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

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Dear Mesdames & Gentlemen

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

The Canadian Advocacy Committee of the CFA Societies of Canada (the CAC) is pleased to respond to the request for comments on the CSA's proposed National Instrument 62-104 *Take-Over Bids and Issuer Bids* (NI 62-104 or the Instrument). The CAC represents the 11,000 Canadian members of CFA Institute[1] and its 12 Member Societies across Canada. The CAC membership includes portfolio managers, analysts and other investment professionals in Canada who review regulatory, legislative, and standard setting developments affecting investors, investment professionals, and the capital markets in Canada.

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

General Comments

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

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

Enhancing Investor Protection.

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

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

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

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

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

3 Sections 5.5 and 5.12.

Gap in the Rule:

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

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

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

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

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

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

Independent Director Approval of Employee Benefit.

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

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

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

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

Exemption from Proportionate Take-Up

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

Closing Remarks

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

Sincerely,

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