tétrault

McCarthy Tétrault is Canada's premier, full-service, national law firm, offering a comprehensive range of strategic, legal and business solutions to Canadian and international clients, including public and private enterprises of all forms, boards of directors, board committees, management, employees, investors, advisers, individuals and a wide range of other market and industry participants. Our 800-plus lawyers deliver integrated business, corporate and securities law, litigation, tax, real property, and labour and employment services and advice through our offices in all major Canadian business centres of Vancouver, Calgary, Toronto, Montréal and Québec City, as well as offices in New York City, US and London, UK.

Clients are always our top priority. Our industry expertise and cross-practice, collaborative platform across all major industries and sectors relevant to Canada and North America more generally, ensure we build and promote our clients' competitive advantage. At McCarthy Tétrault, we pride ourselves on a tradition of legal excellence that has shaped the business and legal landscape in Canada, including through regularly consulting with Canada's regulatory authorities and contributing to the business community as thought leaders, educators and representatives on industry boards and organizations. Several of our partners have been or are involved in various initiatives and committees of the Canadian securities regulators, including acting as present or past members of advisory, disclosure, capital markets and other committees.

(II) Introduction & Overview

We support the CSA's overall objective of modernizing the issuer bid, take-over bid and beneficial ownership reporting regimes to reflect current market practice, provide clarifications and guidance, and improve transparency. In our view, many aspects of the Proposals are thoughtful, well-balanced, and responsive to many issues that market participants and advisers have identified over time. At the same time, because these regimes operate in fast-moving transactional and contested settings, the final rules and guidance should place particular weight on practicality, administrability and objective standards that align with existing securities law requirements and that can be applied consistently and in real time by market participants and their advisers. Where standards are overly subjective, difficult to apply *ex ante* or run contrary to well-established market norms, they risk creating uncertainty, undue burden, uneven compliance outcomes and tactical opportunities for use or misuse in disputes that are disproportionate to any corresponding potential policy benefit. Across the specific proposals discussed below, we therefore encourage the CSA to refine certain drafting or, in some cases, not pursue a suggested amendment or proposed guidance, so that the resulting requirements are clear, operationally workable and less susceptible to strategic misuse or misunderstanding, while still advancing the CSA's overall transparency and investor protection objectives.

We respectfully submit that the final amendments should be guided by four implementation principles. First, where a rule is intended to operate as a real-time compliance trigger, the trigger should be objective and capable of being applied without hindsight. Second, where disclosure is required in perceived contests for control or influence, the obligation should be actual instances of control or influence and calibrated to produce information that is actually material to securityholders and consistent with well-established principles underpinning securities laws. Third, where the CSA is purporting to codify discretionary relief or existing market practice, the resulting rule should preserve the practical utility of that relief and should not be so narrowly framed that market participants remain dependent on case-by-case applications for exemptive relief. Finally, across all Proposed Amendments, we believe the changes should remain focused on promoting the core mandate and purposes of Canadian securities regulators, namely, focused on amendments that appropriately balance: fostering fair, vibrant and efficient capital markets; diminishing actual (not theoretical) threats to market integrity and building public confidence; protecting investors against unfair, improper or fraudulent market practices; supporting conditions that encourage capital formation and business growth; contributing to the stability of Canada's financial system and the reduction of systemic risk; and all while fostering harmonization of rules and policies across all 13 provinces and territories and having regard to rules and practice (where appropriate) in other competing markets, including any corresponding rules in the United States.

(III) New Selective Repurchase Issuer Bid Exemption

(a) General Comments

We are highly supportive of the CSA's decision to codify an exemption for selective repurchases by issuers. Historically, issuers have sought and obtained exemptive relief for negotiated repurchases in circumstances where the policy concerns underlying the formal issuer bid regime could be appropriately addressed through targeted conditions. In that sense, the Proposal usefully acknowledges an established line of market practice and regulatory precedent for selective buybacks by issuers. A codified exemption should allow issuers to pursue efficient repurchases of larger positions in circumstances where doing so can benefit the issuer and its securityholders as determined by the Board of Directors of the issuer, without requiring a full formal issuer bid process or requiring applications for exemptive relief that may unduly delay or prevent legitimate and beneficial transactions or be disproportionate or unnecessary in the circumstances. More broadly, the practical utility of the exemption will depend on whether its conditions are calibrated in a manner that reflects how these transactions are structured and executed in practice, consistent with the historical exemptive relief orders granted to facilitate issuer buybacks. In our view, certain enhancements to the proposed Selective Repurchase Exemption are warranted to maximize the utility of the exemption, while not unduly broadening its scope at the risk of it being misused, with proper deference to issuers' Boards of Directors.

(i) Policy Rationale

In our view, the policy rationale for the Selective Repurchase Exemption is sound and supported by a long line of exemptive relief orders that have been granted over decades. A selective repurchase mechanism can enhance capital allocation and liquidity flexibility, facilitate the orderly acquisition of larger blocks that may not be practicably absorbed through ordinary-course market purchases, and reduce transaction costs and timing burdens relative to a formal issuer bid. It may also provide an additional tool for issuers where a negotiated repurchase is a more efficient means of addressing an overhang or another capital markets objective, e.g., as part of a broader transaction or in settlement of proceedings. In our view, those benefits are real, but they are best achieved where the exemption rests on conditions that are appropriately broad and sufficiently objective to protect non-participating securityholders without making the exemption too rigid to be used in legitimate cases.

(ii) Selective Repurchase Limit

The 5% limit proposed under the Selective Repurchase Exemption appears too low to achieve the CSA's stated objective of enhancing the competitiveness of Canadian capital markets, providing issuers with greater flexibility, enhancing the attractiveness of Canadian investment, and reducing regulatory burden. A 5% cap may work for modest overhangs, but it may not be sufficient to address the very blockholder liquidity problem that prompted the Proposal. Therefore, we recommend that the CSA consider either increasing the cap to 10% (which would better align with other disclosure triggers and protections for minority securityholders relating to insider transactions under applicable securities laws) or introducing a more flexible formulation, such as a 5% cap with a higher cap available in circumstances where the issuer satisfies enhanced liquidity and/or disclosure conditions, or perhaps has implemented additional protections, such as shareholder approvals, formal valuations and/or independent committee processes, including when repurchases involve insiders. We understand that MI 61-101 may not address all of the CSA's concerns to the extent insiders are involved in repurchases in light of available exemptions when the fair market value of the consideration for the transaction does not exceed 25% of the issuer's market capitalization. However, there could be value for capital markets participants in codifying, generally, the CSA's expectations in these circumstances to avoid the review delays and uncertainties that arise in the context of applying for discretionary exemptions.

Moreover, although we appreciate the CSA's concerns with respect to "greenmail" and equal-treatment of shareholders in the context of the Selective Repurchase Exemption, we do not believe the Selective Repurchase Exemption creates a meaningful greenmail risk, and that any such concerns are adequately addressed through the proposed discount requirement, no-undisclosed-material-information condition, liquid market requirement and prompt disclosure, as well as other protections, rather than through use of an unduly restrictive 5% cap, as discussed below.

- <u>Genuine shareholder activism is not structured around greenmail.</u> The premise underlying the greenmail concern appears to be that an activist investor might accumulate a block of securities, not to create value, but tactically, in the hopes that the fact of the investment alone moves the market price, and that the issuer can then be pressured into repurchasing the block at a premium simply to make the activist go away. That premise does not reflect how shareholder activism actually operates in practice, and it should not drive the design of the issuer bid regime. Activism is recognized by securities regulators as a legitimate asset class, and in fact beneficial to the markets. Activist investors typically commit significant time, capital, and resources to researching a target before taking a position, reviewing governance practices, capital allocation decisions, balance sheet structure, and operational or strategic performance to identify deficiencies that have caused a demonstrable loss of value. Having identified those deficiencies, activists generally pursue value creation by agitating for changes to the board of directors, or for changes to capital allocation, balance sheet management, or strategic direction, all at their own not insignificant expense, with a view to improving the issuer's value over the medium to long term. If and when that value is created, it accrues to all securityholders *pro rata*, even though the activist alone bears the burden and costs of the research, engagement, and campaign. In our experience, an activist does not commit substantial capital and reputational risk, or risks of liability to their investors, on the speculative hope that a board, confronted with a potentially elevated share price attributable to the market's anticipation of the activist's involvement, will feel compelled, in the purported exercise of its fiduciary duties, to repurchase the activist's position simply to make the activist go away. Any marginal return (if any) available from such a scenario would be nominal relative to the capital, time horizon, and risks the activist has committed, and it is not a realistic driver of the activist's investment decision.

- <u>The proposed conditions to the exemption already foreclose a greenmail dynamic.</u> The specific conditions attached to the Selective Repurchase Exemption, as proposed, are themselves largely incompatible with a greenmail scenario. Classic greenmail involves an issuer paying a premium over market price to eliminate an unwanted securityholder. The Selective Repurchase Exemption instead requires that the value of the consideration paid for the repurchased securities, including any brokerage fees or commissions, be less than the closing price of the class on the market on which it is principally traded at the date of the bid. A structural discount requirement is the opposite of the premium that defines greenmail, and its presence in the exemption mitigates the concern raised. The exemption's other conditions reinforce a similar conclusion. The requirement that a liquid market exist in the class of securities, determined in accordance with proposed section 1.12 of NI 62-104, ensures that non-participating securityholders can dispose of their securities in the market rather than being disadvantaged by a selective transaction. An aggregate repurchase limit (which, again, we recommend be increased from 5% to 10%) over any 12-month period, combined with the restriction to no more than 5 persons and no more than 5 transactions in that period, is specifically designed to preclude an issuer from establishing a de facto ongoing repurchase arrangement with a particular securityholder. The requirement to issue and file a news release disclosing the transaction and the cumulative amount repurchased under the exemption also ensures the market and regulators can monitor compliance in real time. Taken together, these conditions already constrain the exemption to the circumstances the CSA intends: a modest, transparent, discounted, board-approved repurchase from a limited number of counterparties in a liquid market for legitimate purposes.

- <u>The issuer's board retains full control; fiduciary duty is an independent safeguard.</u> Any decision whether to repurchase securities under the exemption rests entirely with the issuer's board of directors, not with the securityholder. A board asked to repurchase a block of securities from an activist in circumstances suggesting the purpose of the transaction is to eliminate an unwelcome securityholder, rather than to serve a legitimate capital allocation objective, would be exercising, not abdicating, its fiduciary duties by declining to do so, or by satisfying itself that the repurchase serves the interests of the issuer and its securityholders generally rather than the narrow interest of removing a particular holder. The board's ongoing gatekeeping role is itself a safeguard against misuse of the exemption, independent of any additional greenmail-specific condition.

