# Capital Markets Adjudicators' Policy Forum: M&A Update

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OSC

Ontario
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# Introduction and Participants

- Naizam Kanji, Executive Vice President, Strategic Regulation, Ontario Securities Commission (Moderator)
- Jennifer F. Longhurst, Partner, Co-Lead of Critical Situations & Shareholder Activism Group, McCarthy Tétrault LLP
- Jason Koskela, Vice President, Mergers & Acquisitions, Ontario Securities Commission

# Outline of Discussion

- Introduction
- Overview of Proposed Amendments to Early Warning Reporting Regime and NI 62-104
- Proposals re: Derivatives Disclosure and Policy Guidance
- Early Warning Reporting Proposals re: Intentions Disclosure and Joint Actorship
- Selected Proposals re: Take-Over Bids
- Selected Recent M&A-related Commission and Court Decisions
- Questions

# Appendix:

# Summary of Key Proposed Amendments to Early Warning Reporting Regime and NI 62-104

# Selective Repurchase Issuer Bid Exemption

- New selective repurchase issuer bid exemption
  - currently no “private agreement” share buybacks are allowed
  - increasing issuer interest in direct buyback opportunities
- Purpose of the new exemption:
  - enhance competitiveness of our capital markets
  - provide issuers greater flexibility to allocate capital
  - provide more liquidity for sellers of larger blocks of securities
  - better alignment of Canadian buyback regime relative to U.S.
  - maintain fairness and integrity of issuer bid regime through appropriate conditions for exemption

# Selective Repurchase Issuer Bid Exemption

- Specific elements of proposed selective repurchase exemption:
  - issuers can acquire up to 5% within a 12-month period
  - repurchase from not more than 5 persons in the aggregate and not more than 5 transactions in a 12-month period
  - consideration paid must be at a discount to market price
  - issuers must have a liquid market, as defined
  - news release disclosure with details of transaction
- Securities repurchased under other issuer bid exemptions (including normal course issuer bids) would not impact availability of new exemption

# Disclosure of Equity Equivalent Derivatives and Related Guidance

- Proposing new disclosure requirements regarding “equity equivalent derivatives” (i.e. cash-settled swaps) in specific circumstances

  - disclosure of all beneficial and economic ownership interests (including equity equivalent derivatives) in active control contests

  - applies to bidders and dissidents who have filed a take-over bid or dissident proxy circular

  - disclosure of equity equivalent derivative interests, including material terms, dates of agreement, and relationships that could be perceived to affect counterparty decisions

  - requirements to update disclosure after initial bid or dissident proxy circular during the pendency of the bid / proxy contest

# Disclosure of Equity Equivalent Derivatives and Related Guidance

- Purpose of new disclosure is to better inform shareholder decisions in contests for control
  - addresses information asymmetry that exists now
  - more balanced transparency of totality of parties' interests
- Shareholders benefit from clear disclosure of the universe of beneficial ownership and derivative/economic interests in order to:
  - evaluate whether such interests are pertinent to the bidder or soliciting securityholder's influence and leverage
  - understand that any securities underlying equity equivalent derivatives held by the bidder or soliciting securityholder are subject to counterparty tendering and voting practices
  - assess the viability of success of the bid or solicitation and potential alternative options

# Disclosure of Equity Equivalent Derivatives and Related Guidance

- Proposing new policy guidance to clarify when use or disclosure of equity equivalent derivatives may be inappropriate and raise public interest concerns:

  - where a party does 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

  - 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 or matter subject to securityholder approval 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

# Amendments to Early Warning Reporting Regime

## Intention disclosure guidance

- Proposing guidance to clarify expectations regarding the timing of disclosure of an acquiror's plans or future intentions, including that acquirors should:
    - re-assess the accuracy of the disclosure in their most recent early warning report every time an early warning filing requirement is triggered
    - update their early warning reports as soon as they have publicly announced information or facts that differ from the plans or future intentions that were previously disclosed, even if their most recent early warning report contains general language reserving their right to engage in a range of the specified actions
    - consider whether significant steps with respect to a transaction or event, individually or taken together, constitute a change in plans or intentions
        - (i.e. irrevocable steps to effect a transaction)

# Amendments to Early Warning Reporting Regime

## Post-IPO initial reports

- Proposing to require filing of initial EWR upon an issuer IPO
  - Deemed acquisition mechanism
  - No moratorium or news release requirement

## Deemed acquisition on formation of joint actor relationship

- Proposing to deem each person acting jointly or in concert with another person in respect of an issuer to have acquired securities owned or controlled by its joint actors upon formation of the joint actor relationship
  - no trade trigger
  - i.e. if parties collectively own more than 10% of shares and become joint actors then EWR triggered

# Amendments to take-over bid / issuer bid regime

- Removal of 5% purchase exemption for bidders
- Broadening of non-reporting issuer exemption
- Guidance on mini-tenders
- Amendments to accommodate “Dutch auction” issuer bids
- Other targeted and house-keeping amendments