This document is an unofficial consolidation of all changes to National Policy 62-203 *Take-Over Bids and Issuer Bids*, effective as of May 9, 2016. This document is for reference purposes only. The unofficial consolidation of the Policy is not an official statement of the law.

National Policy 62-203
Take-Over Bids and Issuer Bids

PART 1 INTRODUCTION AND PURPOSE

1.1 **Introduction** – National Instrument 62-104 *Take-Over Bids and Issuer Bids* (the Instrument) governs take-over bids and issuer bids in all jurisdictions of Canada. This Policy and the Instrument are together referred to as the "Bid Regime". This Policy outlines how the provincial and territorial securities regulatory authorities interpret or apply certain provisions of the Bid Regime and provides guidance on the conduct of parties involved in a bid.

PART 2 BID REGIME FOR TAKE-OVER BIDS AND ISSUER BIDS IN CANADA

2.1 **General** – The Bid Regime 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.

2.2 **Identifying the offeror** – More than one person may constitute an offeror under a take- over bid. This can arise if an offer is made indirectly, because the terms "offer to acquire" and "take-over bid" in section 1.1 of the Instrument apply to both direct and indirect offers to acquire securities.

For example, a party (the primary party) that uses an acquisition entity, subsidiary or other affiliate (the named offeror) to make a take-over bid, may itself be making an indirect bid. In that case, the named offeror and the primary party may be joint offerors. As joint offerors, both would be subject to the requirements of the Bid Regime, including the requirements to certify and deliver the bid circular.

If a take-over bid is made by a wholly-owned entity, we regard the entity's parent to be a joint offeror. If the named offeror is not a wholly-owned entity, assessment of whether the primary party is a joint offeror would depend on its role, taking into account, among other factors, the answers to the following questions:

- Did the primary party play a significant role in initiating, structuring and negotiating the bid?
- Does the primary party control any of the terms of the offer?
- Is the primary party financing the bid, guaranteeing the financing, or integral to obtaining the financing?
- Does the primary party directly or indirectly control the named offeror?

- Did the primary party form, or cause to be formed, the named offeror?
- Are the primary party's securities being offered as consideration under the bid?
- Will the primary party beneficially own the assets or securities of the target after completion of the bid?

We think a "*yes"* answer to any of these questions could mean that the primary party is making an indirect offer and is a joint offeror under the bid.

2.3 **Bids made only in certain jurisdictions** – The failure to make a bid to security holders of an offeree issuer in one or more jurisdictions if the bid is made to security holders in other jurisdictions is not consistent with the existing framework of securities regulation in Canada, which aims to ensure that all security holders of the offeree issuer in Canada are treated equally. If the bid is not made in all jurisdictions, securities regulatory authorities in the jurisdictions in which the bid is made may issue cease trade orders in respect of the bid.

2.4 **Varying terms –** If an offeror varies the terms of its bid after the bid has been commenced, the variation may have the effect of making the bid less favourable to offeree security holders in circumstances where the offeror

(a) lowers the consideration offered under the bid,

(b) changes the form of consideration offered under the bid, other than to add to the consideration already offered under the bid,

(c) lowers the proportion of outstanding securities for which the bid is made, or

(d) adds new conditions.

Depending on the circumstances, these variations may be so fundamental to the bid that we may exercise our public interest mandate to ensure that offeree security holders are not prejudiced by the variations. We may intervene to cease trade the bid, require that the deposit period be extended for a period longer than mandated under the Bid Regime or require that an offeror commence a new bid with the varied conditions.

2.5 **Interpretation of prohibition against collateral agreements** – An offeror or anyone acting jointly or in concert with an offeror is prohibited from entering into a collateral agreement, understanding or commitment that has the effect of providing a security holder of the offeree issuer with consideration of greater value than that offered to other security holders of the same class. This prohibition applies to a direct or indirect benefit being provided to a security holder and includes participation by the holder in another transaction with the offeror that has the effect of providing consideration of greater value to the holder than that offered to other security holders of the same class.

2.6 **Independent committees for the collateral agreement exceptions –** The Bid Regime excludes employment-related arrangements from the scope of the collateral agreement prohibition if, among other conditions, an independent committee of the offeree issuer has determined that the value of the benefit received by a security holder is less than 5% of the total consideration to be received by the holder under the bid or that a security holder is providing at least equivalent value in exchange for the benefit. For the purposes of these exceptions, we consider a director to be independent if the director

is disinterested in the bid or any related transactions. Although this is a factual determination based on the particular circumstances of the bid, we think that the definitions of independent director and independent committee in Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions* provide relevant guidance on determining director independence.