- <u>Securities regulators retain their public interest jurisdiction as an additional safeguard.</u> In addition to the above protections or mitigants, the codification of a Selective Repurchase Exemption that has long been available via exemptive relief to issuers (including for transactions exceeding 5% of the outstanding shares) at any level, including 10%, would remain subject to the regulators' public interest jurisdiction to intervene if an Issuer purported to leverage the exemption for inappropriate purposes, including potentially greenmail. If the concern regarding greenmail is real – although we believe it is theoretical – the CSA could offer guidance, as it has done in other instances of the Proposal, concerning circumstances in which it may exercise its public interest jurisdiction to intervene, including in the context of greenmail situations.

For these reasons, we do not think the Selective Repurchase Exemption gives rise to a meaningful greenmail concern, nor do we believe increasing the repurchase limit from 5% to 10% increases any risks of greenmail (or other misuse). The economics of genuine shareholder activism, the structural design of the exemption itself, the board's fiduciary obligations, and securities regulators' overriding public interest jurisdiction, each independently foreclose such scenarios. Accordingly, we do not believe any further conditions specific to "greenmail" or other potential misuses are necessary and would caution against adding conditions that could unduly restrict the availability of an otherwise well-designed and beneficial exemption, subject to our suggestions above.

(iii) Purchaser and Transaction Limits

We do not object in principle to limits on the number of sellers and transactions available under the Selective Repurchase Exemption, provided they do not unduly impair legitimate block repurchases. However, we do not believe that the Proposal to limit the Selective Repurchase Exemption to up to 5% of the securities of a class within a 12-month period to be sufficiently meaningful and appears rather arbitrary. Particularly given the nature of the transactions and class of holders that issuers have historically sought exemptive relief to do a selective buy-back is typically from a de minimis number of holders (e.g., one or a couple of large blockholders) and the other exemptions that theoretically could be combined with the Selective Repurchase Exemption to increase the total number of securities to facilitate a buy-back of much more than 5% is, practically, illusory. That is, typically the NCIB Exemption in section 4.8 of NI 62-104 and the employee, officer, director and consultant exemption in section 4.7 of NI 62-104 are not available for purposes of facilitating a buy-back from holder(s) which the Selective Repurchase Exemption is aimed at codifying.

Subject to increasing the 5% repurchase limit to 10% (which we also believe better aligns with other disclosure triggers and protections for minority securityholders relating to insider transactions under applicable securities laws), as outlined above, we do not object to the number of sellers and transactions (e.g. 5-person / 5-transaction) limits available under the Selective Repurchase Exemption, partially consistent with the corresponding "private agreement" exemption to formal take-over bids in section 4.2 of NI 62-104 (we note that this "private agreement" exemption does not contain any percentage limitation when conditions are satisfied). However, we recommend that the CSA clarify that multiple funds, accounts or affiliates under common discretionary management may be treated as a single seller where the seller-side decision-making is centralized and the anti-avoidance concerns addressed by proposed subsection 4.6.1(2) of NI 62-104 are not engaged, as discussed below.

(iv) Requirements for Discount and Liquid Market

Two other aspects of the proposal appear particularly challenging in practice. First, the proposed discount test may be difficult to apply in negotiated transactions because the condition is framed by reference to the closing price at the "date of the bid", while the economic terms of a transaction may be agreed at signing and completed only later. Where there is a gap between signing and closing, market price may move for reasons unrelated to the transaction itself, creating uncertainty as to whether and when the discount condition must be satisfied. This in turn introduces unnecessary execution risk and may encourage parties to structure around ordinary transactional timing. The final rule should clearly specify the time at which the discount condition is tested in order to avoid any ambiguity as to when the “date of the bid” occurs. For the “private agreement” exemption under the corresponding take-over bid rules, where the acquisition is effected through a negotiated share purchase agreement, market participants typically use the signing date of such agreement as the date the bid offer is made and accepted. We recommend testing the condition by reference to the last closing price before the issuer and selling securityholder enter into the binding repurchase agreement, or before the bid is made if no binding agreement precedes the acquisition. Once the parties have entered into a binding agreement that satisfied the discount condition when made, subsequent market movements before settlement should not retroactively invalidate reliance on the exemption.

Second, while we understand the rationale for requiring a liquid market, the proposed test may be unduly restrictive if it relies solely on bright-line trading and market value thresholds. We recommend that proposed section 1.12 of NI 62-104 include an opinion-based alternative modelled on MI 61-101. A purely quantitative test is likely to exclude many issuers for which a selective repurchase could be appropriate, beneficial to the market, and not prejudicial to non-participating securityholders. This is particularly important given the CSA’s own data indicating that the proposed thresholds would be satisfied by a substantial majority of TSX issuers but only a small minority of TSX Venture Exchange issuers. Without an opinion-based alternative, the exemption may operate as a practical exemption for larger issuers only, creating a two-tier regime that is difficult to reconcile with the policy rationale for codifying relief.

(v) Disclosure Requirements

The proposed post-bid news release requirement appears directionally appropriate, and we do not currently suggest materially expanding the disclosure obligation. If the CSA adopts the exemption, the disclosure framework should remain focused on information that is material to the market, not merely useful, and reasonably capable of being prepared promptly, without creating unnecessary complexity that would detract from the objective of a workable exemption.

(vi) Interaction with Other Issuer Bid Exemptions

We agree in principle that a selective repurchase exemption can sit alongside the NCIB Exemption and other existing exemptions set out in Part 4 of NI 62-104, provided the interaction rules are clear. However, more broadly, the utility of the new exemption depends not only on its standalone conditions, but also on whether issuers and advisers can readily determine how it interfaces with existing repurchase alternatives without creating unnecessary overlap, artificial sequencing issues or inadvertent traps.

We do *not*, however, believe that the Selective Repurchase Exemption should be conditioned on the issuer also having a concurrent NCIB in the market for, among other reasons, the following:

- <u>Regulatory precedent does not support such a condition.</u> Exemptive relief orders granted to date by Canadian securities regulatory authorities for selective share buybacks have not, in many instances, required issuers to have a concurrent NCIB in place. An NCIB is only one method, and not always a relevant or effective one, of evidencing that a liquid market exists; not a free-standing requirement in its own right. The codified Selective Repurchase Exemption should not import a new condition that goes beyond established precedent.

- <u>The liquid market condition already addresses the underlying concern.</u> The policy rationale for requiring some assurance around market liquidity is to protect non-participating shareholders – ensuring they retain a liquid market in which to sell their own shares (or otherwise are not disadvantaged by issuer's selective, off-market purchase). However, this concern is already directly and independently addressed by the liquid market condition built into the Selective Repurchase Exemption. A concurrent NCIB is neither necessary or sufficient to achieve that same protective purpose – an issuer can satisfy a liquid market test (subject to our comments elsewhere concerning the proposed bright-line liquid market test proposed for the Selective Repurchase Exemption) without an NCIB in place, and conversely, having an NCIB open does not necessarily offer any increased liquidity.

- Such a condition is incompatible with the TSX's "current intention" requirement for NCIBs. The TSX Company Manual requires that, in order to pursue an NCIB, the issuer must, among other things, file a notice of intention to make an NCIB and, in order to have such notice accepted by the TSX, have a genuine "current intention" to repurchase securities under that program.[1] An NCIB is not meant to be maintained indefinitely, or as a standing formality, in the absence of an actual present intention to buy back stock in the market, at then current market prices. Requiring a concurrent NCIB as a precondition to the Selective Repurchase Exemption would thus, either require issuers to file and maintain an NCIB that does not reflect their current intentions (which arguably would be a misuse of the TSX's NCIB framework), or forego the selective repurchase entirely, notwithstanding that it may be a perfectly legitimate, stand-alone transaction unconnected to any broader market purchase and beneficial to the market, including non-participating shareholders. Either outcome would be a poor result.

- The net effect would be to make codification illusory for many intended users. The stated purpose of codifying the Selective Repurchase Exemption is to provide certainty and reduce the need for one-off exemptive relief applications for a category of transactions regulators have long shown a willingness to permit. If the codified rule imposes a concurrent NCIB condition, the practical result is that the Selective Repurchase Exemption will be rendered unavailable and illusory for many issuers, which will still need to seek discretionary relief. This runs contrary to the outcome codification is intended to eliminate.

(b) CSA's Specific Questions for Comment

See our comments above, several of which are responsive to the specific questions 1 through 11 raised for comment in the Proposal.

(IV) Enhanced Disclosure of Equity Equivalent Derivatives in Specified Circumstances

(a) General Comments

We strongly agree with the CSA's decision *not* to require general aggregation of beneficial ownership and economic exposure, including in respect of equity equivalent derivatives, for purposes of determining the initial and subsequent EWR or AMR triggering thresholds. That approach is consistent with the original objectives of the EWR and AMR regimes and the CSA's acknowledgment that there is not evidence of regular abusive use of derivatives in Canadian markets and that a general aggregation requirement could impose disproportionate burden. Such an approach is also generally consistent with the approach under the corresponding Schedule 13G/13D beneficial ownership regime established, and recently amended, by the U.S. Securities

[1] TSX Company Manual, s. 629(b).

and Exchange Commission (the "**SEC**"). In our view, it is critical to Canada's much smaller and less competitive capital markets that the CSA not purport to create a more onerous beneficial ownership reporting regime in Canada than exists in the United States.

(i) Policy Rationale

As outlined above, we support the CSA's decision not to require general aggregation of beneficial ownership and economic interests for early warning reporting or alternative monthly reporting trigger purposes. In our view, that approach appropriately avoids importing substantial complexity and uncertainty into the threshold analysis, while still leaving room for targeted disclosure obligations in specified contexts. It also reflects a pragmatic recognition that economic exposure and legal ownership serve very different functions in the existing regime, where equity equivalent derivatives are instruments to give a person economic exposure but do not provide the holder the ability to obtain voting or equity securities or to direct the voting of securities held by derivative counterparties. Lastly, it also reflects core objectives underpinning the EWR and AMR regimes, namely, to alert the market of the identity of holders of 10% or more of a class of an issuer's outstanding voting or equity securities because such information may be material information to investors given the potential that such persons can affect the outcome of control transactions.

