

## ANNEX A

### **Proposed Amendments to National Instrument 62-104 *Take-Over Bids and Issuer Bids***

1. *National Instrument 62-104 Take-Over Bids and Issuer Bids is amended by this Instrument.*

2. *The title of the Instrument is replaced with the following:*

*National Instrument 62-104 Take-Over Bids, Issuer Bids and the Early Warning System.*

3. *Section 1.1 is amended by adding the following definitions:*

“derivative” has the same meaning as in National Instrument 55-104 *Insider Reporting Requirements and Exemptions*;;

“economic exposure” has the same meaning as in National Instrument 55-104 *Insider Reporting Requirements and Exemptions*;;

“economic interest” has the same meaning as in National Instrument 55-104 *Insider Reporting Requirements and Exemptions*;;

“equity equivalent derivative” means one or more derivatives, that are referenced to, or derived from, a voting or equity security of an issuer and which provide the holder, directly or indirectly, with an economic interest that is substantially equivalent to the economic interest associated with beneficial ownership of the security;;

“freely tradeable” has the same meaning as in Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions*;;

“related financial instrument” has the same meaning as in National Instrument 55-104 *Insider Reporting Requirements and Exemptions*;;

“related party” has the same meaning as in Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions*;;

4. *The following section is added before Part 2:*

#### **Determination of the existence of a liquid market**

**1.12 (1)** For the purposes of paragraph 4.6.1(1)(c), a liquid market in a class of securities of an issuer exists at the date of an issuer bid only if all of the following conditions are satisfied:

- (a) there is a published market for the class of securities;
- (b) during the period of 12 months before the date of the issuer bid,

- (i) the number of outstanding securities of the class was at all times at least 5 000 000, excluding securities beneficially owned, or over which control or direction was exercised, by related parties of the issuer and securities that were not freely tradeable,
  - (ii) the aggregate trading volume of the class of securities on the published market on which the class was principally traded was at least 1 000 000 securities,
  - (iii) there were at least 1000 trades in securities of the class on the published market on which the class was principally traded, and
  - (iv) the aggregate value of the trades in securities of the class on the published market on which the class was principally traded was at least \$15 000 000;
- (c) the market value of the class of securities on the published market on which the class was principally traded was at least \$75 000 000 for the calendar month preceding the calendar month in which the issuer bid is made, calculated by multiplying the number of securities of the class outstanding as of the close of business on the last business day of the calendar month, excluding securities beneficially owned, or over which control or direction was exercised, by related parties of the issuer and securities that were not freely tradeable, by
- (i) the average of the closing prices of the securities of that class on the published market on which that class was principally traded for each of the trading days during the calendar month, if the published market provides a closing price for the securities, or
  - (ii) the average of the simple averages of the highest and lowest prices of the securities of that class on the published market on which that class was principally traded for each of the trading days for which the securities traded during the calendar month, if the published market does not provide a closing price, but provides only the highest and lowest prices of securities traded on a particular day.

**(2)** For the purposes of subsection (1), if there is more than one published market for a class of securities, the published market on which the class was principally traded must be determined as follows:

- (a) if only one of the published markets is in Canada, the published market on which the class was principally traded is the published market in Canada;
- (b) if there is more than one published market in Canada, the published market on which the class was principally traded is the published market in Canada on which the greatest volume of trading in that class occurred during the 20 business days preceding the date of the issuer bid;

- (c) if there is no published market in Canada, the published market on which the class was principally traded is the published market on which the greatest volume of trading in that class occurred during the 20 business days preceding the date of the issuer bid..

5. *Section 2.2 is amended by repealing subsections (3) and (4).*

6. *Section 2.3 is amended in subsection (2) by adding “, or securities that are convertible into securities of that class,” after “securities of the class subject to the bid”.*

7. *The following section is added before Division 2:*

**Disclosure of changes in economic exposure during take-over bid**

**2.7.1 (1)** If, before the expiry of a take-over bid, an offeror acquires or disposes of an interest in, or right or obligation associated with, a related financial instrument involving voting or equity securities of the offeree issuer, including, for greater certainty, an equity equivalent derivative, or there is a change in an offeror’s interest in, or right or obligation associated with, the related financial instrument, the offeror must, before the opening of trading on the business day following the date of the acquisition, disposition or change, issue and file a news release disclosing the following:

- (a) the material terms of the related financial instrument and its impact on the offeror’s securityholdings in, and economic exposure to, the offeree issuer;
- (b) whether the offeror has the ability, formally or informally, to obtain the voting or equity securities or to direct the voting of voting securities held by a counterparty to the related financial instrument;
- (c) a description of any past or present relationship between the offeror and a counterparty to the related financial instrument, or an affiliate of the counterparty, including, for greater certainty, the name of the counterparty and, if applicable, the affiliate, that, to a reasonable person, could be perceived to affect that counterparty’s decision to acquire, dispose of or vote securities of the offeree issuer, or, if there is no such relationship, a statement to that effect.

