CSA/ACVM Canadian Securities Administrators Autorités canadiennes en valeurs mobilières

NOTICE AND REQUEST FOR COMMENT

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

and

Proposed Amendments to National Instrument 62-103 *The Early Warning System and Related Take-Over Bid and Insider Reporting Issues*

and

Proposed Repeal of CSA Policy 62-201 *Bids Made Only in Certain Jurisdictions*

April 28, 2006

Introduction

We, the Canadian Securities Administrators (the CSA), seek comment on proposed National Instrument 62-104 *Take-Over Bids and Issuer Bids* (the Instrument), which introduces a harmonized take-over bid and issuer bid regime across all Canadian jurisdictions. The Instrument

- consolidates and harmonizes most of the requirements and restrictions governing take-over bids and issuer bids and related early-warning requirements in a single national instrument,
- updates selected take-over bid and issuer bid provisions, and
- provides exemptions from the bid requirements currently contained in various provincial statutes, regulations and rules.

The Instrument requires the use of specified forms of circulars and notices by persons involved in take-over bids and issuer bids:

- Form 62-104F1 *Take-Over Bid Circular*,
- Form 62-104F2 *Issuer Bid Circular*,
- Form 62-104F3 *Directors' Circular*,
- Form 62-104F4 *Director's or Officer's Circular*, and
- Form 62-104F5 *Notice of Change or Notice of Variation*

(collectively, the Forms).

Proposed Companion Policy 62-104CP *Take-Over Bids and Issuer Bids* (the Companion Policy) provides guidance on how the CSA will interpret and apply the Instrument and the Forms.

We are also proposing to make consequential amendments (the Consequential Amendments) to update National Instrument 62-103 *The Early Warning System and Related Take-Over Bid and Insider Reporting Issues* (NI 62-103). We are publishing the Instrument, Forms and Companion Policy together with the Consequential Amendments for a 90-day comment period.

The Instrument and Consequential Amendments will be implemented as

- rules in British Columbia, Alberta, Manitoba, Ontario, Prince Edward Island, Nova Scotia, New Brunswick and Newfoundland and Labrador,
- regulations in Quebec, the Northwest Territories, Nunavut and Yukon, and
- commission regulations in Saskatchewan,

The text of the Instrument and the Consequential Amendments will be available on websites of CSA members, including the following:
www.albertasecurities.com
www.bcsc.bc.ca
www.msc.gov.on.ca
www.osc.gov.on.ca
www.gov.ns.ca/nssc
www.nbsc-cvmnb.ca
www.lautorite.qc.ca
www.sfsc.gov.sk.ca

Background
The Instrument is designed to harmonize most of the requirements and restrictions governing take-over bids and issuer bids and related early warning requirements across all Canadian jurisdictions, including the four jurisdictions that do not currently regulate bids.

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

Local regulations and rules governing take-over bids and issuer bids in certain jurisdictions will also be repealed. Notice of those proposed repeals may be published separately in each jurisdiction.

Purpose and Benefits

The Instrument will eliminate duplication and inconsistencies in existing take-over bid and issuer bid regimes and codify discretionary exemptions that we have routinely granted.

At present, nine jurisdictions have similar but not identical take-over bid and issuer bid requirements. Offerors that wish to conduct a multi-jurisdictional take-over bid or issuer bid must familiarize themselves with the regimes of the jurisdictions in which offeree security holders are located. This typically necessitates consulting the various acts, regulations and rules of the different jurisdictions. On implementation of the Instrument, offerors and other market participants will generally have to look no further than the Instrument for a single set of requirements and restrictions governing a bid made in Canada.

Where possible, we have organized existing requirements, restrictions and exemptions in chronological order to make them more straightforward. We have modified the scope of various current exemptions and introduced several new exemptions in response to a number of relatively routine exemptive relief applications. These changes should yield additional benefits to market participants.