We also understand the policy rationale for requiring disclosure of equity equivalent derivatives in the context of take-over bids. However, the scope and triggering concepts should be carefully assessed to provide clarity, objectivity and certainty, as discussed below.

We question, however, and do not support the application of similar standards and disclosure requirements in respect of solicitations – whether such solicitations are conducted with an information circular, or solicitations are conducted in reliance on one or more exemptions from the requirement to issue an information circular. We believe solicitations – and shareholder activism generally – is a distinct activity from the typical "contests for control" that the EWR and AMR regimes were introduced to provide early warning detection of. Specifically, unlike in the take-over bid context, which has a bright-line 20% or more trigger, and EWR and AMR reporting, which has a bright-line 10% or more trigger, solicitations can be conducted in many manners and, frequently, by investors who hold far below 10% of the voting or equity securities. In that context, we do not believe that they should properly be considered as being engaged in activity similar to that of a bidder in a take-over bid or similar context. Most commonly, shareholder activism is aimed at agitating for change in contexts where the activist holds a small proportion of the stock (typically well below 10%) and is only effective if the activist is able to secure the support and alignment of a majority of the issuer's other shareholders, who are typically unrelated to and not acting jointly or in concert with the activist, through presenting a clear and compelling strategy via a thoughtful and costly campaign. Imposing additional burdens on such investors to disclose present or past holdings of equity equivalent derivatives or other instruments that alter their economic exposure to the issuer, without otherwise being required to file an EWR or AMR given their holdings are under 10% – in our view, outweighs any perceived benefit of such disclosures.

Accordingly, we recommend that the CSA remove the proposed disclosure applicable to soliciting shareholders entirely, given the latter is not a contest for control situation, but rather a legitimate tool aimed at improving issuers' performance for the benefit of all shareholders. Alternatively, if it is viewed that at some threshold, a solicitation is equivalent to a contest for control akin to a take-over bid, we believe that the enhanced disclosures should only be triggered in contexts where, similar to bidders, the soliciting shareholder, together with their affiliates and associates and joint actors, collectively hold 20% or more of the outstanding voting or equity securities and are engaged in a solicitation via an information circular (only).

We also are of the view that imposing these burdens on investors who solicit with an information circular, irrespective of their ownership, creates unequal and unfair treatment of investors who are not able to avail themselves of long-established exemptions, including reliance on the public broadcast or “15-shareholders-or-less” solicitation exemptions, available to dissidents who solicit without an information circular. In some more concentrated companies, investors may be entitled to solicit in reliance on these exemptions. However, in more widely held, less concentrated ownership situations, investors seeking to achieve positive change may not be able to properly make their case to shareholders without sending a circular. The result of imposing different disclosure triggers will be that some soliciting shareholders will be subjected to enhanced disclosure and burdens, while others will be immune, but otherwise may be similarly situated, including holding a small proportion of shares that would not reasonably be viewed as a contest for control.

(ii) Specific Elements of Proposed Amendments

A central concern is the breadth of the proposed counterparty relationship disclosure standard. We appreciate the policy objective of requiring disclosure of relationships that may bear on a counterparty’s hedging, voting or tendering decisions. However, a standard based on what “could be perceived” to affect those decisions may invite over-disclosure and, more likely, tactical allegations in contested settings. We recommend replacing or supplementing that formulation with more objective indicators, such as those arising from contractual rights, voting or tendering arrangements, financing or advisory relationships connected to the transaction, material commercial dependencies, or communications regarding voting, tendering, acquisition or disposition of the relevant securities. We believe that a “balance of possibilities” standard, particularly when linked to a counterparty’s potential decision to acquire, dispose of, or vote securities of the offeree issuer, is too vague and speculative. If any such disclosure requirement were to be imposed, it should be based on a clear, objective “balance of probabilities”, such that it “would reasonably be expected to affect” that person’s decision, to provide greater clarity. We also believe that is consistent with the objectives of the regime, which is not simply to provide information that might be “nice to know” to the market, but rather information which is in fact material and based on objective standards, having regard to a reasonable person in the circumstances.

As outlined above, we are also concerned that the proposed framework creates an uneven and arbitrary disclosure regime within solicitation contexts. A dissident that sends an information circular would be subject to enhanced disclosure regarding equity equivalent derivatives and other economic exposure. By contrast, a soliciting securityholder relying on the public broadcast, speech or publication exemption or the 15-shareholder-or-less exemption would be required to provide beneficial ownership/control disclosure, but would not be subject to the same derivative and economic exposure disclosure contemplated by proposed Items 6.7 and 6.8 of Form 51-102F5. If the policy rationale is that securityholders should understand aggregate economic exposure in active control contests, the CSA should consider eliminating the proposed enhanced disclosures for *any* solicitation campaigns, whether or not a circular is required or the investor is relying on an available exemption from the requirement to issue a circular, on the basis that solicitation campaigns are, in our view, functionally and substantively very different from actual control-contest situations, such as take-over bids, unless or until the soliciting shareholder otherwise has EWR or AMR disclosure obligations due to their holdings of equity or voting securities.

We are also not persuaded that, in the take-over bid context, because a bidder is required under Item 7 of Form 62-104F1 to include disclosure about securities purchased or sold by certain persons within the 6-month period preceding the date of the bid, that they should in turn be required to provide similar information about related financial instruments and other agreements, arrangements or understandings that have or had the effect of altering economic exposure during the 6-month period preceding the date of the bid. The rationale for those disclosures is quite different. In the context of equity equivalent derivatives, related financial instruments, and the like, what should be material to the market at the time of the bid is any existing arrangements that alter the bidder's economic exposure, not past transactions. Maintaining transparency about those existing arrangements or instruments is already captured by the Proposed Amendments, and need not be expanded further to require information about prior transactions in equity equivalent derivatives or other purely economic arrangements which are no longer present or relevant.

(iii) New Guidance on Disclosure and Use of Derivatives

We also think the accompanying guidance should be refined to avoid creating undue uncertainty through open-ended statements about the use of derivatives and public interest concerns. Guidance can play a useful interpretive role, but where the governing concepts are already nuanced, broad or subjective, expansive commentary may increase rather than reduce uncertainty. The final guidance should therefore seek to articulate clearer, more objective indicators of concern and should align with the CSA's decision not to impose general early warning aggregation of equity equivalent derivatives.

(b) CSA's Specific Questions for Comment

See our comments above, some of which are responsive to the specific questions 12 through 16 raised for comment in the Proposal.

(V) <u>Amendments to Early Warning Reporting Regime – Disclosure and Timing Requirements for Acquirors' Plans or Future Intentions</u>

(a) General Comments

We appreciate the CSA's objective of improving the usefulness of early warning disclosure regarding an acquiror's plans or future intentions, and we agree that an acquiror should not be permitted to rely indefinitely on stale disclosure once its intentions have in fact changed. However, we also observe that the existing framework already prescribes for that result; subsection 5.2(1) of NI 62-104 requires an acquiror to make further disclosure each time there is a change in a material fact contained in its most recent report, and Item 5 of Form 62-103F1 requires the acquiror to describe any plans or future intentions that it and any joint actor may have which relate to or would result in the enumerated actions. Our concern is thus not with the objective of proposed section 3.3 of NP 62-203, but with those elements of the proposed guidance that would supplement the objective "change in a material fact" standard with subjective, hindsight-dependent concepts, in particular the references to "significant steps" and "irrevocable steps". In our view, those concepts are ill-suited to operate as real-time compliance triggers for a filer that, unlike a reporting issuer, has no confidential filing mechanism, is frequently not in control of the pace or the outcome of the matters it would be required to describe, and must self-assess its obligations in a setting that may later become contested. If the compliance issue existed before, we fail to see how this new guidance will change acquirors' actions.

<u>Practical effect of the proposed guidance</u>

It appears that the issue the CSA is seeking to address is one of compliance rather than one of disclosure policy. The Notice does not suggest that the existing requirement is misdirected, or that the enumerated actions in Item 5 of Form 62-103F1 capture the wrong information. The concern, as we read it, is that in the CSA's view, acquirors are not updating their disclosure when they should. That is a compliance problem, and compliance problems are ordinarily addressed by sharpening the trigger, by supervision and by enforcement where a filer has in fact failed to update disclosure it knew to be inaccurate. We do not believe that the appropriate response to a compliance problem is to introduce a less precise standard than the one already in place. Under the Proposed Changes, an acquiror acting in good faith is left to determine, in real time and without the benefit of hindsight, whether a series of steps has become collectively "significant" or whether a step it has taken is "irrevocable". An acquiror not acting in good faith, by contrast, gains the benefit of that same imprecision. The guidance therefore risks increasing the burden on the compliant while doing little to constrain the conduct that prompted it.

Relatedly, we are not persuaded that the proposed guidance will materially change market practice in the manner contemplated. As a practical matter, parties generally will not disclose intentions before there is a signed agreement or a similarly concrete development, absent a leak, market rumour or comparable event that independently requires a response. In fact, there have been circumstances in which securities regulators have taken issue with issuers' and/or bidders' premature disclosures of potential transactions or material events that have not crystallized or are subject to significant uncertainty, such as when there is no binding agreement to effect the same. In that sense, there may be limits on the extent to which guidance alone can accelerate meaningful disclosure; the more likely outcome is not better information, but more generic and more carefully hedged statements, drafted to preserve optionality and to avoid the risk that a definitive-sounding statement is overtaken by events. Disclosure of that character is of limited use to securityholders and may in fact be less informative or more confusing than the disclosure currently provided, while increasing the volume of filings that the market must interpret.

We are also concerned about the emergence of a practical two-tier system in which more heavily advised participants and larger non-venture issuers adapt to the guidance in one manner, while many TSX Venture Exchange issuers and other less well-resourced market participants experience greater uncertainty in both preparing and interpreting the required disclosure. That outcome would be inconsistent with the CSA's burden reduction objectives and would produce uneven compliance across the market. The CSA should therefore consider whether the guidance, as proposed, would meaningfully improve the quality of disclosure or instead add compliance complexity without materially changing underlying behaviour.

<u>Timing standard should rest on the objective backstops</u>

We support the portion of proposed section 3.3 of NP 62-203 that states that a change in plans or future intentions will occur "at the latest upon the execution of a definitive agreement to enter into a transaction, the commencement of a take-over bid, the public announcement of a proxy solicitation or a similar event, as applicable" and that notwithstanding that presumption, "a change in plans or future intentions may, in some instances, occur at an earlier stage of a particular transaction or a particular event". A clear statement to that effect would preserve the utility of the guidance while removing the principal source of uncertainty.

