

ANNEX D

Proposed Changes to National Policy 62-203 *Take-Over Bids and Issuer Bids*

1. *National Policy 62-203 Take-Over Bids and Issuer Bids is changed by this Document.*

2. *The title of the Policy is replaced by the following:*

National Policy 62-203 *Take-Over Bids, Issuer Bids and the Early Warning System.*

3. *Part 1 is changed by replacing section 1.1 with the following:*

1.1 Introduction – National Instrument 62-104 *Take-Over Bids, Issuer Bids and the Early Warning System* (the Instrument) governs take-over bids, issuer bids and the early warning system in all jurisdictions of Canada. This Policy and the Instrument, insofar as they relate to take-over bids and issuer bids, are together referred to as the “Bid Regime”. This Policy, the Instrument and National Instrument 62-103 *The Early Warning System and Related Take-Over Bid and Insider Reporting Issues* (NI 62-103), insofar as they relate to the early warning system, are together referred to as the “Early Warning System”. This Policy outlines how the provincial and territorial securities regulatory authorities interpret or apply certain provisions of the Bid Regime and the Early Warning System, and provides corresponding guidance..

4. *Part 2 is changed by*

(a) *replacing the title with “The Bid Regime”, and*

(b) *adding the following sections:*

2.4.1 Bid conditions – While the Instrument does not expressly regulate conditions to take-over bids, except with respect to financing arrangements, there may be circumstances where bid conditions raise public interest concerns. That may be the case if a take-over bid includes conditions that require an offeree issuer to take actions for the benefit of the offeror where a refusal to do so would entitle the offeror not to consummate its bid, or where a bid contains conditions that grant an offeror unqualified judgment or discretion to determine whether the conditions have been satisfied, thereby providing the offeror with a degree of optionality that calls into question the credibility of the bid.,

2.18 Mini-tender offers – A “mini-tender offer” refers to a widely disseminated offer to acquire outstanding voting or equity securities of an issuer where the securities subject to the offer to acquire, together with the offeror’s securities, constitute in the aggregate less than 20% of the outstanding securities of the class. A mini-tender offer is not a take-over bid to which the requirements of Part 2 of the Instrument apply. However, 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. In particular, security holders to whom a mini-tender offer is made should be treated equally, offered identical consideration, given a reasonable period of time to consider the terms of the offer and provided with adequate information that allows them to make a reasoned decision as to whether to accept or reject the offer.

Whether a security holder has been provided with sufficient time and information will depend on the circumstances of the mini-tender offer. As a guideline, 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.

Securities regulatory authorities may intervene if a mini-tender offer is conducted in a manner or in circumstances that are prejudicial to the public interest. That could arise if, for example, specific elements of the Bid Regime that are derived from the underlying principles noted above are absent, including where a mini-tender offeror varies or extends its offer either without notice to security holders or in a manner in which notice is not likely to reach them, or where a mini-tender offeror does not provide sufficient time following a variation or extension for security holders to change their minds with respect to the offer. Securities regulatory authorities may also intervene if a mini-tender offer is made at such a substantial discount to the prevailing market price of the class of securities that no reasonable security holder would tender to it except through mistake, inadvertence or misunderstanding.

Security holders to whom a mini-tender offer is made who are not in a Canadian jurisdiction may have recourse under the laws of their home jurisdictions.,

- 2.19 Prompt payment for securities taken up** – The Bid Regime requires that offerors pay “promptly” for any securities taken up under the bid. Although not specifically defined, what we consider to be prompt in the context of the timing of payment for securities tendered under a bid and taken up is informed by the practices of the financial community, including settlement practices, then in effect. Accordingly, where the settlement period for securities trades is one business day after the trade date, we view payment within one business day from take up as being made “promptly”.,
- 2.20 Date of the bid** – Certain exemptions from the take-over bid and issuer bid requirements refer to the market price of the securities at the “date of the bid”. The date of the bid is the date on which an “offer to acquire” is made. If a person has a right to purchase securities owned by a second person (i.e., a call

option), the date of the first person's bid generally would be the date on which the first person exercises the call option rather than the date on which the second person grants the call option, as it is upon exercise that the first person's investment decision crystallizes and an offer to acquire is made. Conversely, if a person has a right to sell securities that it owns to a second person (i.e., a put option), the date of the second person's bid generally would be the date on which the second person grants the put option rather than the date on which the first person exercises the put option, as it is upon grant that the second person's investment decision crystallizes and an offer to acquire is made., *and*