**(2)** If, before the expiry of a take-over bid, an offeror enters into, terminates or amends an agreement, arrangement or understanding that has the effect of altering the offeror’s economic exposure to the offeree issuer and disclosure is not otherwise required under subsection (1), the offeror must, before the opening of trading on the business day following the date of the entering into, termination or amendment, issue and file a news release disclosing the following:

- (a) the material terms of the agreement, arrangement or understanding and its impact on the offeror’s economic exposure to the offeree issuer;

- (b) a description of any past or present relationship between the offeror and a counterparty to the agreement, arrangement or understanding, or an affiliate of the counterparty, including, for greater certainty, the name of the counterparty and, if applicable, the affiliate, that, to a reasonable person, could be perceived to affect that counterparty's decision to acquire, dispose of or vote securities of the offeree issuer, or, if there is no such relationship, a statement to that effect..
- 8. **Section 2.12 is amended in subsection (1) by adding** “including, for greater certainty, the mandatory 10-day extension period,” **before** “and whether or not”.
- 9. **Section 2.26 is amended by adding the following subsection:**
  - (3.1) Subsection (1) does not apply to securities deposited under the terms of an issuer bid by a security holder that
    - (a) is entitled to elect to sell the number of securities required to be sold so that the proportion of securities of the class owned by the security holder after completion of the bid equals the proportion of securities of that class owned by the security holder before the bid, and
    - (b) makes the election..
- 10. **Paragraph 2.30(1)(c) is amended by replacing** “within 3 business days” **with** “promptly”.
- 11. **Section 2.31.1 is amended**
  - (a) **by deleting** “and” **at the end of paragraph (a),**
  - (b) **in clause (b)(iv)(A) by replacing** “pay for securities taken up as soon as possible, and in any event not later than 3 business days after the securities are taken up” **with** “pay promptly for securities taken up”,
  - (c) **in clause (b)(iv)(B) by replacing** “pay for securities taken up as soon as possible and in any event not later than 3 business days after the securities are taken up.” **with** “pay promptly for securities taken up, and”, **and**
  - (d) **by adding the following paragraph:**
    - (c) send a notice of variation to each holder of securities to whom the bid was required to be sent under section 2.8..
- 12. **Section 2.32 is amended**
  - (a) **in subsection (2) by replacing** “An offeror must pay” **with** “An offeror must pay promptly” **and deleting** “as soon as possible, and in any event not later than 3 business days after securities deposited under the bid are taken up”, **and**
  - (b) **by adding the following subsection:**

**(4.1)** Despite subsection (4), an offeror may extend an issuer bid for which all the terms and conditions have been complied with or waived without first taking up all securities deposited under the bid and not withdrawn if all of the following apply:

- (a) the terms of the bid entitle security holders to elect a minimum price per security, within a range of prices, at which they are willing to sell their securities under the bid;
- (b) at the time of the extension, the aggregate price payable for the securities deposited under the bid and not withdrawn is less than the maximum aggregate price payable under the bid;
- (c) at the time of the extension, the market price of the securities is not greater than the maximum price per security within a range of prices set out in the terms of the bid..

**13. Subsection 2.32.1(2) is amended by replacing “An offeror must pay” with “An offeror must pay promptly” and deleting “as soon as possible, and in any event not later than 3 business days after securities deposited under the bid are taken up”.**

**14. Section 4.3 is amended by replacing paragraph (c) with the following:**

- (c) the number of security holders of that class of securities at the date of the bid is not more than 50, excluding any holder that is, at the date of the bid
  - (i) an employee, officer, director or consultant of the offeree issuer or an affiliate of the offeree issuer,
  - (ii) a former employee, officer, director or consultant of the offeree issuer that, while in that relationship, was, and has continued after the end of that relationship to be, a security holder of the offeree issuer,
  - (iii) a former employee, officer, director or consultant of an affiliate of the offeree issuer that, while in that relationship, was, and has continued after the end of that relationship to be, a security holder of the offeree issuer, or
  - (iv) a spouse of a person referred to in subparagraph (i), (ii) or (iii) where the person has control or direction over the securities of the offeree issuer beneficially owned by the spouse..