<u>"Significant steps" and "irrevocable steps" are too subjective</u>

The proposed guidance would require an acquiror, when it or any joint actor "takes significant steps with respect to a particular transaction or event", to assess whether those actions, "individually or taken together", constitute a change in previously disclosed plans or future intentions, and states that a change may occur earlier where the acquiror or a joint actor "has taken irrevocable steps to effect a potential transaction". Neither concept is defined, and both are qualitative, subjective, cumulative and, by their nature, most readily applied after the fact. Whether a step was “significant”, and whether a series of steps has become “irrevocable”, are precisely the kinds of determinations that in our experience are resolved only on a full evidentiary record, and often only once a transaction or campaign has succeeded or failed. Requiring a filer to make that judgment contemporaneously, on pain of a filing default or worse, imports the same difficulty we identify elsewhere in this comment letter in relation to the proposed deemed acquisition on formation of a joint actor relationship.

Moreover, the consequences of that uncertainty are not evenly distributed. In a contested setting, an issuer or a rival bidder has an obvious incentive to assert that an acquiror crossed an undefined “significant steps” threshold weeks earlier than the acquiror judged, and to seek relief on that basis, which in turn can help make a bidder’s offer – even if non-binding – more coercive to shareholders. Guidance framed in these terms would supply a new and readily deployed procedural argument in circumstances where the underlying disclosure objective has already been met. We are also concerned that the practical response of many acquirors will be to file early and generically in order to protect themselves, which returns the market to the very boilerplate that the guidance is intended to discourage.

Interaction with confidentiality, negotiation and existing disclosure obligations

An acquiror filing under the early warning requirements is not in the same position as a reporting issuer disclosing a material change. A reporting issuer that determines confidentiality is warranted may file a confidential material change report under Part 7 of NI 51-102 and rely on that mechanism while a transaction remains uncertain (although we acknowledge that the filing of confidential material change reports is quite infrequent due to other practical and legal concerns doing so raises). No comparable accommodation exists under the EWR or AMR regimes. The effect of an early trigger is therefore an unqualified obligation to make public disclosure of intentions that may be preliminary, conditional on financing or diligence, or dependent on the agreement of the issuer or third parties. Premature disclosure of that kind carries a real risk of being inaccurate or misleading if the matter does not proceed as contemplated, may itself move the market price and prejudice the transaction that the disclosure describes, and may put the acquiror in tension with confidentiality obligations owed to counterparties and lenders.

We recommend that if the CSA intends to proceed with any guidance or changes in this area, the final guidance acknowledge this asymmetry expressly. At a minimum, the CSA should confirm that an acquiror is not expected to disclose the existence or terms of confidential negotiations, financing discussions or preliminary approaches before the objective markers described above are reached, and that a decision not to update in those circumstances does not, without more, constitute a failure to comply with subsection 5.2(1) of NI 62-104. We would also encourage the CSA to consider whether corresponding guidance is warranted to address the possibility that an acquiror’s compelled early disclosure of a contemplated transaction becomes, in effect, a disclosure of the issuer’s undisclosed material information.

Reserving language and the CSA’s “boilerplate” concern

We understand and share the CSA’s concern that general language reserving the right to take any of the actions enumerated in Item 5 of Form 62-103F1 should not be used as a substitute for disclosure once an acquiror has actually formed a plan or intention with respect to a particular action. We caution, however, against treating reserving language as presumptively deficient. Item 5 requires disclosure of plans or future intentions which the acquiror “may have” in relation to the enumerated actions, and an acquiror that has genuinely not settled on a course of action, and that is preserving a range of options, is accurately describing its position when it says so. That is a substantive statement about the acquiror's posture, not an evasion, and securityholders are not assisted by disclosure that purports to a greater degree of certainty than exists. We recommend that the final guidance distinguish between reserving language used to describe a genuinely open position, which remains appropriate, and reserving language maintained after a decision with respect to a particular enumerated action has in fact been made, which is not.

Reassessment on subsequent filings and application to eligible institutional investors

We do not object to the expectation that an acquiror reassess the accuracy of its Item 5 disclosure each time it is required to make further disclosure, including on a filing triggered by an increase or decrease in its securityholding percentage under paragraph 5.2(2)(a) of NI 62-104. That is consistent with existing practice. We recommend, however, that the guidance confirm that the obligation is one of reassessment, and that the reassessment does not itself give rise to a filing obligation in the absence of a change in a material fact, so that the guidance is not read as requiring an affirmative statement in every subsequent report.

We also note that the proposed guidance would appear to apply to disclosure required under Form 62-103F2 and Form 62-103F3. Eligible institutional investors relying on Part 4 of NI 62-103 are, by the design of the AMR regime, holders that do not have the requisite intention to change or influence control of the issuer, and the loss of eligibility provisions in Part 4 already address the circumstances in which that changes and full early warning reporting is required. We recommend that the CSA either omit the extension of this guidance to Forms 62-103F2 and 62-103F3 or clarify how it is intended to operate alongside the loss of eligibility provisions.

In summary, the compliance concern the CSA has identified is, in our view, better addressed through the existing objective standard in subsection 5.2(1) of NI 62-104 than through guidance introducing less determinate concepts than the requirement it supplements. Should the CSA proceed, we recommend that it retain the objective backstop in proposed section 3.3 of NP 62-203, together with the acknowledgment that a change in plans or future intentions may in some instances occur at an earlier stage, but remove the references to "significant steps" and "irrevocable steps". We further recommend that the final guidance confirm that an acquiror is not expected to disclose confidential negotiations, financing discussions or preliminary approaches before those objective markers are reached, distinguish between reserving language describing a genuinely open position and reserving language maintained after a decision has in fact been made, and confirm that the expectation of reassessment on subsequent filings does not itself create a disclosure obligation absent a change in a material fact. We also recommend that the CSA either omit the extension of this guidance to Forms 62-103F2 and 62-103F3 or clarify how it is intended to operate alongside the loss of eligibility provisions in Part 4 of NI 62-103.

(b) CSA's Specific Questions for Comment
None.

(VI) Early Warning Reporting Triggers and Thresholds – Deemed Acquisition on Formation of Joint Actor Relationship

(a) General Comments

We appreciate the CSA's effort to clarify aspects of the early warning reporting regime, including in relation to joint actors. Where two or more securityholders genuinely act jointly or in concert and, as a result of an acquisition, collectively cross the 10% threshold, we agree that the market should receive early warning disclosure. However, that result is already produced by the existing regime. Our principal concern, and it is a fundamental one, is with the Proposal in new subsections 5.1(4) and 5.1(5) of NI 62-104 to deem an acquisition (and, on cessation, a disposition) to occur automatically upon the formation of a joint actor relationship, without any actual acquisition or disposition of securities. For the reasons set out below, we do not support that proposal and recommend that it not be adopted in any form.

Our opposition to deeming a triggering and disclosure obligation upon the formation of joint actorship rests on six related concerns. First, the authority the CSA cites does not support the premise that the current rule contains a "gap": the cited decision did not identify an inadvertent gap, but deliberately interpreted the early warning trigger to require an actual acquisition, and rejected the "absurd consequences" argument on which the Proposals now rely. Second, "acting jointly or in concert" is a highly fact-specific concept that, as both *Re NorthWest Copper Corp.*, 2023 BCSECCOM 602 ("***NorthWest Copper***") and *Re DIRTT Environmental Solutions Ltd.*, 2023 ABASC 32 ("***DIRTT***") demonstrate, is typically resolved only after a contested evidentiary hearing and with the benefit of hindsight; it is ill-suited to operate as a real-time, self-assessed compliance trigger. Third, a deemed-acquisition-on-formation trigger would chill exactly the kind of legitimate shareholder engagement that both decisions were at pains to protect, and which Canadian and U.S. securities regulators have expressly endorsed in recent years. Fourth, it would hand issuers and rival bidders a new tactical weapon to try to thwart legitimate and fundamental shareholder rights, a concern that is not theoretical, since both *NorthWest Copper* and *DIRTT* arose from precisely that kind of tactical deployment and market participants hoped, in the aftermath of those decisions, that their clarity would reduce tactical "joint actorship" complaints. Fifth, the proposal could require consortiums and joint bidders (where their combined ownership is 10% or more) to prematurely disclose their discussions and/or preliminary arrangements. Sixth and finally, the proposal is difficult to reconcile with both the CSA's own, correct decision not to require aggregation of equity equivalent derivatives for early warning purposes as well as the take-over bid regime with its 20% threshold which only applies to actual offers.

(i) Deemed Acquisitions – Securities of Joint Actors

Proposed subsection 5.1(4) of NI 62-104 would deem each person acting jointly or in concert with others to have acquired the securities beneficially owned, or over which control or direction is exercised, by those others "when they began acting jointly or in concert with each other"; proposed subsection 5.1(5) would deem a corresponding disposition upon cessation of the relationship. The effect is to make the existence and timing of an early warning obligation turn not on any acquisition or disposition of securities, but on the formation (or ending) of a relationship, which is inherently fluid and very difficult, in legal and practical terms, to pinpoint. We therefore recommend that subsections 5.1(4) and 5.1(5) not be adopted, for the reasons further detailed below.

<u>The Proposal does not fill a "gap": *NorthWest Copper* deliberately settled the trigger</u>

The Notice justifies the Proposal as addressing a "gap" whereby, following the formation of a joint actor relationship, an acquisition is "no longer required for a reporting obligation to arise," and cites *NorthWest Copper* (Notice, note 17). With respect, that decision is not authority for a gap; it is authority for the opposite. In *NorthWest Copper*, a BCSC panel confronted the precise question the Proposals address: whether, when parties act jointly or in concert, an early warning obligation can arise without a subsequent acquisition. The issuer argued, as the Proposals now assume, that requiring an acquisition after the relationship forms would produce "absurd consequences," because a group each individually below 10% could combine above 10% and escape disclosure. The panel rejected that argument on the plain meaning of the rule:

> *"[I]f parties are acting jointly or in concert, the early warning requirements are triggered only when as a result of a subsequent acquisition, the joint actors collectively hold 10% or more of the outstanding securities of the class. Absent an acquisition, the early warning requirements contained in section 5.2 do not apply. To hold otherwise would be to read out altogether the reference to an acquisition." (para 156)*

The BCSC panel addressed the "absurd consequences" argument directly, holding that leaving some joint action outside early warning "is neither an absurd consequence nor a sufficient basis to reject the plain meaning of the provision" (para 157). That interpretation was not the panel's alone: it was the position advanced by the BCSC executive director, the regulator's own staff, who argued that "a plain reading of the provision requires an acquisition" and that "[i]t is the acquisition that triggers the disclosure requirement" (para 118).