2.7 **Equivalent value exception** – In determining that a security holder is providing at least equivalent value in exchange for a benefit under clause 2.25(1)(b)(ii)(B) of the Instrument, an independent committee should consider, among other things, whether the employment compensation arrangement, severance arrangement or other employment benefit arrangement is on terms consistent with arrangements made with individuals holding comparable positions (i) with the offeror and (ii) in the industry generally. Where an independent committee does not have the expertise or resources to ascertain whether an arrangement is on terms consistent with industry standards, we recommend the committee retain an appropriately qualified independent expert to advise it concerning industry standards.

2.8 **Redacting or omitting filed information** – The Bid Regime requires the offeror and offeree issuer to file prescribed documents relating to control of the offeree issuer and to the bid. The filer is permitted, under certain conditions, to omit or mark provisions of a filed document so as to make the provisions unreadable. However, we do not think it appropriate for a filer to omit or redact an entire document on the basis that the information in the document is subject to confidentiality.

2.9 **Section 1.2 of the Instrument** – Saskatchewan is not included in subsection 1.2(1) of the Instrument because the definitions of "offer to acquire" and "offeror" are in the regulations to *The Securities Act, 1988* (Saskatchewan). The definitions are the same.

2.10 **Take-over bid deposit period** – The Bid Regime requires all non-exempt take-over bids to remain open for a minimum deposit period of 105 days (section 2.28.1 of the Instrument), except in the following circumstances:

(a) the offeree issuer states in a news release a shorter deposit period for a bid of not less than 35 days (section 2.28.2 of the Instrument); or

(b) the issuer issues a news release that it intends to effect a specified alternative transaction (section 2.28.3 of the Instrument).

Where a shorter minimum deposit period applies, an offeror that has not yet commenced its take-over bid can avail itself of the shorter minimum deposit period by establishing an expiry date for the initial deposit period based on the number of days specified for the bid referred to in the deposit period news release. In the case of an alternative transaction, section 2.28.3 of the Instrument permits an offeror to establish a minimum initial deposit period of at least 35 days. This provision applies regardless of the length of time that may be required to complete the alternative transaction.

If an offeror has already commenced a take-over bid when a deposit period news release is issued or an alternative transaction is announced, sections 2.28.2 and 2.28.3 of the Instrument do not require the offeror to shorten the deposit period for its bid, nor do they apply to automatically shorten the initial deposit period of its bid. To avail itself of the permitted shorter initial deposit period, the offeror must vary its take-over bid in accordance with section 2.12 of the Instrument to reflect the earlier expiry date for the bid. As a consequence, the offeror must allow securities to be deposited under its bid for at least 10 days after the notice of variation even if the offeror's take-over bid would otherwise have already satisfied the shorter minimum deposit period.

2.11 **Deposit period news release** – A "deposit period news release" is defined, in part, as a news release

issued by an offeree issuer in respect of a "proposed or commenced" take- over bid. A take-over bid is "proposed" if a person publicly announces that it intends to make a take-over bid for the securities of an offeree issuer. An anticipated but unannounced take-over bid or possible future take-over bid would not constitute a "proposed" take-over bid within the meaning of this definition.

A deposit period news release will state an initial deposit period for a take-over bid of not more than 105 days and not less than 35 days. A deposit period news release must describe the minimum deposit period by referring to a number of days from the date of the bid and not to specific calendar dates in order to facilitate the generic application of the shorter minimum deposit period to multiple take-over bids.

2.12 **Multiple deposit period news releases** – The Bid Regime does not restrict an offeree issuer from issuing multiple deposit period news releases in respect of a take-over bid or contemporaneous bids. While likely rare, we anticipate that there may be circumstances where an offeree issuer determines to further shorten a previously stated minimum initial deposit period for a take-over bid or determines to state a shorter initial minimum deposit period for a take-over bid after it had previously stated an initial minimum deposit period for another take-over bid. In the event that an offeree issuer issues multiple deposit period news releases, the provisions in section 2.28.2 of the Instrument should be interpreted such that the shortest initial minimum deposit period stated in a deposit period news release applies to all take-over bids that are subject to section 2.28.2 of the Instrument.

2.13 **Alternative transaction** – The Bid Regime includes a definition for an "alternative transaction" that is based, with certain modifications, principally on the definition of "business combination" in Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions*. This definition is intended to encompass transactions agreed to or initiated by the issuer that could result in the acquisition of the issuer or the business of the issuer as an alternative to doing so by means of a take-over bid.