**15. The following section is added after section 4.6:**

**Selective repurchase exemption**

**4.6.1 (1)** An issuer bid for a class of securities is exempt from Part 2 if all of the following conditions are satisfied:

- (a) the aggregate number of securities or, in the case of convertible debt securities, the aggregate principal amount of securities acquired by the issuer in reliance on this exemption during the 12 months immediately preceding the date of the bid does not exceed 5% of the securities of that class outstanding at the beginning of the 12-month period;
- (b) the securities acquired by the issuer in reliance on this exemption during the 12 months immediately preceding the date of the bid are acquired from not more than 5 persons in the aggregate and in not more than 5 transactions in the aggregate;
- (c) a liquid market in the class of securities that is the subject of the bid exists at the date of the bid, determined in accordance with section 1.12;
- (d) the bid is made outside of the regular trading hours of the market on which the class of securities that is the subject of the bid is principally traded, determined in accordance with subsection 1.12(2);
- (e) the value of the consideration paid by the issuer for any of the securities acquired in reliance on this exemption, including brokerage fees or commissions, is less than the closing price of the class of securities that is the subject of the bid on the market on which the class is principally traded, determined in accordance with subsection 1.12(2), at the date of the bid;
- (f) the board of directors of the issuer has determined that
  - (i) following the completion of the bid, the market for the class of securities that is the subject of the bid would not reasonably be expected to be materially less liquid than the market that existed at the date of the bid, and
  - (ii) the bid would not reasonably be expected to have a significant negative effect on the market price or value of the class of securities that is the subject of the bid;
- (g) neither the issuer nor, to the knowledge of the issuer after reasonable inquiry, the selling security holder has knowledge of any material fact or material change in respect of the issuer or its securities that has not been generally disclosed at the date of the bid;
- (h) the issuer issues and files, after making the bid and before the opening of trading of the market on which the class of securities that is the subject of the bid is principally traded, determined in accordance with subsection 1.12(2), a news release disclosing the following information:
  - (i) the name of the selling security holder;

- (ii) the number of securities or, in the case of convertible debt securities, the aggregate principal amount of securities acquired by the issuer;
- (iii) the value of the consideration paid by the issuer for the securities per security and in total;
- (iv) the market price of the class of securities at the date of the bid;
- (v) the aggregate number of securities or, in the case of convertible debt securities, the aggregate principal amount of securities acquired by the issuer within the preceding 12-month period in reliance on this exemption.

(2) In subsection (1), if an issuer makes an offer to acquire securities from a person and the issuer knows or ought to know after reasonable enquiry that

- (a) the person acquired the securities in order that the issuer might make use of the exemption under subsection (1), then each person from whom those securities were acquired must be counted as one person in the determination of the number of persons to whom an offer to acquire has been made, or
- (b) the person from whom the acquisition is being made is acting as a nominee, agent, trustee, executor, administrator or other legal representative for one or more other persons having a direct beneficial interest in those securities, then each of those other persons must be counted as one person in the determination of the number of persons to whom an offer to acquire has been made.

(3) Despite paragraph (2)(b), a trust or estate is to be considered a single security holder in the determination of the number of persons to whom an offer to acquire has been made if

- (a) an inter vivos trust has been established by a single settlor, or
- (b) an estate has not vested in all persons who are beneficially entitled to it..

**16. Section 4.7 is amended by replacing “executive officer” with “officer”.**

**17. Section 4.8 is amended by replacing subsection (1) with the following:**

- (1) In this section, “**designated exchange**” means the Toronto Stock Exchange, the TSX Venture Exchange, Cboe Canada Inc., CNSX Markets Inc. or other exchange recognized or designated by the securities regulatory authorities for the purpose of this Instrument..

**18. Section 4.9 is amended by replacing paragraph (c) with the following:**

- (c) the number of security holders of that class of securities at the date of the bid is not more than 50, excluding any holder that is, at the date of the bid

- (i) an employee, officer, director or consultant of the issuer or an affiliate of the issuer,
- (ii) a former employee, officer, director or consultant of the issuer that, while in that relationship, was, and has continued after the end of that relationship to be, a security holder of the issuer,
- (iii) a former employee, officer, director or consultant of an affiliate of the issuer that, while in that relationship, was, and has continued after the end of that relationship to be, a security holder of the issuer, or
- (iv) a spouse of a person referred to in subparagraph (i), (ii) or (iii) where the person has control or direction over the securities of the issuer beneficially owned by the spouse..