2.21 Selective offshore repurchases – As issuer bids are defined as offers made by issuers to persons in the local jurisdiction, offers made to security holders who are not in Canada or residents of Canada technically fall beyond the definition of “issuer bid” for the purposes of Canadian securities legislation. However, Canadian securities regulatory authorities retain public interest jurisdiction over transactions by issuers in their local jurisdiction and may determine to intervene in any given transaction if the circumstances raise public interest concerns. In general, offshore repurchases would not raise public interest concerns if an issuer conducts repurchases from a security holder who is not in Canada or a resident of Canada in the circumstances and manner described in the selective repurchase exemption set out in section 4.6.1 of the Instrument.

Issuers considering a selective offshore repurchase who have questions regarding whether such a transaction would raise public interest concerns should contact the applicable securities regulatory authorities prior to proceeding with such transaction..

5. Part 3 is changed by

(a) *replacing the title with* “Take-Over Bid Requirements and the Early Warning System”,

(b) *replacing section 3.1 with the following:*

3.1 Derivative arrangements – The definition of “equity equivalent derivative” is intended to refer to a derivative or combination of derivatives which, either on their own or when taken together, are referenced to, or derived from, a voting or equity security of an issuer, with an economic interest that is substantially equivalent to the economic interest associated with beneficial ownership of the security. We would generally consider a derivative or combination of derivatives to substantially replicate the economic interest of owning a reference security if it provides a rate of return between 90% and 110% of the rate of return of the reference security. An equity equivalent

derivative would include a cash settled equity total return swap or substantially similar derivative.

In general, the Instrument does not require an investor to aggregate securities that it beneficially owns with reference securities underlying equity equivalent derivatives held by it for the purposes of early warning reporting. However, an investor is deemed, for purposes of sections 5.2 and 5.4 of the Instrument only, to have acquired the reference securities underlying an equity equivalent derivative during the pendency of a solicitation made under paragraph 9.1(2)(b) of National Instrument 51-102 *Continuous Disclosure Obligations*. The purpose of this deeming provision is to require, by application of the early warning system, disclosure of changes in a soliciting securityholder's aggregate economic position, whether through beneficial ownership of securities or through economic interests in equity equivalent derivatives, subsequent to the filing of its proxy circular in circumstances where its aggregate economic position is equivalent to a beneficial ownership position of 10% or more of the outstanding securities of the class.

An investor that is a party to an equity swap or similar derivative arrangement may under certain circumstances have deemed beneficial ownership of, or control or direction over, the reference voting or equity securities. This could occur where the investor has the ability, formally or informally, to obtain the voting or equity securities or to direct the voting of voting securities held by any counterparties to the transaction. This determination would be relevant for compliance with the early warning and take-over bid requirements under the Instrument.

Equity equivalent derivatives must be disclosed in compliance with securities laws, having regard to circumstances where beneficial ownership of, or control or direction over, reference securities may be deemed. The disclosure or use of equity equivalent derivatives in a manner that is abusive of the capital markets may engage securities regulatory authorities' public interest jurisdiction. For example, we may have public interest concerns where investors do not clearly and accurately differentiate between beneficial ownership of securities and economic interests in their public disclosures and instead express them as an aggregate economic interest, which can generate confusion in the market. We may also have public interest concerns where equity equivalent derivatives are used in a deliberate effort to accumulate substantial economic positions in an issuer if the holder seeks to influence the outcome of a potential take-over bid by either exerting pressure on a counterparty or communicating expectations of commercial incentives or disincentives for the counterparty or its affiliates dependent on how or when the counterparty acquires, disposes of or votes securities of the offeree issuer.