Summary of Key Features of the Instrument

Part 1 Definitions and Interpretation

Part 1 of the Instrument identifies defined terms used in the Instrument. We have added a definition of "person" that includes an individual, corporation, partnership, trust or fund for purposes of the Instrument. We have also modified the definition of issuer bid to exclude gifts and bids that are a step in a business combination or reorganization. We have also defined several terms such as "offer to acquire" and "offeror" for the purposes of the various *Securities Acts* and this Instrument.

For purposes of determining when a person is acting jointly or in concert, we have introduced a deeming provision in section 1.7 of the Instrument in respect of certain specified persons. Associates of the offeror will only be presumed to be acting jointly or in concert with the offeror, which for most jurisdictions represents no change. Under the existing securities legislation of most jurisdictions the following are presumed to be acting jointly or in concert with an offeror in determining whether the take-over bid and early warning thresholds have been triggered and integration requirements apply:

(a) every person or company that, as a result of any agreement, commitment or understanding with the offeror or with any person or company acting jointly or in concert with the offeror, acquires or offers to acquire securities of the same class as those subject to the offer to acquire;

(b) every person or company, that as a result of any agreement, commitment or understanding with the offeror or with any person or company acting jointly or in concert with the offeror, intends to exercise jointly or in concert with the offeror or with any person acting jointly or in concert with the offeror any voting rights attaching to any securities of the offferee issuer;

(c) every affiliate of the offeror; and

(d) every associate of the offeror.

However, under the existing securities legislation of at least one jurisdiction, both affiliates and associates of the offeror are currently deemed to be acting jointly or in concert with the offeror. The Instrument would establish a deeming provision for the persons or companies in paragraphs (a), (b) and (c). In most jurisdictions this change means that a deeming provision would replace a presumption for determining the status of persons or companies in paragraphs (a), (b) and (c) above, but in at least one jurisdiction, associates of an offeror would now only be presumed to be acting jointly or in concert instead of being deemed to be acting jointly or in concert with the offeror. In our view, these relationships are of such significance that any purchases made by persons in these circumstances should come within the ambit of the Instrument. The persons and companies identified in paragraph (d) would be subject to a rebuttable presumption due to the range of entities that might be caught by a deeming provision including persons who have no relevant connection to the acquisition activities of the offeror. Although a deeming provision may be the subject of exemptive relief, it is intended that a deeming provision cannot be rebutted by evidence to the contrary unlike a presumption.

Part 2 Bids

Part 2 of the Instrument consists of five divisions dealing with the formal bid process:

Division 1 - focuses on restrictions on acquisitions or sales prior to, during and after the bid. These restrictions are similar to the current restrictions on acquisitions found in existing take-over bid and issuer bid regimes.

Division 2 - outlines the procedures to be followed when making a bid, including making the bid to all security holders in Canada, methods for delivery of bid circulars and notices of change or variation, and obtaining the consent of experts. These procedures do not differ significantly from current procedures in place under existing bid regimes.

Division 3 - deals with the obligations of an offeree issuer relating to the preparation and delivery of a directors' circular and related notices of change or variation to its security holders. These obligations remain essentially unchanged from current obligations of offeree issuers under existing securities legislation.

Division 4 - sets out the obligations of the offeror, including requirements for identical consideration and adequate financial arrangements for cash bids, which are very similar to their current counterparts in existing legislation. We have, however, introduced some modifications to the current variation, collateral benefit and proportionate take-up and payment provisions.

A key change contained in Division 4 is the addition of the restriction in subsection 2.21(3) of the Instrument which restricts the type of variations to the terms of an offer that an offeror is permitted to make after a bid has commenced. An offeror would not be able to

- lower the consideration offered under the bid,

- change the form of consideration offered under the bid, other than to add to the consideration already offered under the bid,

- lower the proportion of outstanding securities for which the bid is made, or

- add new conditions.

The variations listed make the terms of the bid less favourable to offeree security holders. We are concerned that a notice of variation would not provide security holders of the offeree issuer with sufficient time or disclosure to consider these types of changes. We are seeking comment on whether changes of this nature to a bid are so fundamental to the bid that they should trigger a new bid.