**19. Section 5.1 is amended**

**(a) in subsection (1) by adding the following definitions:**

“securityholding percentage” means a person’s beneficial ownership of, or control or direction over, a class of voting or equity securities of a reporting issuer, or securities convertible into the class of voting or equity securities, expressed as a percentage of the outstanding securities of the class, calculated in accordance with applicable securities legislation listed in Appendix D of NI 62-103 *The Early Warning System and Related Take-Over Bid and Insider Reporting Issues*;

“solicit” has the same meaning as in National Instrument 51-102 *Continuous Disclosure Obligations.*, **and**

**(b) by adding the following subsections:**

**(3)** For the purposes of this Part, securities beneficially owned, or over which control or direction is exercised, by a person at the time that an issuer becomes a reporting issuer are deemed to have been acquired by the person at that time.

**(4)** For the purposes of this Part, a person acting jointly or in concert with one or more other persons in respect of an issuer is deemed to have acquired the securities of the issuer that are beneficially owned, or over which control or direction is exercised, by the other person or persons when the first mentioned person began acting jointly or in concert with that other person or those other persons.

**(5)** For the purposes of this Part, a person that ceases acting jointly or in concert with one or more other persons in respect of an issuer is deemed to have disposed of the securities of the issuer that are beneficially owned, or over which control or direction is exercised, by the other person or persons at the time the first mentioned person ceases acting jointly or in concert with that other person or those other persons.

(6) For the purposes of determining control or direction over securities of an issuer under sections 5.2 and 5.4, an acquiror or person acting jointly or in concert with the acquiror has acquired, and has, control or direction over a security, including an unissued security, if the acquiror or person is a counterparty to an equity equivalent derivative of the security during the period that

- (a) begins on the date that the acquiror or person commences a solicitation under paragraph 9.1(2)(b) of National Instrument 51-102 *Continuous Disclosure Obligations*, and
- (b) ends on the later of the following:
  - (i) the date on which the meeting in respect of the solicitation is held;
  - (ii) the date on which the acquiror or person issues and files a news release stating that the solicitation has ceased..

**20. Section 5.2 is amended**

**(a) by replacing subsection (2) with the following:**

- (2) An acquiror that is required to file a report under paragraph (1)(b) must issue and file a news release and file another report, in accordance with paragraphs (1)(a) and (b), each time any of the following apply:
  - (a) the acquiror, or any person acting jointly or in concert with the acquiror, acquires or disposes of beneficial ownership of, or acquires or ceases to have control or direction over, either of the following:
    - (i) securities in an amount that results in an increase or a decrease in the securityholding percentage of the acquiror of 2% or more than the securityholding percentage reported in the most recent report required to be filed by the acquiror under subsection (1) or this subsection;
    - (ii) securities convertible into the class of securities that was the subject of the most recent report required to be filed by the acquiror under subsection (1) or this subsection that results in an increase or a decrease of 2% or more than the securityholding percentage reported by the acquiror in that report;
  - (b) there is a change in a material fact contained in the most recent report required to be filed under paragraph (1)(b) or paragraph (a) of this subsection.,

**(b) by replacing subsection (3) with the following:**

(3) An acquiror must issue and file a news release and file a report, in accordance with paragraphs (1)(a) and (b), if the acquiror's securityholding percentage, as reported in the most recent report required to be filed by the acquiror under this section, decreases to less than 10%., **and**

(c) **by adding the following subsection:**

(5) Paragraph (1)(a) does not apply to an acquiror in respect of a deemed acquisition of securities under subsection 5.1(3)..

**21. Section 5.3 is amended by adding the following subsection:**

(3) Subsection (1) does not apply to an acquiror in respect of a deemed acquisition of securities under subsection 5.1(3)..