Paragraphs 2.7.1(1)(c) and 2.7.1(2)(b) of the Instrument and Item 8.1 of Form

62-104F1 *Take-Over Bid Circular* require a description of any past or present relationship between the offeror or any joint actor and a counterparty, or an affiliate of the counterparty, 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. Such relationships may include instances where the counterparty or an affiliate of the counterparty has a material financial interest in the offeror or any joint actor, has a material financial interest in future business involving the offeror or any joint actor, acts as a financial advisor to the offeror or any joint actor, or acts as a lead or co-lead lender or manager of a lending syndicate in connection with the bid. A relationship with a counterparty, or an affiliate of that counterparty, that terminated more than 24 months before a bid was commenced generally would not have to be disclosed on the basis that it could not be perceived to affect the counterparty's decision to acquire, dispose of or vote securities of the offeree issuer.,

(c) *adding the following sections:*

3.3 Change in plans or future intentions of the acquiror or a joint actor – An acquiror that is required to make disclosure under subsection 5.2(1) of the Instrument must make further disclosure in accordance with subsection 5.2(1) each time there is a change in a material fact contained in the most recent report required to be filed under paragraph 5.2(1)(b) or subsection 5.2(2) of the Instrument. Subsection 5.2(1) of the Instrument refers to section 3.1 of NI 62-103, which in turn refers to the information required by Form 62-103F1 *Required Disclosure under the Early Warning Requirements*. Item 5 of Form 62-103F1 *Required Disclosure under the Early Warning Requirements* requires the acquiror to describe any plans or future intentions which it and any joint actor may have which relate to or would result in certain actions.

A change in plans or future intentions is a factual determination based on the circumstances of a particular transaction or a particular event. We expect that, when an acquiror or any joint actor takes significant steps with respect to a particular transaction or event, the acquiror will assess whether those actions, individually or taken together, constitute a change in the plans or future intentions disclosed in the acquiror's previous report filed under the early warning requirements.

We generally consider 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. However, a change in plans or future intentions may, in some instances, occur at an earlier stage of a particular transaction or a particular event. For example, if an acquiror or any joint actor has taken irrevocable steps to effect a potential transaction, or

publicly announced information or facts that differ from the plans or future intentions that were previously disclosed, then those changes generally would trigger further disclosure under the early warning requirements. The foregoing is not intended to be exhaustive of all of the circumstances in which a change in plans or future intentions, as those terms are used in Item 5 of Form 62-103F1 *Required Disclosure under the Early Warning Requirements*, may occur.

An acquiror should re-assess the accuracy of the disclosure in its reports filed under the early warning requirements in respect of the plans or future intentions of the acquiror and any joint actor every time it is required to make further disclosure, including as a result of an increase or a decrease in its securityholding percentage that triggers a filing pursuant to paragraph 5.2(2)(a) of the Instrument.

If the acquiror's most recent report filed under the early warning requirements contains general language reserving the right to take any of the actions enumerated in Item 5 of Form 62-103F1 *Required Disclosure under the Early Warning Requirements*, we expect the acquiror to update the disclosure in such report as soon as a change in plans or future intentions with respect to a particular action actually occurs.

For greater clarity, this guidance also applies with respect to disclosure required under Form 62-103F2 *Required Disclosure by an Eligible Institutional Investor under Section 4.3* and Form 62-103F3 *Required Disclosure by an Eligible Institutional Investor under Part 4*.

3.4 Reporting of acquisitions during bid – Eligible institutional investors who are exempt from the early warning requirements under section 4.1 of NI 62-103 cannot continue to rely on the alternative monthly reporting system and must make disclosure in accordance with section 5.4 of the Instrument if, during the pendency of a non-exempt take-over bid or issuer bid, they acquire beneficial ownership of, or control or direction over, securities of the class subject to the bid that, when added to their securities of that class, constitute 5% or more of the outstanding securities of that class. The exemption in section 4.1 of NI 62-103 is in respect of the early warning requirements in section 5.2 of the Instrument and does not extend to the requirements in section 5.4 of the Instrument.

3.5 Applicability of the Early Warning System – The Early Warning System and the concept of acting jointly or in concert apply to proxy solicitations generally, including for the purpose of voting on an alternative slate of directors, even in the absence of a take-over bid or issuer bid.

3.6 Calculation of early warning reporting thresholds – Section 5.2 of the Instrument is a transactional requirement and requires that an acquiror conduct an analysis and calculation each time that the acquiror acquires one of the categories of securities referred to in that provision (i.e., a voting or equity security of a reporting issuer, or a security convertible into voting or equity securities of a reporting issuer). The securities that are the subject of the transaction at hand form the first part of the calculation.

Convertible securities that are not exercisable within 60 days are one of the categories of securities subject to section 5.2 of the Instrument, as they are “securities convertible into voting or equity securities of any class of a reporting issuer.” Accordingly, where the subject transaction involves convertible securities, those convertible securities should be included in the first part of the calculation, irrespective of whether or not they are convertible within 60 days and irrespective of any conditions attached to them.