The acquisition trigger is therefore not an oversight or a drafting gap. It is a considered, plain-meaning feature of the long-established regime, endorsed by a securities commission panel and by the regulator's own staff, and reached after the contrary "absurdity" argument was squarely raised and rejected. Recasting that settled interpretation as a "gap" and reversing it, on the same reasoning the panel declined to accept, is not a clarification; it is a substantive change in policy. If the CSA wishes to make that change, it should be justified transparently on its own merits rather than presented as gap-filling. It is also notable that where the *NorthWest Copper* panel did see room for clarification, it was narrow: it "encourage[d] the CSA to make... clearer in the language of the relevant provisions" that acting jointly or in concert can apply to proxy solicitation (para 99). The Proposals go well beyond that limited invitation.

<u>Joint actorship is fact-specific and hindsight-driven, and cannot bear the weight of a real-time trigger</u>

Whether parties are "acting jointly or in concert" is, by the express terms of section 1.9(1) of NI 62-104, "a question of fact." Both decisions show how demanding that inquiry is. In *NorthWest Copper*, the panel could resolve the question only after a contested hearing, applying a balance-of-probabilities standard that required "clear, convincing and cogent" evidence and a careful weighing of disputed circumstantial evidence. It held that the bar for such a finding "is appropriately set relatively high" (para 204), and that alignment of interest is not enough: the applicant had to show that the parties "actively worked together to achieve a joint specific purpose, and were not simply aligned in interest" (para 205).

DIRTT is to the same effect. The ASC panel dismissed the joint actor allegation, holding that the fact that the parties' "interests... aligned in some areas... did not mean that they were acting jointly or in concert" (para 172), and emphasizing that "doing something separately at the same time is not equivalent to doing something together" (para 171). Parallel purchases, attendance at the same meetings (which the issuer itself had arranged), shared concerns about management, and even a willingness to support a shareholder requisition after it was announced were all held insufficient to establish joint actorship.

The implication for the Proposals is direct. A concept that sophisticated tribunals resolved only after contested hearings, and with hindsight, cannot fairly be converted into a bright-line moment (i.e. "when they began acting jointly or in concert") that market participants must identify prospectively, in real time, and self-report, on pain of a deemed acquisition, a news release and the moratorium. Neither the participants nor their advisers will reliably be able to fix the instant at which a relationship "began," and the same facts will predictably be characterized very differently by adverse parties. That is the antithesis of the objective, administrable trigger the early warning system should provide, and it is at odds with the implementation principles set out earlier in this comment letter, which calls for real-time compliance triggers to be objective and capable of application without hindsight. Having the acquisition as the trigger is key and much more susceptible to determination.

The Proposal would unduly chill legitimate shareholder engagement and the exercise of fundamental investor rights

Both the *NorthWest Copper* and *DIRTT* decisions were careful to protect ordinary shareholder engagement, and the proposal cuts against that protection. In *NorthWest Copper*, the panel expressly (and rightly, in our view) balanced block disclosure against the free flow of shareholder discussion:

> *"Disclosure of shareholder blocks is important, but so is the free flow of information and opinion among shareholders of a public company. We conclude that it is better to insist on sufficiently clear, convincing and cogent evidence that parties are acting jointly or in concert and take the risk that by doing so, some groups will fly under the radar, than to allow reliance on speculation to create a climate that stifles discussion among shareholders." (para 204)*

The *DIRTT* panel made the same point in terms of a "chilling effect," warning that investors "may become reluctant to invest in a company or criticize its management for fear of being attacked for abusive conduct merely because another investor's approach had similar timing or raised similar concerns" (para 210). A trigger that deems an acquisition, with immediate disclosure and moratorium consequences, the moment a joint actor relationship is alleged to "begin" runs directly against this policy. It would turn routine and healthy shareholder dialogue into a disclosure-risk event, discouraging precisely the engagement that the CSA elsewhere in the Proposals seeks to encourage. The concern is especially acute where the coordinating shareholders are exercising fundamental corporate-democracy rights, being the right to speak with one another and to vote for directors or the removal of directors (one of the few fundamental rights that shareholders still enjoy, with most governance determinations falling within the hands of issuers), which the *NorthWest Copper* panel described as "of critical importance" (para 211) and which should not be recast as a deemed securities "acquisition."

We also believe the Proposal would create a more onerous regime for investors in Canada, relative to established and recently amended rules in the U.S. pertaining to beneficial ownership reporting and "group formation", and also run contrary to similar views expressed by the SEC relating to the same. In its October 10, 2023 final rule – *Modernization of Beneficial Ownership Reporting*, the SEC clarified that standard shareholder communications do not constitute legal "group formation" under Sections 13(d)(3) and 13(g)(3) and explicitly stated that its guidance aimed to protect the free flow of information and promote shareholder engagement, acknowledging the importance of activism for market accountability, while providing safe harbours for joint engagement with management and voting initiatives. To deem investors in Canadian companies – many of whom are U.S.-based, including U.S.-based activists – to have filing obligations in Canada immediately upon joint actor formation, notwithstanding the absence of any acquisition or trade that otherwise triggers disclosure – would hamper the competitiveness of our capital markets, create unnecessary disharmonization between otherwise very similar beneficial ownership reporting regimes, chill investor engagement and dialogue and, ultimately, likely serve to immunize many Canadian companies from legitimate shareholder activities that aim to make for more effective, efficient, competitive and desirable Canadian markets and better performing reporting issuers for the benefit of all shareholders.

The Proposal invites tactical misuse; which the *NorthWest Copper* and *DIRTT* decisions had served to mitigate

Tactical abuse arising from the Proposals is not an abstract risk. Both decisions arose from an incumbent board deploying the "joint actor" allegation tactically, seemingly to disenfranchise dissident shareholders and entrench itself. In *NorthWest Copper*, the application, which was dismissed, was found to be an eleventh-hour attempt to win a proxy contest by disenfranchising shareholders; the panel accepted that "any potential harm to investors of non-disclosure could have been addressed with a disclosure order," and refused the "draconian" voting- and trading-prohibition remedies the issuer sought (paras 208, 211). In *DIRTT*, the ASC panel went further, expressing "dismay that DIRTT brought the Application, as it was ill-conceived and an imprudent use of DIRTT resources" (para 3), finding that "only DIRTT's conduct raised public interest concerns," and observing that the board "took steps to thwart the Requisition and to tar those involved," repeatedly labelling them "the Joint Actors" (para 211).

A deemed-acquisition-on-formation trigger would supply issuers and rival bidders with a new and earlier pressure point: an incentive to characterize ordinary interactions as the "beginning" of joint actorship in order to force premature disclosure, or to manufacture an alleged reporting default with which to attack perceived opponents agitating for change for the benefit of all shareholders. The existing acquisition-based trigger, combined with the very helpful standards and guidance established under *NorthWest Copper* and *DIRTT*, is far more resistant to that gamesmanship precisely because it keys to an objective, observable event.

The Proposal could require premature disclosure of consortium and joint bidder discussions and preliminary arrangements

The consequences of proposed subsections 5.1(4) and 5.1(5) are not confined to the shareholder engagement context. They would also apply, and in our view would apply most acutely, to consortium bids, club deals and other joint acquisition proposals, which are an established and beneficial feature of Canadian M&A. Paragraph 1.9(1)(a) of NI 62-104 deems persons to be acting jointly or in concert where, as a result of an agreement, commitment or understanding, they intend to exercise jointly or in concert with each other any voting rights attaching to the securities, or where they intend to acquire or offer to acquire securities jointly. Two or more parties who agree to explore or pursue a joint bid therefore become joint actors at, or shortly after, the moment they agree to work together, and typically long before any offer is made, any definitive agreement is signed, or any securities are acquired. Where each of them holds securities of the target – as is frequently the case where a consortium is assembled around an existing significant shareholder, or a strategic party with a toehold – and their holdings in the aggregate reach 10% of a class, the Proposal would deem each of them to have acquired the securities of all of the others at that moment, and would require an immediate news release, an early warning report and compliance with the moratorium provisions in Part 5 of NI 62-104.

The disclosure that would be compelled at that point is not limited to the bare fact of the relationship. Item 5 of Form 62-103F1 requires an acquiror to describe any plans or future intentions that it or any joint actor may have that relate to or would result in, among other things, the acquisition of additional securities of the issuer, a corporate transaction such as a merger, reorganization or liquidation, or a change in the board of directors or management of the issuer. A consortium formed for the purpose of considering or making a proposal to acquire the issuer would have to say so. The Proposal would therefore compel public disclosure of a contemplated acquisition proposal at the earliest and most fragile stage of its development: before diligence, before financing has been arranged or committed, before any approach has been made to the target's board, and before the parties themselves know whether they will proceed at all. A single bidder in precisely the same position – contemplating precisely the same transaction and holding precisely the same number of securities – would have no disclosure obligation whatsoever until it acquired securities or commenced a bid. The obligation would arise solely because the prospective bidder has a partner.

The consequences of that asymmetry are significant, and they fall on securityholders as much as on the parties. Disclosure of a preliminary, conditional and wholly uncertain intention is of limited use to the market when made and is liable to be inaccurate or misleading if the proposal is not ultimately pursued. It will predictably move the target's trading price, increasing the costs of the very transaction that the disclosure describes and, in many cases, preventing that transaction from proceeding on terms acceptable to the consortium or at all. It invites interlopers, arbitrage positions and rumour-driven trading to form before the consortium has completed the work necessary to determine whether and, ultimately, to make, a proposal in the first place. And it places the consortium members in direct tension with confidentiality obligations owed to one another, to their financing sources and, where an approach has already been made, to the target itself, and may in substance compel disclosure of the target's own undisclosed material information, being the existence of a possible transaction. As we note above in relation to the proposed guidance on plans and future intentions, an early warning filer has no analogue to the confidential material change report available to a reporting issuer under Part 7 of NI 51-102; once triggered, the obligation is an unqualified obligation to disclose publicly.