The purpose of the bid requirements is to ensure that offeree security holders are provided with sufficient time and information to make an informed decision about tendering to the offer. Offerors have a responsibility to launch their bid on appropriate terms. These restrictions do not limit the type of conditions that an offeror can attach to a bid.

Current take-over bid requirements generally prohibit offeree security holders from being offered different consideration for their targeted securities. We frequently deal with the issue of whether employment contracts, often designed to encourage key personnel of the offeree issuer to remain in place in the event that a bid is successful, constitute a prohibited collateral benefit, and discretionary relief is often sought and routinely granted.

To address this issue, the collateral agreement prohibition in section 2.22 of the Instrument incorporates a provision that makes it clear that the collateral benefit prohibition under certain conditions excludes consideration offered and paid under employment compensation, severance or other employee benefit arrangements entered into with employees or directors of the offeree issuer. This should reduce or eliminate the necessity for discretionary relief. Coincidentally, the issue is also being considered in the US and we will monitor the US developments during our comment period.

The proportionate take-up and payment provision in section 2.23 of the Instrument has also been drafted to exclude the popular modified "dutch auction" process and odd lot purchases from the strict application of the proportionate take-up requirements to issuer bids. This change is intended to eliminate the need for exemptive relief under the existing requirement.

Division 5 - deals with bid mechanics such as the minimum deposit period, prohibition on take-up, withdrawal rights, take-up and payment for deposited securities, and return of deposited securities. Sections 2.30 and 2.31 are new provisions requiring the prompt issuance and filing of a news release on the expiry of a bid and when an offeror knows that it will not take-up securities deposited under a bid. The offeror must also promptly return the securities to the security holder.

Part 3 General

Part 3 contains provisions related to the language of bid documents, the filing of documents such as lock-up and support agreements by the offeror, and certification of circulars and notices by authorized officers and directors of the offeror or offeree issuer.

Section 3.2 imposes a new filing requirement under which an offeror would be obligated to file copies of documents related to the take-over bid, including agreements between an offeror and a security holder of the offeree issuer, directors or officers of the offeree issuer, the offeree issuer itself, or any other material agreement that the offeror has access to that affects control of the offeree issuer if those documents have not already been filed. The purpose of this requirement is to provide greater transparency regarding agreements that affect control as well as to address the ambiguity and mixed practice as to whether current early warning requirements require the filing of some of these agreements. Lastly, this requirement would create a more level playing field with merger and acquisition transactions subject to a vote of all shareholders as issuers are already obligated to file many of these documents under Part 12 of National Instrument 51-102 *Continuous Disclosure Obligations*, if they have access to them.

Section 3.4 of the Instrument obligates any non-corporate entity such as an income trust that is the target of a take-over bid to provide a list of its security holders at the request of the offeror. This will ensure that an offeror has the right to obtain a list of offeree security holders regardless of the structure of the offeree issuer.

Part 4 Required Forms

Part 4 of the Instrument identifies the five forms of circulars and notices required to be used by offerors and offeree issuers under the Instrument. These include a form of notice of change or variation. The existing notice of intention to make an issuer bid would be replaced by an obligation to promptly issue and file a news release.

Part 5 Exemptions

Part 5 sets out exemptions from the bid requirements in Part 2 of the Instrument, many of which are based on current exemptions in existing securities legislation. Notable changes have been made to the "private agreement" exemption and we have also added two new take-over bid and issuer bid exemptions.

Key features of various exemptions are summarized below:

- The "private agreement" exemption in section 5.3 of the Instrument, like its current counterpart, provides that an offer to purchase made to not more than 5 persons is exempt from the requirements of Part 2. We have addressed a current area of uncertainty by clarifying that the exemption cannot be relied on for additional purchases by the same offeror.

