Susan Copland, B.Comm, LLB.
Director

Secretary
Ontario Securities Commission
20 Queen Street West
19th Floor, Box 55 Toronto ON
M5H 2S8
comments@osc.gov.on.ca

Anne-Marie Beaudoin
Corporate Secretary
Autorite des marches financiers
800, square Victoria, 22 etage
Montreal QC H4Z 1G3
Consultation-en-cours@lautorite.qc.ca

July 12, 2013

Dear Sir/Madame:

Re: Proposed Amendments to Multilateral Instrument 62-104 *Take-Over Bids and Issuer bids,* National Instrument 62-103 *Early Warning System and Related Take-Over Bid and Insider Reporting Issues* and National Policy 62-203 *Take-Over and Issuer Bids* (the "Proposed Amendments ")

The Investment Industry Association of Canada ("IIAC" or "the Association") appreciates the ability to comment on the Proposed Amendments.

The Association supports the general objective of the Proposed Amendments, which is to provide greater transparency about significant holdings of issuers' securities. However, we are concerned that the broad application of a number of the provisions of the Proposed Amendments will have significant negative unintended consequences for capital raising in the small-cap sector, and in relation to certain business activities. This submission provides suggestions as to how these concerns could be addressed using exemptions and amendments to specific sections of the Proposed Amendments.

We note that the Notice does not reference any cost-benefit analysis that may have been conducted to ascertain if the perceived benefits of the Proposed Amendments justify the costs to the industry, including dealers, issuers and investors. The IIAC believes that, in order to maintain an efficient regulatory environment, it is important that such an analysis be undertaken in respect of all material regulatory initiatives.

Effect of Proposed Amendments on Canadian/Small-Mid Cap Issuers

We are very concerned about the effect of the Proposed Amendments on Canadian issuers, most of which would be characterized as small-cap, when compared with their US counterparts. The general impact of the Proposed Amendments is much more significant for smaller-cap issuers, and will have many unintended negative consequences.

The primary impact of lowering the reporting thresholds from 10% to 5% will be a significant reduction in capital investment and access to capital for small-cap issuers. Currently, many small-cap institutional investors impose a hard cap on the percentage of securities in each small-cap issuer that they are willing to hold. This cap is based on the trigger for early warning reporting requirements, which represent material cost and operational burden for such investors. The requirements of the Early Warning Regime (including the level of detail required in the disclosure, the 2-day deadline on filing, the press release, and the 1-day moratorium on further acquisitions) means certain investors currently do not allow a level of investment that would trigger such requirements in the ordinary course. The Proposed Amendments, which reduce the threshold to 5% would also increase the scope and complexity of the filing, and accelerate the due date of the press release. This will very likely result in more investors limiting themselves to smaller concentrations in ownership and ultimately less access to capital, less investment in small-cap businesses in Canada, and less liquidity in the market.

The provisions in the Proposed Amendments that would make the Alternative Monthly Reporting (AMR) filing more similar to an Early Warning Report (EWR) or a Schedule 13D in the US will also likely result in more Eligible Institutional Investors (EIIs) capping their ownership so as to avoid triggering a disclosure, with the same consequences of lessened liquidity, lower levels of small-cap investment and thinner concentrations of ownership.

Currently, small-cap issuers are generally less likely to have institutional investors (which are critical to their financial health) with ownership stakes exceeding 9.9%. As noted above, if the threshold is moved to 5%, it is extremely likely that many of these investors will reduce their investments to correspond with the reduced reporting requirements. This could have a devastating effect on small cap issuers who are already facing very difficult capital raising conditions.

Nevertheless, if the CSA determines that the threshold should be reduced to 5%, it is imperative that exemptions be created to take into account the smaller cap nature of Canadian issuers.

The Canadian marketplace is different from the US in respect of not only the size of the issuers, but the concentration of owners and stock. Smaller cap issuers tend to have fewer investors holding more securities, due to the smaller financing and public shareholder base. As such, the presence of institutional investors holding a material ownership stake is critical to such issuers.

If a lower reporting threshold were to be implemented, in order to ensure that smaller cap issuers would not face a significant and negative effect on their ability to raise capital, we recommend that issuers below a specified market capitalization be exempted from the lower early warning threshold, and be subject to the current 10% standard. We recommend the market cap threshold be set at $1 billion.

Active vs Passive Investors

Given that the intention of the Proposed Amendments is to help identify investors who are accumulating positions with the intent to affect change in, or control of the issuer, the increased reporting requirements should exempt passive shareholders. Increasing reporting requirements for such shareholders does not support the regulatory objective, and it would impose significant costs to such investors, thus reducing the likelihood of investment in such issuers.

The impact of the proposed amendments is to require EIIs to meet a compliance burden very similar to that proposed for non-EIIs:

- The disclosure threshold drops to 5% (albeit at month-end only);
- The ownership calculation requires inclusion of certain equity equivalent derivatives;
- The AMR requires disclosure of equity equivalent derivatives, stock lending agreements, the material terms of any agreements, arrangements, or understandings involving equity equivalent derivatives, other related financial instruments, or securities lending transactions. The AMR would require disclosure of “any transaction that has the effect of altering, directly or indirectly, the eligible institutional investor’s economic exposure to the issuer.”

