

# EARLY WARNING ENHANCEMENTS

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The Canadian Securities Administrators (CSA) have adopted amendments to the early warning requirements in National Instrument 62-103 *The Early Warning System and Related Take-Over Bid and Insider Reporting Issues* and associated changes to Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids* and National Policy 62-203 *Take-Over Bids and Issuer Bids* (collectively, the "**Early Warning Amendments**"). The Early Warning Amendments are expected to come into force at the same time as the changes to the take-over bid regime [1] on May 9, 2016. The following are the key changes resulting from the Early Warning Amendments:

- Enhanced disclosure is now required regarding the intention of the acquirer and the purpose for the acquisition. This includes disclosure of any intention to change the board or management, sell or transfer material assets, effect a corporate transaction involving the reporting issuer, change the capitalization or dividend policy, change the reporting issuer's charter or by-laws in a way that might impede the acquisition of control, or solicit proxies.
- Enhanced disclosure is now required regarding the material terms of any related financial instruments, securities lending arrangements and other arrangements in respect of a reporting issuer's securities.
- It was clarified that early warning news releases must be issued by the opening of trading on the next business day.
- Disclosure is now required for decreases in ownership of a reporting issuer of 2% or more and also for ownership falling below the 10% reporting threshold.
- Lenders are now granted an exemption from the early warning reporting trigger for securities transferred or lent pursuant to a "specified securities lending arrangement." A "specified securities lending arrangement" is a securities lending arrangement (i) that is in writing, (ii) that requires the borrower to pay to the lender amounts equal to all dividends or interest, (iii) for which the lender maintains records of all securities that it has transferred or lent under such arrangements, and (iv) under which the lender either has the unrestricted right to recall all the securities transferred before the record date for voting or requires the borrower to vote the securities transferred or let in accordance with the lender's instructions.
- Guidance was added to NP 62-203 regarding the circumstances in which an investor may have to include an equity swap or similar derivative arrangement in the calculation of reporting thresholds. This

could occur when the investor has the ability to obtain the voting or equity securities or to direct the voting of voting securities held by any counterparties to the transaction.

- Eligible institutional investors will be prevented from using the Alternative Monthly Reporting System if they solicit proxies to (i) support the election of a director of a reporting issuer other than the persons proposed by management or (ii) support an M&A transaction that is not supported by management or oppose an M&A transaction that is recommended by management.

by Paul Collins, Paul Davis and Adam Kline

[1] The CSA recently adopted significant amendments to Canada's take-over bid regime that will also come into force on May 9, 2016. See our bulletin on this topic [here](#).

### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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