

**APPENDIX A TO THE CHOICE OF LAW RULES**

**COMMON TAKEOVER CODE**

**[Reflecting written comments from the Trinidad and Tobago SEC (T&T SEC Comments) and discussions among regulators in the Cooperating Jurisdictions at meetings in (1) Barbados in July 2009; (2) Trinidad in October 2009; (3) Trinidad in July 2010, and (4) Barbados in January 2011. Also reflecting discussions held with several takeover regulators from other countries, including regulators in Austria, the U.K., and Canada.]**

**IMF's Caribbean Regional Technical Assistance Centre (CARTAC)  
Regional Protocol on Cross-Border Takeovers and Mergers  
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## **§ I Introduction**

### **A. Origin of this Common Code, Qualifications, Definitions, Structure, and Purpose**

#### **1. Origin**

This Common Takeover Code (Common Code) and the related (1) Choice of Law Rules of the International Monetary Fund's Caribbean Regional Technical Assistance Centre (CARTAC), Regional Protocol on Cross-border Takeovers and Mergers (the Choice of Law Rules), (2) Transactions Report and Application of the Proposed Choice of Law Rules (Transactions Report), and (3) Table Comparing Takeover Regulations (Table Comparing TO Regs), were prepared under the auspices of CARTAC on behalf of the securities regulators in the following Caribbean countries: the Bahamas; Barbados; Guyana; Jamaica; Trinidad and Tobago; and the countries that are members of the Eastern Caribbean Securities Market, *i.e.*, Anguilla; Antigua and Barbuda; Commonwealth of Dominica; Grenada; Montserrat; Saint Kitts and Nevis; Saint Lucia; and Saint Vincent and the Grenadines. These countries are defined below as the Cooperating Jurisdictions. This Common Code is Appendix A to the Choice of Law Rules.

#### **2. Qualification: Common Code Has Not Been Adopted**

**It must be emphasized that this Common Code and the related Choice of Law Rules are just proposals of the consultant, and reflect one approach to addressing the issue. Only the appropriate authorities in the Cooperating Jurisdictions can adopt Choice of Law Rules and a Common Code.**

#### **3. Definitions in this Common Code: See Section III**

A significant number of terms used in this Common Code are defined, and to facilitate understanding, all defined terms are capitalized. Section III contains either the definition of the defined term or a reference to the section of this Common Code containing the definition of the term.

#### **4. Structure of the Sections within this Common Code**

The Sections in this Common Code follow the following general scheme: The major sections are indicated by a large Roman number, such as Section I and II; the first subsection is indicated by a capital letter, such as A and B; the second subsection is indicated by a number such as 1 and 2; the third subsection is indicated by a small letter, such as a and b; the fourth subsection is indicated by small Roman numbers in parentheses, such as (i) and (ii); and the fifth subsection is indicated by capital letters in parentheses, such as (A) and (B). The following is an example of a cross reference: *See* Section IV.B.2.c (ii)(A). The fourth and fifth subsections are not reflected in the table of contents. Specific subsections are sometimes referred to in the text as paragraphs.

## **5. Purpose**

As indicated in the Choice of Law Rules, the purpose of those rules is to minimize transactions costs associated with Takeover or Merger Transactions where the Offeree Issuer is listed on multiple exchanges within the Cooperating Jurisdictions, and this Common Code is Appendix A to the Choice of Law Rules.

The application of the Choice of Law Rules may be illustrated as follows. A company may be incorporated in Barbados and listed on exchanges in Barbados, Jamaica, and Trinidad & Tobago. Among other things, the Choice of Law Rules specify the Supervisory Authority (SA) within the Cooperating Jurisdictions that has exclusive jurisdiction of a proposed Takeover or Merger Transaction of an Offeree Issuer that is listed on two or more exchanges within the Cooperating Jurisdictions. Under the Choice of Law Rules, the Applicable SA is required to apply this Common Code to the transaction.

Thus, with the adoption of the Choice of Law Rules and this Common Code, potential duplicate oversight of Takeover and Merger Transactions will be eliminated, and this Common Code would apply to the transaction. It is anticipated that the Cooperating Jurisdictions will also adopt the Common Code as the Takeover Regulation for non-cross-listed transactions.

### ***B. Sources and Background***

The starting point for this Common Code is Canada's Multilateral Instrument 62-104, Takeover Bids and Issuer Bids (Can TO Reg). Although this Common Code follows the basic structure of the Can TO Reg, this Common Code varies from the Can TO Reg in many substantive ways.

Most of the sections of this Common Code refer to the correlative provision of the Can TO Reg or indicate that there is no correlative provision in the Can TO Reg. This Common Code also adopts provisions from the European Union's 2004 Directive on Takeover Bids (EU TO Dir); the U.K.'s City Code on Takeovers and Mergers (U.K.'s Takeover Code); Canada's Multilateral Instrument 61-101, Protection of Minority Security Holders in Special Transactions (Can Protection of Minority Shareholders); the U.S. tender offer rules; and the Takeover Regulations (TO Regs) in the Cooperating Jurisdictions.