**22. Section 5.4 is amended**

(a) **by replacing subsection (2) with the following:**

(2) An acquiror must issue and file a news release containing the information required under subsection (3) before the opening of trading on the next business day each time the acquiror, or any person acting jointly or in concert with the acquiror, acquires beneficial ownership of, or control or direction over, in aggregate, securities of the class subject to the bid that results in a change in the securityholding percentage of the acquiror of 2% or more than the securityholding percentage reported in the most recent news release required to be filed by the acquiror under this section., **and**

(b) **in paragraph (e) of subsection (3) by replacing “market in” with “market on”.**

**23. Form 62-104F1 Take-Over Bid Circular is amended**

(a) **in Part 1 in paragraph (a) by replacing “National Instrument 62-104 Take-Over Bids and Issuer Bids” with “National Instrument 62-104 Take-Over Bids, Issuer Bids and the Early Warning System”, and**

(b) **by adding the following item:**

**Item 8.1. Interests affecting economic exposure**

(1) If the offeror, or any person acting jointly or in concert with the offeror, has, or had at any time during the 6-month period preceding the date of the take-over bid, an interest in, or right or obligation associated with, a related financial instrument involving a voting or equity security of the offeree issuer, including, for greater certainty, an equity equivalent derivative, disclose the following:

(a) the material terms of the related financial instrument and its impact on the offeror's or person's securityholdings in, and economic exposure to, the offeree issuer;

- (b) the date the interest in, or the right or obligation associated with, the related financial instrument was acquired;
- (c) whether the offeror or person has or had the ability, formally or informally, to obtain the voting or equity securities or to direct the voting of voting securities held by a counterparty to the related financial instrument;
- (d) a description of any past or present relationship between the offeror or person and a counterparty to the related financial instrument, or an affiliate of the counterparty, including, for greater certainty, the name of the counterparty and, if applicable, the affiliate, that, to a reasonable person, could be perceived to affect that counterparty's decision to acquire, dispose of or vote securities of the offeree issuer, or, if there is no such relationship, a statement to that effect.

(2) If the offeror, or any person acting jointly or in concert with the offeror, is a party, or has been a party at any time during the 6-month period preceding the date of the take-over bid, to any agreement, arrangement or understanding that has or had the effect of altering, directly or indirectly, the economic exposure of the offeror or person to the offeree issuer and disclosure is not otherwise required under subsection (1), disclose the following:

- (a) the material terms of the agreement, arrangement or understanding and its impact on the offeror's or person's economic exposure to the offeree issuer;
- (b) the date of the agreement, arrangement or understanding;
- (c) a description of any past or present relationship between the offeror or person and a counterparty to the agreement, arrangement or understanding, or an affiliate of the counterparty, including, for greater certainty, the name of the counterparty and, if applicable, the affiliate, that, to a reasonable person, could be perceived to affect that counterparty's decision to acquire, dispose of or vote securities of the offeree issuer, or, if there is no such relationship, a statement to that effect..

**24. Form 62-104F2 Issuer Bid Circular is amended**

- (a) *in Part 1 in paragraph (a) by replacing “National Instrument 62-104 Take-Over Bids and Issuer Bids” with “National Instrument 62-104 Take-Over Bids, Issuer Bids and the Early Warning System”,*
- (b) *in Item 2 of Part 2 by replacing “dutch auctions” with “Dutch auctions”, and*

(c) *in Item 8 of Part 2 by replacing the last paragraph with the following:*

If an issuer intends to rely on one or more of the exceptions from the proportionate take up and payment requirements found in subsections 2.26(2), (3) and (3.1) of the Instrument relating to standard trading units, “Dutch auctions” and proportionate tenders, describe the mechanism under which securities would be deposited and taken up without proration..

25. ***Form 62-104F3 Directors’ Circular is amended in Part 1 in paragraph (a) by replacing “National Instrument 62-104 Take-Over Bids and Issuer Bids” with “National Instrument 62-104 Take-Over Bids, Issuer Bids and the Early Warning System”.***
26. ***Form 62-104F4 Director’s or Officer’s Circular is amended in Part 1 in paragraph (a) by replacing “National Instrument 62-104 Take-Over Bids and Issuer Bids” with “National Instrument 62-104 Take-Over Bids, Issuer Bids and the Early Warning System”.***
27. ***Form 62-104F5 Notice of Change or Notice of Variation is amended in Part 1 in paragraph (a) by replacing “National Instrument 62-104 Take-Over Bids and Issuer Bids” with “National Instrument 62-104 Take-Over Bids, Issuer Bids and the Early Warning System”.***
28. (1) This Instrument comes into force on [x].  
(2) In Saskatchewan, despite subsection (1), if these regulations are filed with the Registrar of Regulations after [x], these regulations come into force on the day on which they are filed with the Registrar of Regulations.