Proposed subsection 5.1(5) compounds the difficulty. If the consortium does not proceed – the members are unable to agree on price or structure, financing proves unavailable, diligence is unsatisfactory, or the target's board declines to engage – the joint actor relationship would cease and each member would be deemed to have disposed of the others' securities, triggering a further news release and report. The market would be told, in sequence and in real time, that a group had assembled to consider a transaction and that the group had disbanded, in circumstances where no securities changed hands and no transaction was ever publicly proposed. Disclosure of that character is at best uninformative and is more likely to be actively misleading as to the prospects of the issuer. It would also hand issuers, rival bidders and other adverse parties a public record of a failed approach that can readily be deployed tactically in any subsequent process, which is the same concern we identify above in respect of the tactical misuse of joint actor allegations generally.

The predictable response to a rule of this kind is that parties will structure around it rather than comply with it in the manner the CSA intends. Prospective consortium members may defer any agreement, commitment or understanding among themselves until the latest possible moment, to the detriment of the diligence, financing and negotiation that a well-prepared proposal requires; may restructure the arrangement so that a single member is the sole bidder, with the others participating only through equity commitments documented after signing; or may simply decline to pursue Canadian targets on a joint basis. None of those outcomes serves securityholders, and each of them reduces the number and quality of proposals that Canadian issuers receive. Consortium and club arrangements are frequently the only practicable means of assembling the capital required for larger Canadian transactions, particularly where Canadian pension funds and private capital participate alongside a strategic party, and the regime should not penalize that structure relative to a single-bidder structure that raises identical policy considerations.

We emphasize that the existing regime already addresses the underlying disclosure concern at the point at which it becomes material to securityholders. If members of a consortium acquire securities and, in the aggregate with their existing holdings, cross 10%, early warning reporting is required in the ordinary course. If the consortium makes an offer to acquire that would result in it holding 20% or more, the take-over bid regime applies, the securities of all joint actors are aggregated through the definition of "offeror's securities" in section 1.1 of NI 62-104, and Form 62-104F1 requires disclosure of the offeror and of the persons acting jointly or in concert with it. If the consortium enters into a definitive agreement with the issuer, the issuer's own continuous disclosure obligations are engaged. In each case the market receives the information at a time when securityholders can act on it, which is the purpose of the regime. What the Proposal would add is disclosure at a stage at which there is nothing for securityholders to decide.

Accordingly, we recommend that proposed subsections 5.1(4) and 5.1(5) not be adopted in any form.

<u>The Proposal is inconsistent with the CSA's treatment of equity equivalent derivatives as well as the take-over bid regime</u>

The Proposal is also difficult to reconcile with the CSA's own treatment of the identical concept under the take-over bid regime. As the Notice confirms, the deeming in proposed subsections 5.1(4) and 5.1(5) would operate only for the purposes of the early warning requirements in Part 5 of NI 62-104, and the formation of a joint actor relationship would not, on its own and absent a subsequent acquisition, constitute a take-over bid, even where the joint actors collectively own or exercise control or direction over 20% or more of a class. We agree with that limitation. We do not, however, think that its logic can be confined to Part 5. The take-over bid threshold is engaged only where there is an "offer to acquire", and the securities of joint actors are aggregated with the offeror's securities as at the date of that offer. The CSA has therefore accepted, in the same instrument and in respect of the same relationship, that the mere formation of a joint actor relationship is not an acquisition and should not be treated as one – notwithstanding that the collective holding in that case is twice the early warning threshold and that the policy stakes, being a potential change of control, are at their highest.

That concession is, with respect, difficult to square with the Proposal. If the formation of a joint actor relationship among holders of 20% or more does not warrant being deemed an acquisition for take-over bid purposes, we do not see why the formation of the same relationship among holders of 10% or more should be deemed an acquisition for early warning purposes. The distinction cannot rest on materiality; if anything, the aggregation of a 20% block is the more significant market event. Nor can it rest on the character of the conduct, which is identical in each case. The difference is that the take-over bid regime keys to an objective, externally verifiable event, being an offer to acquire, and the CSA has rightly been unwilling to displace that objective trigger with a relationship-formation test that would be resolved only after the fact. The early warning regime rests on the same architecture, for the same reasons, and in our view should be left undisturbed for the same reasons.

The Proposal would also produce an anomaly that is difficult to explain to market participants and their advisers: a group deemed to have acquired securities, and required to announce that acquisition publicly and observe a moratorium, under Part 5 of NI 62-104, while at the same time being taken not to have acquired anything under Part 2 of the same instrument. Deeming provisions that operate differently in different Parts of a single instrument, in respect of a single defined concept, are precisely the sort of technical trap that the Proposals are elsewhere directed at reducing.

Elsewhere in the Proposals, the CSA declined to require general aggregation of beneficial ownership and economic interests, including equity equivalent derivatives, for early warning threshold purposes, reasoning that it does "not have evidence that derivatives are being used inappropriately or abusively with any regularity" in Canadian markets and that aggregation "could impose a disproportionate burden relative to potential concerns." We strongly agree with that restraint, as reflected in our comments on enhanced derivative disclosure. Consistent with it, the enhanced economic-exposure disclosure the CSA does propose is confined to circumstances where an information circular is required in contests for control, not to ordinary stakebuilding.

The joint actor deeming proposal runs the other way. It broadens the early warning trigger, reaches pre-circular and pre-bid conduct, and imposes a subjective, hindsight-prone and burdensome test, all without evidence of an actual market problem that the CSA (rightly) required before declining to aggregate derivatives. For similar reasons the CSA is not prepared to aggregate a holder's own economic exposure through derivatives during stakebuilding, we do not believe it is appropriate to deem an outright acquisition, and compel immediate disclosure, the instant a joint actor relationship is said to have been formed. The two positions should be reconciled in favour of the more measured approach the CSA has taken to derivatives in the context of take-over bids.

For the above reasons, we recommend that proposed subsections 5.1(4) and 5.1(5) not be adopted. The existing trigger, an actual acquisition that takes joint actors, in the aggregate, to 10% or more, is clear, objective and administrable, and it strikes the appropriate balance the *NorthWest Copper* panel endorsed between transparency and the free flow of shareholder engagement.

If the CSA's underlying concern is that coordinated blocks of 10% or more should be transparent in genuine contests for control or influence, that concern is better met through an objective triggering event tied to actual conduct (e.g. an acquisition, the launch of a take-over bid, or the filing of a requisition or information circular by persons who are in fact joint actors) rather than the mere formation of a relationship. A circular- or bid-based trigger would also ensure that, as in *DIRTT*, securityholders receive the material information in time to make their tendering or voting decisions, which is the regime's underlying purpose. However, in such contexts, we would also suggest that the CSA consider what corresponding disclosure obligations an issuer should have upon the occurrence of such events, rather than placing all disclosure obligations on the acquirer. For example, if an acquirer faces an EWR disclosure trigger upon requisitioning a meeting or, say, filing an information circular, seeking the election of dissident director nominees, should the issuer not have a corresponding disclosure obligation to ensure any information that an acquirer is required to provide to the issuer – such as disclosures concerning nominees submitted pursuant to an advance notice by-law adopted by the issuer – be fully and accurately disclosed by the issuer in its continuous disclosure documents pertaining to such event?

At a minimum, if the CSA nonetheless proceeds, we recommend that the rule incorporate the safe harbours and clearer triggering events, confirming that exploratory discussions, discussions among shareholders concerning issuers' governance, business and affairs (including the nomination or election of directors), shareholders agreeing to support dissident investors agitating for change at an issuer (such as supporting their director nominees), voting support, confidentiality and standstill arrangements, joint diligence, non-binding term sheets and ordinary-course financing discussions do not, without more, trigger a deemed acquisition, and that a reporting obligation arises only upon an actual coordinated agreement, commitment or understanding to acquire, vote or dispose of securities, launch a bid, *jointly* solicit proxies, or otherwise exercise coordinated influence over the issuer at a relatively "high bar".

(b) CSA's Specific Questions for Comment

See our comments above, several of which are responsive to the specific question 18 raised for comment in the Proposal.

(VII) Amending Exemptions and Codifying Common Discretionary Exemptions – Amendments to the Take-Over Bid and Issuer Bid Regimes

(a) General Comments

(i) Removing the 5% Market Purchase Exemption

The CSA's rationale for the proposed removal of the 5% Market Purchase Exemption is consistent with broadly-held critiques of the exemption and, accordingly, we do not object to its removal. The underlying policy rationale for the 5% Market Purchase Exemption – to promote liquidity in the applicable target issuer's securities and encourage bidders to raise their offer prices – was to some extent undermined by the addition of the non-waivable 50% minimum tender requirement in 2016, as any securities taken up pursuant to the 5% Market Purchase Exemption are in any case excluded from the 50% minimum tender threshold. Further, we also accept the CSA's referenced concern with the exemption's potential tool of abuse by bidders to block the potential intervention of competing bids, a dynamic that is unhelpful to the interests of securityholders. Indeed, as Canadian securities regulators have noted previously (see *Aurora Cannabis Inc. (Re)*, 2018 ONSEC 10), the liquidity concern is often only applicable in the context of circumstances that otherwise militate in favour of action to suspend its use, or remove it altogether (as in *Falconbridge Ltd (Re)* (2006), 29 OSCB 6783).

We would note that restrictions under U.S. securities laws have also historically complicated the use of purchases under the exemption and that its removal accordingly aligns Canadian securities laws with international norms. The only concern we do have is that the removal of the exemption does reduce an avenue for bidders to partially finance bid costs through a post-bid position, which further complicates incentives for potential bidders. However, this is a relatively minor factor that is unlikely in practice to have a material impact on a potential bidder's considerations.

(ii) The Non-Reporting Issuer Exemptions from the Take-Over Bid and Issuer Bid Requirements

We have no substantive comments at this time on the Proposed Amendments to the NRI TOB Exemption (section 4.3 of NI 62-104) and NRI Issuer Bid Exemption (section 4.9 of NI 62-104), including the codification of additional categories of excluded persons for the Maximum Securityholder Condition. We are generally supportive of this change. We would also support an increase in the Maximum Securityholder Condition beyond 50, on the basis that relief has historically been granted and would be reflective of today's more complex public and private capital markets, including many non-reporting issuers having more than 50 securityholders.

(iii) Other Amendments (Mini-Tenders Guidance, "Dutch Auction" Issuer Bids and Targeted/Housekeeping Amendments)

See our comments below under the heading "*Miscellaneous – Proposed Guidance in NP 62-203*".

(iv) Modified Dutch Auction Issuer Bids – Extension Take Up Requirement

We are supportive of codifying relief from the Extension Take Up Requirement for modified "Dutch auction" issuer bids proposed in subsection 2.32(4.1) of NI 62-104, which would help rectify a long-standing challenge faced by issuers engaged in such issuer bids.