2.14 **Alternative transaction – time of agreement** – Section 2.28.3 of the Instrument provides that, in certain circumstances, the initial deposit period for a bid must be at least 35 days from the date of the bid if an issuer issues a news release announcing that it "intends to effect an alternative transaction, whether pursuant to an agreement or otherwise". An agreement to enter into an alternative transaction should be interpreted as having occurred when the issuer first makes a legally binding commitment to proceed with the alternative transaction, subject to conditions such as security holder approval.

Where an issuer does not technically negotiate an alternative transaction with another party, such as in the case of a share consolidation, a determination to effect the alternative transaction should be interpreted as having occurred when the issuer's board of directors decides to proceed with the alternative transaction, subject to conditions.

2.15 **Alternative transaction – reliance on issuer news release** – Section 2.28.3 of the Instrument provides for the reduction of the minimum initial deposit period for a take- over bid to 35 days if an issuer issues a news release announcing that it intends to effect an alternative transaction. Section 2.28.3 applies in respect of an offeror's take-over bid, such that an offeror should reasonably determine whether an issuer's announced transaction is an "alternative transaction" before either, as the case may be, reducing the initial deposit period of its outstanding take-over bid to not less than 35 days or commencing a take-over bid for the issuer with an initial deposit period of not less than 35 days.

2.16 **Change in information or variation of terms** – Subsections 2.11(5) and 2.12(3.1) of the Instrument provide that the initial deposit period for a take-over bid must not expire before 10 days after the date of a notice of change or notice of variation, respectively. If an offeror is required to send a notice of

change or a notice of variation in circumstances where the initial deposit period would expire less than 10 days from the date of the notice then the offeror would be obliged to further extend the initial deposit period to ensure that at least 10 days have elapsed before the expiry of the initial deposit period.

2.17 **Partial take-over bids** – The Bid Regime includes specific requirements for partial take- over bids, including that an offeror is required to take up securities deposited on a proportionate or *pro rata* basis where a greater number of securities is deposited under the bid than the offeror is bound or willing to acquire. The Bid Regime exempts an offeror making a partial take-over bid from the general obligation to immediately take up all deposited securities if, at the expiry of the initial deposit period, the specified bid conditions in subsection 2.32.1(1) of the Instrument are satisfied. Instead, subsection 2.32.1(6) of the Instrument provides that the offeror is required to take up at the expiry of the initial deposit period only the maximum number of securities that it can without contravening the *pro rata* requirement. An offeror would therefore make the determination of the maximum number of securities it can take up assuming that all other securities subject to the bid will be deposited during the mandatory 10-day extension period.

Subsection 2.32.1(7) of the Instrument further requires that an offeror making a partial take-over bid must take up any securities **deposited** during the initial deposit period and not already taken up by it in reliance on subsection s. 2.32.1(6), and securities deposited during the mandatory 10-day extension period, on a *pro rata* basis and not later than one business day after expiry of the mandatory 10-day extension period. This *pro rata* determination would take into account the fact that a portion of the securities deposited in the initial deposit period has already been taken up by the offeror.

The following are illustrative examples of how the proportionate take-up provisions in the Bid Regime would apply to partial take-over bids in different circumstances.

Partial take-over bid scenario	**Offeree shares deposited as at expiry of initial deposit period (all other conditions satisfied)**	**Maximum number of offeree shares taken up *pro rata* by offeror at expiry of initial deposit period**	**Additional offeree shares deposited during mandatory 10-day extension period**	**Total offeree shares taken up at expiry of mandatory 10-day extension period**
Bid for 3,000 offeree shares (30% of 10,000 issued and outstanding offeree shares) Offeror does not own offeree shares at commencement of bid and does not acquire offeree shares during the bid.	6,000 (60% of the 10,000 offeree shares subject to the bid) (minimum 50% tender is required to meet minimum tender requirement in s. 2.29.1(c))	1,800 (60% of 3,000 offeree shares bid for, or 30% of 6,000 shares deposited) Offeror cannot take-up more than 60% of the 3,000 shares it bid for (30% of deposited shares) to allow for possibility of additional deposit of all	2,000 (20% of the 10,000 offeree shares subject to the bid)	3,000 (30% of 10,000 issued and outstanding offeree shares) *Summary* A total of 8,000 (80%) of the offeree shares subject to the bid deposited as at expiry of the mandatory 10-day extension period (6,000 as at expiry of initial deposit period plus 2,000 deposited during mandatory 10-day extension period).