  The Instrument provides that offerors relying on the "private agreement" exemption in section 5.3 must complete their purchases within 6 months of the initial purchase and are restricted to using the exemption only once in relation to that offeree issuer. There is a carve-out for intra-group transactions. The most significant proposed change is the restriction on the number of times an offeror may make use of the exemption. In our

view, this restriction is necessary to ensure that the exemption is used for its original purpose of allowing limited transfers by groups of controlling security holders rather than for the purpose of avoiding the formal bid requirements by characterizing the bid as a series of exempt "private agreements". Permitting an offeror to make continuous exempt purchases of a small number of securities effectively drains the control premium from minority security holders and is inconsistent with the equal treatment principles of the bid requirements.

- Sections 5.5 and 5.12 of the Instrument provide new exemptions for take-over bids and issuer bids where the bulk of the targeted securities (more than 90%) are held outside Canada and the offeror is a foreign issuer. These provisions allow a bid to be made to Canadian residents in accordance with the offeror's home-jurisdiction rules, provided the consideration offered to Canadian residents is substantially similar to that offered to security holders in the offeror's home jurisdiction.

- Sections 5.6 and 5.13 of the Instrument provide harmonized *de minimis* exemptions for take-over bids and issuer bids where there are fewer than 50 beneficial owners of securities of the targeted subject in the jurisdiction and their targeted securities held in the jurisdiction constitute less than 2% of the total outstanding.

- Section 5.8 of the Instrument provides an exemption for issuer bids where the acquisition is being made from current or former employees, executive officers, directors or consultants. This exemption has been expanded in scope to include executive officers, directors and consultants and tracks the wording of the exemption from the prospectus and registration requirements in section 2.24 of National Instrument 45-106 *Prospectus and Registration Exemptions*.

Part 6 Early Warning
The early warning provisions in existing securities legislation of those jurisdictions that currently regulate bids have been harmonized and moved into Part 6 of the Instrument.

Part 7 Exemption
Part 7 allows the regulator or securities regulatory authority to grant an exemption from the requirements of the Instrument

Part 8 Transition
Part 8 provides for a transitional provision that will allow offerors that have commenced a bid under the existing bid requirements prior to the Instrument being implemented to complete their bid in accordance with the existing bid requirements.

Valuation
The Instrument does not address valuation and other requirements for insider bids and related party transactions (which may arise in a take-over bid) currently found in Ontario Securities Commission Rule 61-501 *Insider Bids, Issuer Bids, Business Combinations and Related Party Transactions*, Quebec Regulation Q-27 *Respecting Protection of Minority Securityholders in the Course of Certain Transactions* and in TSX Venture Exchange Policy 5.9 *Insider Bids, Issuer Bids, Business*

Combinations and Related Party Transactions. These rules and policy do not form part of the NI 62-104 harmonization project.

Forms

The Forms would modify and modernize the requirements of existing local forms in those jurisdictions that currently regulate bids.

Modifications to the Forms include the addition of general instructions at the beginning of each form, dealing with such things as defined terms, plain language, numbering and headings and incorporation of information by reference where appropriate. The prescribed statement of rights in each of the Forms has also been modified to include the right of price revision provided for under Quebec securities legislation.

Form 62-104F1 sets out the disclosure required to be provided by an offeror in its take-over bid circular. A number of disclosure items in this form have been reordered and modified. The form explicitly permits offerors that are eligible to use the short form prospectus system under National Instrument 44-101 *Short Form Prospectus Distributions* to incorporate by reference previously filed information (such as financial statements) required where securities are provided as consideration.

Form 62-104F2 sets out the disclosure required to be provided by an issuer making an issuer bid. A number of disclosure items in this form have been reordered and modified. The form explicitly permits issuers that are eligible to use the short form prospectus system under National Instrument 44-101 *Short Form Prospectus Distributions* to incorporate by reference previously filed information (such as financial statements) required where securities are provided as consideration.

Form 62-104F3 sets out the disclosure required to be included in a circular prepared and circulated by the board of directors of an offeree issuer.

Form 62-104F4 sets out the disclosure required to be included in a individual director's or officer's circular.

Form 62-104F5 sets out the disclosure required to be included in a notice of change or variation.