(v) Issuer Bids – Proportionate Tenders

We are supportive of codifying relief to facilitate Proportionate Tenders in the context of issuer bids proposed in subsection 2.26(3.1) of NI 62-104, again, which would help rectify a long-standing challenge faced by issuers engaged in such issuer bids.

(vi) Issuer Bids – Acquisition of Convertible Securities during an Issuer Bid

We have no substantive comments at this time on the Proposed Amendment to subsection 2.3(2) of NI 62-104 regarding the acquisition of convertible securities during an issuer bid, which seems directionally appropriate.

(b) CSA's Specific Questions for Comment

See our comments above, some of which are responsive to the specific questions 19 and 20 raised for comment in the Proposal.

(VIII) <u>Miscellaneous – Proposed Guidance in NP 62-203</u>

(a) General Comments

Our specific comments on certain of the proposed guidance in NP 62-203 addressing mini-tender offers, the "date of the bid", offshore repurchases, public interest jurisdiction, and acting jointly or in concert in proxy solicitations are set out below, as applicable.

(i) Offshore Repurchases

We support the Proposed Amendments' clarification of how the issuer bid requirements apply to offshore repurchases, and in particular the guidance that a repurchase from a securityholder who is neither in Canada nor a resident of Canada, effected consistently with the new Selective Repurchase Exemption, will not generally raise public interest concerns. This reflects our own experience. In connection with a U.S. convertible note offering by a reporting issuer with no trading market in Canada, we obtained comfort from staff that they would not intervene to apply the issuer bid requirements to the share repurchases arising on exercise of a covered capped call entered into to hedge the dilutive impact of the notes, on the basis that the call counterparties were financial institutions resident outside Canada. Staff expressly declined, however, to extend that comfort to an otherwise identical transaction with a counterparty resident in Canada, which would have required exemptive relief and separate consideration — relief that the timelines of a marketed financing would not permit.

We respectfully submit that the residency of the hedging counterparty is not a meaningful distinction from an investor-protection standpoint. A covered or capped call written to hedge convertible-note dilution is an integral, arm's-length feature of a financing rather than a selective return of capital: no additional consideration is payable by the issuer on exercise, any shares delivered to the issuer are cancelled, and the structure reduces dilution for — and so benefits rather than prejudices — the issuer's public securityholders. Whether the counterparty bank sits in New York or Toronto, or elsewhere in Canada, has no bearing on the position of those securityholders. We therefore recommend that the CSA (i) confirm in the companion policy that these financing-integral derivative repurchases fall within the non-intervention view reflected in the offshore guidance, and (ii) preferably, remove the counterparty-residency condition so that Canadian financial institutions may act as counterparties on the same basis as their foreign counterparts. The latter change would directly advance the CSA's stated objective of enhancing the competitiveness of Canadian capital markets, and would avoid the anomalous result of Canadian issuers being required to source these hedges exclusively offshore, to the detriment of Canadian banks.

(ii) Public Interest Jurisdiction in Equity Equivalent Derivatives

See our general comments above under the heading "*Enhanced Disclosure of Equity Equivalent Derivatives in Specified Circumstances – General Comments – New Guidance on Disclosure and Use of Derivatives".*

(iii) Acting Jointly or in Concert in Proxy Solicitations

See our general comments above under the heading "*Early Warning Reporting Triggers and Thresholds – Deemed Acquisition on Formation of Joint Actor Relationship – General Comments – Deemed Acquisitions – Securities of Joint Actors".*

(iv) Mini-Tenders

We support the CSA's decision to update its guidance on mini-tender offers. Mini-tenders have a legitimate, established role in Canadian capital markets, and the principal existing guidance, CSA Staff Notice 61-301 – *Staff Guidance on the Practice of "Mini-Tenders"* ("**Staff Notice 61-301**"), is more than 25 years old and addresses only a subset of issues arising in practice. However, we also appreciate that mini-tender offers may, in some circumstances, be misused, be coercive, or otherwise potentially prejudice shareholders.

In our view, however, proposed new section 2.18 of NP 62-203 is unhelpful and unlikely to achieve the CSA's objective. Respectfully, we believe it is framed too generally to give offerors, issuers, securityholders and their advisers meaningful guidance on mini-tender offers, but also omits to provide other much-needed guidance or clarity. At the same time, it invokes the mechanics of the formal take-over bid regime, including Form 62-104F1, in a general way that risks imposing disproportionate and often inapt obligations in the context of a transaction that, by definition, falls outside the well-established and recalibrated take-over bid regime. We explain below and recommend a more targeted approach that combines clear principles with specific, context-appropriate expectations, drawing in part on guidance issued by the SEC.

We also do not consider NP 62-203 the right place for mini-tender guidance, since a mini-tender offer is neither a take-over bid nor an issuer bid. Proposed section 2.18 also creates uncertainty as to how it will operate alongside Staff Notice 61-301. We therefore suggest that the CSA use this opportunity to revisit, update and, ideally, replace Staff Notice 61-301 in its entirety with new tailored guidance, or undertake to do so in the near future, outside of the Proposed Changes.

Our comments on proposed section 2.18 of NP 62-203 are as follows:

<u>Mini-tender offers serve legitimate market functions</u>

The guidance should acknowledge and preserve, the legitimate functions that mini-tender offers can serve. For example, a mini-tender can provide liquidity to securityholders, including holders of less than a "board lot" or other small positions who might otherwise face disproportionate brokerage costs on a sale. It also lets investors build a position in an issuer relatively quickly while remaining below the 20% threshold that triggers the formal take-over bid requirements, which can be important for fostering other legitimate objectives. Mini-tenders have also been used in Canada as legitimate tools in formal take-over bids and business combination transactions, including to achieve an increased price for target securityholders, or otherwise to influence or disrupt a competing transaction. The 2019 contest for control of Transat A.T. Inc. is illustrative. There, Group Mach Acquisition Inc. launched a mini-tender offer structured to remain below the 20% take-over bid threshold in order to press for improved terms for shareholders in connection with Air Canada's proposed acquisition of Transat. Although the Québec Financial Markets Administrative Tribunal found the mini-tender contrary to the public interest in that case and prohibited Group Mach from taking up any tendered securities, the mini-tender nonetheless successfully contributed to Air Canada increasing its offer price from $13 to $18 per share.

Guidance that treats mini-tender offers as inherently suspect, or that generally imposes the formal take-over bid requirements without regard to these legitimate uses, risks chilling conduct that benefits securityholders and market efficiency. We are also concerned that proposed section 2.18 of the Proposals appears less fully developed than other aspects of the Proposals. If the CSA believes mini-tender offers warrant additional regulation, we believe it should more fully consider how they differ in substance and mechanics from formal take-over bids and develop a specific, tailored and comprehensible framework, rather than generally applying the take-over bid rules. By treating mini-tender offers as though they were take-over bids, the proposed guidance risks increasing, not reducing, the confusion Staff Notice 61-301 was intended to prevent, including the risk that a securityholder inadvertently tenders to a mini-tender in the mistaken belief that it is a formal take-over bid. We therefore encourage the CSA to develop its guidance more fully and target genuine investor-protection concerns – the risk that securityholders tender by mistake, inadvertence, misunderstanding or coercion – without unduly impairing the legitimate activity described above.

<u>The proposed guidance in the Proposals is too general</u>

Proposed section 2.18 of NP 62-203 states that "both take-over bids and mini-tender offers require security holders to make tendering decisions. Accordingly, certain principles underlying the Bid Regime should be applied in the context of a mini-tender offer", then identifies at a high level that securityholders should be treated equally, offered identical consideration, given a reasonable period to consider the offer and provided with adequate information to make a reasoned decision. It adds that whether a securityholder has been given sufficient time and information "will depend on the circumstances." While we do not disagree with these principles in theory, we believe they remain too vague to be useful or applied consistently. At this level of abstraction, the guidance gives little practical direction on how to conduct a compliant mini-tender offer and gives issuers and securityholders correspondingly little certainty about what to expect. Vague guidance also invites inconsistent application, a problem compounded by the absence of any clarity on how the new guidance should be read with Staff Notice 61-301.

<u>It is inappropriate to generally apply the take-over bid rules to mini-tender offers</u>

We are concerned with the guidance's treatment and proposed application of Form 62-104F1 to mini-tender offers. Proposed section 2.18 states that, "with respect to take-over bids, the Instrument contemplates a minimum deposit period of 35 days, and Form 62-104F1 Take-Over Bid Circular sets out the information that securities regulatory authorities have determined is relevant to a security holder's tendering decision," and offers Form 62-104F1 as a "guideline" for the information to be provided in a mini-tender offer. We appreciate that this is framed as guidance rather than a mandatory standard. However, by definition mini-tender offers are not take-over bids, and using Form 62-104F1 as the benchmark is likely in practice to create an expectation that a mini-tender offeror should provide take-over bid circular-level disclosure for a mini-tender offer. In our view, that expectation is not appropriate and disproportionate, particularly considering how infrequently mini-tender offers arise and in light of past case law and guidance offered on the topic.

NI 62-104 establishes a bright-line threshold for a take-over bid: an offer to acquire outstanding voting securities that, together with securities already held by the offeror and its joint actors, would result in the offeror holding 20% or more of the outstanding securities of the class. By contrast, a mini-tender offer, as defined in proposed section 2.18 (though we note the definition differs from that in Staff Notice 61-301), falls below that threshold and is not subject to the requirements of Part 2 of NI 62-104.

As the CSA acknowledges in Staff Notice 61-301 and proposed section 2.18, a mini-tender offer is, by definition, not a take-over bid. We therefore find the proposed application of the entirety of Form 62-104F1, the disclosure form required for a take-over bid, to be the wrong measure of adequate disclosure for a mini-tender.

The CSA's stated rationale is that "both take-over bids and mini-tender offers require security holders to make tendering decisions." With respect, we do not agree entirely with that rationale. Many transactions governed by securities legislation require an investor to make an investment or disposition decision, yet the prescribed form and intensity of disclosure vary widely with the nature, scale and consequences of the transaction. The point is illustrated in the context of investors making investment decisions: an investor deciding whether to purchase securities in a private placement makes an investment decision no less real than an investor purchasing securities under a prospectus. Yet we do not point issuers conducting private placements to Form 44-101F1 and suggest they provide prospectus-level disclosure for those offerings.