		4,000 (40%) remaining shares subject to the bid during mandatory 10-day extension period.		Proration factor: 3,000 / 8,000 (number of shares sought / number of shares tendered) = approx. 0.375. The offeror will take up and pay for 37.5% of shares deposited by each shareholder, taking into account any shares already taken up at expiry of initial deposit period.
Bid for 3,000 offeree shares (30% of 10,000 issued and outstanding offeree shares) in addition to shares held by offeror Offeror owns 1,000 (10%) of offeree shares at commencement of bid and does not acquire offeree shares during the bid.	6,000 (66 $^{2}/_{3}$ % of the 9,000 offeree shares subject to the bid) (minimum 50% tender of the 9,000 offeree shares not held by offeror (or 4,500 shares) is required to meet minimum tender requirement in s. 2.29.1(c))	2,000 (66 $^{2}/_{3}$% of 3,000 offeree shares bid for, or 33 $1/_{3}$ % of 6,000 shares deposited) Offeror cannot take-up more than 66 $^{2}/_{3}$% of the 3,000 offeree shares it bid for to allow for possibility of additional deposit of all 3,000 (33 $^{1}/_{3}$%) remaining shares subject to the bid during mandatory 10-day extension period.	2,000 (approx. 22% of the 9,000 offeree shares subject to the bid)	3,000 (30% of 10,000 issued and outstanding offeree shares) *Summary* A total of 8,000 (80%) of offeree shares subject to the bid deposited as at expiry of the mandatory 10-day extension period (6,000 as at expiry of initial deposit period plus 2,000 deposited during mandatory 10-day extension period). Pro ration factor: 3,000 / 8,000 (number of shares sought / number of shares deposited) = approx. 0.375. The offeror will take up and pay for 37.5% of shares deposited by each shareholder, taking into account any shares already taken up at expiry of initial deposit period.

PART 3 TAKE-OVER BID AND EARLY WARNING REQUIREMENTS

3.1 **Equity swap or similar derivative arrangement** – An investor that is a party to an equity swap or similar derivative arrangement may under certain circumstances have deemed beneficial ownership, or control or direction, over the referenced 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.

3.2 **Securities lending arrangements** – Securities lending describes the market practice whereby securities are temporarily transferred from one party (the lender) to another party (the borrower) in return for a fee. As part of the lending arrangement, the borrower is obliged to redeliver to the lender the securities or identical securities to those that were transferred or lent, either on demand or at the end of the loan term.

Securities lending arrangements transfer title of securities from the lender to the borrower for the duration of the loan. During this period, the borrower has full ownership rights and may re-sell the securities as well as vote them. Securities lending arrangements between the lender and the borrower generally provide for payment to the lender of any economic benefits (for example, dividends) accruing to the securities while "on loan". Therefore, securities lending separates the economic interest in the securities which remains with the lender from the ownership and voting rights which are transferred to the borrower. If the lender wants to vote the loaned securities it must, in accordance with the terms of the securities lending arrangement, either recall the securities or identical securities from the borrower or otherwise direct the voting of the loaned securities.

Since securities lending arrangements involve a disposition and acquisition of securities, lenders and borrowers should consider securities lent (disposed) and borrowed (acquired) under securities lending arrangements in determining whether an early warning reporting obligation has been triggered.

Paragraph 5.7(a) of the Instrument provides an exception for the lender of securities under a securities lending arrangement from the early warning requirements if the securities are transferred or lent pursuant to a securities lending arrangement that meets the criteria of a specified securities lending arrangement. If the securities lending arrangement is not a specified securities lending arrangement, then the early warning reporting requirements for dispositions of securities will apply to the disposition of securities by the lender under the securities lending arrangement.

Paragraph 5.7(b) of the Instrument provides an exception for the borrower of securities under a securities lending arrangement from the early warning requirements if the securities or identical securities are borrowed, disposed of or acquired in connection with a borrower's short sale if certain conditions are met. Short selling is a trading strategy where the borrower uses securities borrowed under a securities lending arrangement to settle a sale (disposition) of the securities to another party with the objective of later repurchasing (acquiring) identical securities at a lower price on the market to return the securities to the lender. If all the conditions of paragraph 5.7(b) are not satisfied, then the early warning reporting requirements will apply to the borrower in respect of securities borrowed under the securities lending arrangement and the disposition of and acquisition of the securities or identical securities in the market in connection with the securities lending arrangement.