The securities that are the subject of the transaction at hand then need to be added to the second part of the calculation, being the “acquiror’s securities” (determined in accordance with the provisions of the Instrument) to arrive at the numerator to be used for the securityholding percentage calculation.

The term “acquiror's securities” is defined as “securities of an issuer beneficially owned, or over which control or direction is exercised, on the date of the acquisition or disposition, by an acquiror or any person acting jointly or in concert with the acquiror.” As the reference is to those securities “beneficially owned”, whether convertible securities will be included as part of the “acquiror’s securities” is to be determined with reference to section 1.8 of the Instrument.

The following are illustrative examples of the early warning reporting calculation:

An acquiror has 2,000 common shares and 1,000 options of IssuerCo. The acquiror acquires 500 warrants in IssuerCo in a trade. As of the trade date, none of the warrants are exercisable within 60 days and none of the options are exercisable within 60 days. The numerator, for the purposes of calculating the acquiror’s securityholding percentage, would be 2,500 (consisting of the 500 warrants acquired that are not exercisable within 60 days and the 2,000 common shares comprising the “acquiror’s securities”), and the denominator would be IssuerCo’s number of common shares outstanding, unadjusted by any of the convertible securities held by the acquiror.

If the acquiror subsequently purchases an additional 200 warrants, the analytical exercise is repeated. As of this subsequent trade date, assume that none of the newly acquired warrants are exercisable within 60 days, that 250 of the 1,000 options held by the acquiror have vested (or will vest within 60 days) and that 300 of the 500 previously acquired warrants are now exercisable (or will be exercisable within 60 days). The numerator, for the purposes of the acquiror's securityholding percentage, would be 2,750 (consisting of the 200 newly acquired warrants that are not exercisable within 60 days and the "acquiror's securities", which would include the 2,000 common shares, the 250 vested options and the 300 currently exercisable warrants). The 250 vested options and 300 currently exercisable warrants forming part of the "acquiror's securities" would be added to IssuerCo's outstanding common shares to form the denominator of the securityholding percentage calculation.

Section 1.8 of the Instrument deems an acquiror to have acquired and to be the beneficial owner of a security, including an unissued security, if the acquiror is the beneficial owner of a security convertible into the security within 60 days following that date. Accordingly, the calculation of early warning reporting thresholds should be undertaken each time (a) a convertible security that is not exercisable within 60 days becomes exercisable within 60 days as a result of the passage of time, and (b) a convertible security that is exercisable within 60 days expires, lapses or terminates in accordance with its terms.

3.7 Calculating beneficial ownership on a fully diluted basis in limited circumstances – The early warning reporting calculations are to be done on a partially diluted basis. However, in circumstances where the acquiror is acquiring convertible securities as part of a treasury offering and the terms of the convertible securities provide that either all of the convertible securities issued pursuant to such offering convert into the underlying voting or equity securities, or none of them do (for example, in a subscription receipt offering, or a fully backstopped rights offering), beneficial ownership may be calculated on a fully diluted basis as, in those circumstances, it would not be possible for only some (but not all) of the underlying securities in respect of that offering to be issued.

3.8 Trigger for subsequent alternative monthly reports – An eligible institutional investor who satisfies the criteria set out in, and who is filing reports under, Part 4 of NI 62-103 for a reporting issuer (each, an AMR Filer) is required to file a report in accordance with Part 4 of NI 62-103 if the securityholding percentage of the AMR Filer in a class of voting or equity

securities of the reporting issuer as of the end of the month in which the AMR Filer has acquired or disposed of beneficial ownership of, or acquired or ceased to have control or direction over, any securities of the class crosses one of the fixed 2.5% thresholds starting at 10% (e.g., 10%, 12.5%, 15%, 17.5%, etc.) when compared to the AMR Filer's most recently filed report. For example, if an AMR Filer has reported an 11.5% securityholding percentage in a class of voting or equity securities of a reporting issuer and the AMR Filer acquires an aggregate of 1.2% of the securities of that class over the course of a month such that, as of the end of the month, the AMR Filer's securityholding percentage in the class is 12.7%, the AMR Filer would be required to file a report in accordance with Part 4 of NI 62-103. This AMR Filer's next report would be required when its securityholding percentage in that class of securities decreases below 12.5% or increases above 15%.