Companion Policy

The Companion Policy provides guidance on how we will interpret and apply the Instrument and Forms. The contents of several CSA policies and notices have been modernized and incorporated into the companion policy. As a result, the following CSA policies and notices will be repealed or withdrawn:

- National Policy 62-201 *Bids Made Only in Certain Jurisdictions* (Policy 62-201),
- CSA Staff Notice 62-301 *Implementation of Zimmerman Amendments Governing the Conduct of Take-Over Bids and Issuer Bids,*
- CSA Notice 62-303 *Identifying the Offeror in a Take-Over Bid, and*

- CSA Notice 62-304 *Conditions in Financing Arrangements for Take-Over Bids and Issuer Bids.*

Related Amendments
Amendments to NI 62-103
The Consequential Amendments would amend NI 62-103 to update definitions, early warning procedures and the various appendices. The text of the Consequential Amendments is set out in **Schedule 1** to this Notice.

Local Repeals
The list of proposed repeals of local take-over bid and issuer bid rules or regulations in a particular jurisdiction is set out in **Schedule 2** to this Notice published in that particular jurisdiction or may be published separately in each jurisdiction. Some jurisdictions may need to implement the Instrument using a local implementing rule. Jurisdictions that must do so will separately publish the implementing rule.

Alternatives Considered
No other alternatives were considered.

Anticipated Costs and Benefits
The Instrument and Forms will harmonize and modify most of the requirements and restrictions governing take-over bids, issuer bids and related early warning requirements across Canadian jurisdictions. We believe that harmonizing these requirements will ease the regulatory burden of issuers by reducing the sheer number of requirements that would otherwise require consideration. Modifications to the existing requirements and restrictions include changing the scope of certain current exemptions and the introduction of several new exemptions in response to routine exemptive relief applications. In our view, the Instrument and Forms will impose little, if any, additional costs on market participants.

Unpublished Materials
No unpublished study, report, or other written materials were relied on in proposing the Instrument, Forms, Companion Policy, Consequential Amendments or the repeal of Policy 62-201.

Request for Comment
We request your comments on the Instrument and related amendments to NI 62-103. In addition to any general comments you may have, we also invite comments on the following specific questions.

1. *Acting jointly or in concert* – When determining whether or not certain persons are acting jointly or in concert with an offeror, is the proposed distinction between the use of a rebuttable presumption and a deeming provision appropriate with respect to the various persons listed? If so, why? If not, why not?

2. *Restriction on variation of bids* – Are the proposed restrictions on certain variations of bids appropriate? If so, why? If not, why not?

3. Collateral benefit prohibition - Does the new collateral agreement provision in section 2.22 of the Instrument provide appropriate relief? If so, why? If not, why not?

4. *Filing agreements* - Does the new requirement in section 3.2 of the Instrument to file agreements related to a take-over bid meet the stated policy objectives? If so, why? If not, why not?

5. *Private agreement exemption* - Does the proposed amendment to the private agreement exemption meet the policy objectives of the exemption? Given the relative reduction in levels of commissions and brokerage fees and the general increase in liquidity since the private agreement exemption was first established, is the maximum 15% premium (including brokerage fees or commissions) to the market price of the securities acquired currently allowed by the exemption excessive? Would a 10% maximum premium be preferable? Should the exemption be eliminated entirely? If so, why? If not, why not?

6. *Early warning system* - Should the early warning requirements be located in NI 62-103 with other related early warning matters rather than in Part 6 of the Instrument. If so, why?

How to Provide Your Comments
Please provide your comments by July 28, 2006.

Please e-mail your submission as indicated below, but address your submission to all of the CSA member commissions, as follows:

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

You do not need to deliver your comments to all of the CSA member commissions. Please deliver your comments to the two addresses that follow, and they will be distributed to all other jurisdictions by CSA staff.

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If you are not able to send your comments by e-mail, please send a diskette containing your comments in Word.

We cannot keep submissions confidential because securities legislation in certain provinces requires that a summary of the written comments received during the comment period be published.

Questions
Questions relating to this notice may be referred to:

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