These proposed changes to the AMR requirements are quite broad and would require EIIs to disclose considerably more information than is currently required in an AMR or in a Schedule 13G in the US's passive regime. It would take significantly more time and manpower to prepare such a disclosure, which is compounded by the fact that many shareholders reporting systems will not easily or cleanly allow for retrieval of this information.

The current proposals would create a major burden on passive investors, which does not appear to be the intent of the regulators. Maintaining the short-form AMR and allowing passive investors who do not qualify as EIIs to file on the AMR regime, even at a 5% threshold, would increase transparency in the market without being overly restrictive to investors who have no intent to affect control.

The designation of EIIs and AMR reporting requirements are another means of reducing the burden for investors that are not the target of the Proposed Amendments. The current list of EIIs does not cover many types of investors who accumulate 5%+ positions in the ordinary course of their business. For instance, broker-dealers are not included in the definition of EIIs. We recommend that broker-dealers be included among the highly regulated entities that are currently included in the EII definition.

Further, any passive investor that holds a position in the ordinary course should be eligible to file a short-form disclosure, to minimize the compliance burden and allow freedom to trade, regardless of status. The passive 13G regime in the US achieves the dual goals of transparency and ease of transacting in the US market. Broker-Dealer inventories would be an example of passive ownership holdings where positions fluctuate in the normal course of business as a result of hedging activities driven by client demand, or conducting investment banking transactions. By including certain types of derivatives that affect the active investor's total economic interest and by excluding the passive ownership holdings accumulated in the broker-dealer's normal course of business this would help achieve the desired level of transparency the regulators are seeking with respect to the current "hidden ownership" and "empty voting" challenges by targeting the intended participants of this proposal that may accumulate substantial economic interest in an issuer without public disclosure that could potentially be converted to direct interest in the security. This may also remove double counting of the broker-dealer passive ownership holdings that are accumulated in response to client-driven business. The burden for reporting should reside with the economic owners rather than those with specific market making responsibilities.

Derivatives

In respect of the inclusion of equity derivative positions in the calculation, we believe that the issue should not be whether a party has an "economic interest" in an equity derivative but instead whether they have a beneficial ownership interest. The test should be primarily based on whether a party has the right to vote any shares or the ability to obtain voting rights. Where a party does not hold any voting rights, there should be no reporting requirements. It is our understanding that this is the position taken in the U.S. where an equity derivative is reportable for early warning purposes only where it may be converted to a voting interest within a period of 60 days. This approach recognizes that the vast majority of equity derivative transactions are undertaken by parties who are looking for economic exposure only, and are therefore not appropriate for inclusion in the early warning requirement regime.

The rules should also be clarified to ensure they apply to principal positions only and not to trades that an institution is undertaking on behalf of a client. As noted above, the reporting obligation is meant to disclose an entity's ownership position, which should not include positions taken for a client.

These changes are important, as otherwise the provisions in the Proposed Amendments will lead to double-counting and confusion in the market place.

Securities Lending

Consistent with our position on Derivatives, we believe that in respect of securities lending, the rule should focus on the concept of beneficial ownership and in particular on who has voting rights over the borrowed securities. The rule should indicate that the responsibility for reporting should be determined by which party controls the voting rights of any lent or borrowed securities.

We think the proposed rules should be clarified to indicate that borrows and loans should be offset against one another in any calculation of total holdings. Securities lending participants are often not just lenders or borrowers, rather they undertake both roles simultaneously on the same securities. If consideration to the net position of lent or borrowed securities is not taken into account, it is possible that this may result in over-reporting which compromises the integrity of the information.

In addition, we believe that it is appropriate that the exemption that applies to lenders of securities where a stock loan agreement allows for loan recalls for the purposes of voting or where the borrower will vote upon instruction from the lender, be extended to the borrower as well. Given that borrowed securities are executed under the same stock loan agreement, this would not avoid a reporting requirement for a natural net borrower. If the intent of the requirement is to identify and limit suspected "empty voting" scenarios, there should be an allowance in the rules that exempt a borrower from the reporting requirement in cases where the borrower commits not to vote the shares.

Transition Period

If adopted as presented, the Proposed Amendments will require a great deal of work on dealers' existing systems. We suggest that the transition period allow for one year in order for dealers to develop a complete solution to accommodate the Proposed Amendments.

Conclusion

Although we understand the stated rationale for the Proposed Amendments, we believe it is critical that a thorough analysis be undertaken to determine if the current regime has resulted in problems that are clearly identifiable and resolvable through a change in regulation. If so, the costs of implementing such change should be carefully measured against the anticipated benefits.

Thank you for considering our comments. If you have any questions please do not hesitate to contact me.

Yours sincerely,

Susan Copland