- 3.9 Issuer actions** – Section 6.1 of NI 62-103 provides an entity with an exemption from the early warning requirements and the obligation to report under Part 4 of NI 62-103 until the entity undertakes a trade, at which time the entity must assess its post-trade securityholding percentage in the class of securities of the reporting issuer relative to the securityholding percentage in that class that the entity reported in its most recent early warning report or alternative monthly report, as applicable.

If the entity is not reporting under Part 4 of NI 62-103 and its securityholding percentage following the trade represents a 2% or greater change when compared to its most recently filed early warning report, then a subsequent early warning report and news release would be required. The following are illustrative examples of the issuer action exemption in the context of the early warning requirements:

A person has, and has reported, a 12% ownership position in a class of voting or equity securities of a reporting issuer. The reporting issuer conducts a repurchase of securities of the class, in which the person does not participate, that causes the person's securityholding percentage to increase to 14.5%. Pursuant to section 6.1 of NI 62-103, the person is not required to issue and file a news release or file a report at the time of the issuer action. Subsequent to the issuer action, the person acquires securities that amount to 1% of the class, increasing the person's securityholding percentage to 15.5%. As the person's securityholding percentage (i.e., 15.5%) represents a 2% or greater change in percentage ownership from the 12% that it most recently reported, the person is required to issue and file a news release and file a report in accordance with section 5.2 of the Instrument.

A person has, and has reported, a 12% ownership position in a class

of voting or equity securities of a reporting issuer. The reporting issuer undertakes a private placement of securities of the class, in which the person does not participate, that causes the person's securityholding percentage to decrease to 11%. Pursuant to section 6.1 of NI 62-103, the person is not required to issue and file a news release or file a report at the time of the issuer action. Subsequent to the issuer action, the person acquires securities that amount to 2% of the class, increasing the person's securityholding percentage to 13%. As the person's securityholding percentage (i.e., 13%) represents only a 1% change in percentage ownership from the 12% that it most recently reported, the person is not required to issue and file a news release or file a report in accordance with section 5.2 of the Instrument.

If the entity is an AMR Filer and its securityholding percentage as at the end of the month in which it undertook a trade, when compared to its most recently filed alternative monthly report, increased or decreased past one of the fixed 2.5% thresholds starting at 10% (e.g., 10%, 12.5%, 15%, 17.5%, etc.), then an alternative monthly report would be required. The following are illustrative examples of the issuer action exemption in the context of the alternative monthly reporting system:

An AMR Filer has, and has reported, a 12% ownership position in a class of voting or equity securities of a reporting issuer. The reporting issuer conducts a repurchase of securities of the class, in which the AMR Filer does not participate, that causes the AMR Filer's securityholding percentage to increase to 14.5%. The AMR Filer does not undertake a trade in securities of that class in the month in which the issuer action occurred. Pursuant to section 6.1 of NI 62-103, the AMR Filer is not required to file a report in accordance with Part 4 of NI 62-103 in respect of the month in which the issuer action occurred. In the following month, the AMR Filer undertakes various trades in the class of securities, such that its securityholding percentage, as at the end of that month, is 15.5%. As the AMR Filer's securityholding percentage (i.e., 15.5%) has increased past the 12.5% and 15% reporting thresholds since the AMR Filer's most recently filed report, the AMR Filer is required to file a report in accordance with Part 4 of NI 62-103 in respect of that month.

An AMR Filer has, and has reported, a 12% ownership position in a class of voting or equity securities of a reporting issuer. The reporting issuer undertakes a private placement of securities of the class, in which the AMR Filer does not participate, that causes the

AMR Filer's securityholding percentage to decrease to 9%. The AMR Filer does not undertake a trade in securities of that class in the month in which the issuer action occurred. Pursuant to section 6.1 of NI 62-103, the AMR Filer is not required to file a report in accordance with Part 4 of NI 62-103 in respect of the month in which the issuer action occurred. In the following month, the AMR Filer undertakes various trades in the class of securities, such that its securityholding percentage, as at the end of that month, is 11%. As the AMR Filer's securityholding percentage (i.e., 11%) has not increased or decreased past one of the fixed 2.5% thresholds since the AMR Filer's most recently filed report, the AMR Filer would not be required to file a report in accordance with Part 4 of NI 62-103 in respect of that month. The AMR Filer's next report would be required when its securityholding percentage in that class of securities decreases past 10% or increases past 12.5%..

Effective Date

6. These changes become effective on [x].