Required disclosure should be tailored to the character of the transaction and the specific policy concerns it raises, and the same reasoning should apply to mini-tender offers. Treating a mini-tender as though it warrants take-over bid circular disclosure because a tendering decision is involved is, in our view, not appropriate and would impose disclosure obligations disproportionate to the nature of a mini-tender transaction.

Further, many items required by Form 62-104F1 have little or no application to a mini-tender and would impose real, disproportionate burdens and confusion if treated as the standard. For example, each of the following items is appropriate in the context of a formal take-over bid, a control transaction, but has limited relevance to a mini-tender, where the offer is for a small percentage of a class of shares that does not confer control: Item 7 (trading in the securities of offeree issuer), Item 9.1 (minimum tender requirement and mandatory extension period), Item 17 (purpose of the bid), Item 18 (valuation), Item 20 (rights of appraisal and acquisition), Item 22 (approval of take-over bid circular), Item 23 (other material facts) and Item 25 (statement of rights).

Rather than pointing to Form 62-104F1, we recommend that guidance should be developed setting out a tailored and appropriately limited list of disclosure items material in the mini-tender context, drawing in part from the existing suggestions in Staff Notice 61-301 and the SEC's guidance. See also our comments above under the heading *"Miscellaneous – Proposed Guidance in NP 62-203 – General Comments – Mini-Tenders"*.

The proposed guidance is disproportionately one-sided as between the offeror and the issuer

The guidance, as drafted, is asymmetric: it contemplates a range of expectations for the mini-tender offeror but none for the target issuer. For example, it does not suggest that the target's board of directors should express a view on the offer, as a target board must do by way of a directors' circular in a formal take-over bid. We do not suggest that a full directors' circular obligation is warranted for a mini-tender, since it is, by definition, not a take-over bid. We do, however, encourage the CSA to make the guidance more balanced and give proportionate recognition to the target's role, including its responsibility to its shareholders. For example, guidance encouraging or facilitating a timely issuer response where the board considers it appropriate would produce a more balanced framework than one that places the entire burden on the offeror.

Deposit period should not be prescriptive

We agree that a 35-day minimum deposit period may be an appropriate reference point for the "reasonable period of time" securityholders should have to consider a mini-tender offer, but also are of the view that there may be some cases where a shorter period is also acceptable based on the surrounding context, e.g., an impending transaction or other event that does not afford an offeror of a mini-tender the ability to provide a full 35-day deposit period. That said, we acknowledge that 35 days is broadly consistent with the 20-business-day minimum offering period for tender offers in the United States under Regulation 14E. We would, however, encourage the CSA to clarify that the reference is illustrative, not prescriptive, and that the appropriate period for a given mini-tender may be shorter.

In light of the above comments, our recommendations in respect of section 2.18 of NP 62-203 are as follows:

- The CSA should update and consolidate (or replace) Staff Notice 61-301. Rather than introducing new standalone guidance in proposed section 2.18 of NP 62-203, we recommend that the CSA use this opportunity to revisit, update and, ideally, replace Staff Notice 61-301 with updated guidance. That notice dates from 1999 and sets out disclosures staff considered appropriate for mini-tender offers at the time. Introducing proposed section 2.18 without reconciling it with Staff Notice 61-301 would leave offerors, issuers and securityholders, and their advisors, with two overlapping and partly inconsistent sources of guidance of differing vintage, generality and emphasis; which confusion is compounded by past unpublished guidance provided by securities regulators in Canada, the *Group Mach* public interest decision on mini-tenders and by past court decisions. For example, the definition of a "mini-tender offer" is inconsistent between the two. Staff Notice 61-301 states that a mini-tender is "a widely-disseminated offer to purchase shares of a public company at a price below the current market price" and that "a mini-tender offeror usually offers to acquire only a small percentage of the outstanding shares of a public company and in any event significantly less than 20% of the outstanding shares of a public company"; section 2.18 of NP 62-203, however, does not state that the offer price must be below current market price. In our view, a single, current and consolidated statement of the CSA's expectations in a refreshed staff notice would be more useful than issuing incremental guidance and would avoid the interpretive uncertainty competing guidance instruments create.

- The CSA should issue clear guidance on mini-tender offers. Rather than defaulting to the take-over bid framework, we recommend that the CSA address the issue directly and identify with reasonable specificity the features that matter in the mini-tender context. This better reflects the fundamental point that a mini-tender offer is not a formal take-over bid and should not be held to the same standards.

  The guidance should focus on what is genuinely material in the mini-tender context. In our view, it could draw on the more concrete, practical approach reflected in the SEC's guidance on mini-tender offers.[2] Among the matters the CSA might consider specifically addressing include the following:

  - that the offer not be structured in a coercive manner;
  - equal treatment of, and identical consideration for, all securityholders of the class to whom the offer is made;
  - adequate dissemination of the offer, and of any material change to it, by means reasonably designed to reach affected securityholders, including at a minimum filing the offer on SEDAR+ together with dissemination by press release or advertisement, rather than relying only on delivery to a depositary or posting a notice on a website;
  - clear and prominent disclosure of information material to a tendering decision in a mini-tender offer, including the principal trading market and current market price of the securities; the offer price and, where the offer is at a discount, a prominent statement to that effect; a clear calculation of the net price the securityholder will receive after any fees, commissions, deductions or adjustments; the existence or absence of withdrawal rights and the procedure for exercising them; whether tendered securities will be taken up pro rata if the offer is oversubscribed; and the identity of the offeror and its financial capacity to pay for the securities;
  - that any conditions to the offer be based on objective criteria outside the offeror's control, so that the offeror cannot terminate, vary or extend the offer at will; and
  - that a mini-tender offer may not be subject to a financing condition, and that the offeror disclose the source of, and its capacity to provide, the funds required to complete the offer.

  An approach of this kind would offer clear guidance capable of being complied with, reduce uncertainty, target the specific abuses that have historically prompted regulatory concern, and do so in a manner proportionate to the nature of a mini-tender offer.

(v) Settlement Period

We believe there are real practical and legal impediments to the Proposed Amendments relating to a proposed reduction in settlement periods, and thus are not supportive of the Proposed Changes in this regard, for the following reasons:

[2] See https://www.sec.gov/rules-regulations/2000/07/commission-guidance-mini-tender-offers-limited-partnership-tender-offers.

- Depositary processing. Depositaries completing tailored corporate actions in the bid context must undertake verification and administrative steps well beyond those required for standard trade settlement. The current three business day period accommodates those practical realities; a one business day period (or a "promptly" standard interpreted as such) would be too stringent and administratively difficult for depositaries to meet consistently.
- International registered holders. While technological improvements have made certain aspects of bid settlement mechanics more efficient, administrative complexities remain, particularly in processing payments to registered holders located in international jurisdictions.
- Notice of Guaranteed Delivery mechanics. The guaranteed delivery process contemplates delivery of the actual documents within a specified period (typically up to three business days after expiry of a bid). A shortened payment period is difficult to reconcile with that timeline and, absent a workable Notice of Guaranteed Delivery mechanism, not all securityholders would be able to participate in a bid on an equal footing.

While we understand the CSA's position of moving bid settlement payments to one business day to align with the current securities trade settlement period and we appreciate the CSA's interest in ensuring the timely receipt of payment for securityholders for their securities in the context of a bid, we do have concerns with the proposed replacement of "3 business days" with "promptly" with respect to the prescribed settlement period for a take-over bid or issuer bid. In our view, the CSA's proposal to provide guidance to interpret "promptly" as consistent with the practices applicable to equity and long-term debt trades in Canada (i.e., 1 business day as of May 27, 2024), risks creating too stringent and administratively difficult a requirement for acquirers and depositaries and may be detrimental to registered holders who want to participate in a bid.

The current regulatory environment accommodates the practical realities faced by depositaries, whose role in completing tailored corporate actions in the context of a take-over bid in particular requires more extensive verification and other administrative processes on behalf of the acquirer than that for more standard capital markets transactions. We would further note that it is for this reason that the broader settlement cycle specified under National Instrument 24-101 – *Institutional Trade Matching and Settlement* has not historically been linked with the process for settlement for take-over and issuer bids. While technological improvements have made certain aspects of take-over bid settlement mechanics more efficient, our view is that certain administrative complexities remain, particularly for processing payments to registered holders located in international jurisdictions.

In addition, the settlement period for bids should remain at the three business days given the potential for registered securityholders to participate in the bid and the use of a Notice of Guaranteed Delivery. For securities trades generally, a registered holder is in control of when and how they sell their registered securities which could involve a dematerializing of a certificate into electronic form so as to meet the one business day settlement cycle. Notice of Guaranteed Delivery allows registered holders to commit to tender their securities by the deadline of a bid provided that they deliver the actual documents within a specified period (usually up to 3 business days after a bid expires). Without Notice of Guaranteed Delivery, not all securityholders could participate in the bid which could be unfair. All securityholders are to be treated fairly and have a reasonable opportunity to participate in a bid. If the settlement period is moved to "promptly" – which likely would be interpreted as one business day given the proposed guidance – it would require securityholders that utilize a Notice of Guaranteed Delivery to make decisions earlier in the bid process. That is to be able to participate, such registered holder would have to potentially tender into the bid earlier than other securities holders to allow for the delivery of the actual documents prior to the bid expiring. Having to make such a decision earlier than other securityholders could be detrimental and unfair. As such, the policy rationale behind this change is something that should be reconsidered.

Accordingly, we do not support shortening the tendering process payment period to one business day, whether directly or through the proposed replacement of “3 business days” with “promptly” (interpreted, per the proposed guidance, as consistent with the one business day settlement cycle for equity and long-term debt trades in Canada). Taken together, the above burdens and impediments risk being detrimental to registered holders who wish to participate in a bid, which is the very group the Proposal seeks to benefit.

(b) CSA’s Specific Questions for Comment

See our comments above, several of which are responsive to the specific questions 21 and 22 raised for comment in the Proposal.

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We would be pleased to discuss our comments with you. If we can be of further assistance, please do not hesitate to contact any of Shea T. Small (ssmall@mccarthy.ca; 647-283-8424), Patrick Boucher (pboucher@mccarthy.ca; 514-397-4237), Robert Hansen (rhansen@mccarthy.ca; 416-601-8259), Jennifer F. Longhurst (jlonghurst@mccarthy.ca; 416-601-7764), Andrew Parker (aparker@mccarthy.ca; 416-601-7939) or Samantha Pettinato (spettinato@mccarthy.ca; 416-601-7847) with any questions regarding this submission.

Yours truly,

McCarthy Tétrault LLP

McCarthy Tétrault LLP