### ***C. Summary of Application of the Common Code to Prototypical Transactions***

Where pursuant to the Choice of Law Rules, an SA in the Cooperating Jurisdictions has exclusive jurisdiction over a Public Cross Listed Issuer (*i.e.*, a public company listed on two or more exchanges in the Cooperating Jurisdictions) that becomes the target (Offeree Issuer) of a Takeover or Merger Transaction, the SA must apply this Common Code. This Common Code applies, in the manner indicated, to the Takeover or Merger Transactions discussed in summary form below. Also, discussed in summary form are the third party disclosure requirements set out in the Common Code. A similar summary is contained in Section I.F.5 of the Choice of Law Rules.

#### **1. Insider Takeover or Merger Transaction.**

Special enhanced rules designed to ensure fair treatment of Non-Affiliated Shareholders are set out in Section II.C of this Common Code for Insider Takeover or Merger Transactions. These are transactions in which an insider of the Offeree Issuer is participating on the Offeror side of the transaction. Any transaction subject to these rules must comply with the following standards:

(a) the requirement that the price be in cash or with a cash alternative at the highest price paid by the Offeror in the last 12-months; (b) the Independent Committee of Directors of the Offeree Issuer requirement (applicable in all Insider Merger or Similar Transactions and in Insider Takeover Bids where the board makes a favorable recommendation), (c) the Independent Valuation Expert requirement, (d) the Formal Valuation requirement, and (e) the Majority of the Minority Tendering or Voting Condition. Several options are provided for satisfying the Independent Committee of Directors requirement, including the potential for the Applicable SA, in the exercise of its sole discretion, to make recommendations of persons who would constitute the committee. An exception applies to certain second-step mergers where the per-share consideration is at least as high as the per-share consideration paid in the first-step bid. Also, if in an Insider Takeover Bid, the Offeree Issuer's board does not promptly appoint an Independent Committee of the Board, who can then appoint the required Independent Valuator, the Applicable SA will appoint the Independent Valuator. In all Insider Takeover or Merger Transactions, the Offeror is responsible for the cost of the Independent Valuator.

## **2. The 30% Threshold Mandatory Bid.**

If in a non-bid transaction or transactions (*i.e.*, private purchase or purchases, including purchases from the Offeree Issuer) an Offeror acquires shares of an Offeree Issuer that causes the Offeror to own 30% or more of the voting power or value of the Offeree Issuer's shares, then the Offeror must comply with the Mandatory Bid requirements of the Common Code, pursuant to which the Offeror must make an any and all bid to the shareholders of the Offeree Issuer. Since a Mandatory Bid is also an Insider Takeover or Merger Transaction, the bid will have to comply with the rules in Section II.C governing such transactions, including a 12 month look-back period for determining the minimum price that must be offered in the bid.

## **3. The 30% Ownership and 2 Percentage Point Increase Mandatory Bid.**

If within a 12 month period, an Offeror that owns 30% or more but less than 50% of the shares of an Offeree Issuer acquires additional shares of the Offeree Issuer (including shares acquired from the Offeree Issuer) and as a result of the acquisition the Offeror's share ownership increases by 2 percentage points or more, the Offeror must make a Mandatory Bid. As indicated, since a Mandatory Bid is also an Insider Takeover or Merger Transaction, the bid will have to comply with the rules in Section II.C governing such transactions, including a 12 month look-back period for determining the minimum price that must be offered in the bid.

## **4. The 50% Ownership and 5 Percentage Point Increase Mandatory Bid.**

If within a 12 month period, an Offeror acquires additional shares of a Offeree Issuer (including shares acquired from the Offeree Issuer) and immediately after the acquisition, the Offeror's ownership of the shares of the Offeree Issuer increases from (a) an amount that is 50% or more (the Starting Amount), to (b) an amount that is at least five percentage points above the Starting Amount, the Offeror must make a Mandatory Bid. As indicated, since a Mandatory Bid is also an Insider Takeover or Merger Transaction, the bid will have to comply with the rules in Section II.C governing such transactions, including a 12 month look-back period for determining the minimum price that must be offered in the bid.

[**Comment:** The Cooperating Jurisdictions may consider eliminating this Mandatory Bid and extending the 30% Ownership and 2 Percentage Point Increase Mandatory Bid to all bids where the Offeror owns more than 30% of the shares of the Offeree Issuer.]

## **5. Voluntary Any and All Offer.**

These bids are made by Offerors who are not required to make a bid pursuant to a Mandatory Offer. Although these bids are generally third party bids by non-Controlling persons, these bids will also be subject to the Insider Takeover and Merger rules of Section II.C if the Offeror is an Insider. The Common Code applies, including a 6 month look-back rule for determining the price that must be offered in the bid if the transaction is not an Insider Takeover or Merger Transaction, in which case a 12-month look-back applies. Such bids cannot Close unless a majority of the Non-Affiliated Shareholders have tendered.

## **6. The Mini and Other Partial Bids.**

These are bids for less than all of the stock of the Offeree Issuer where the Offeror ends up with less than 30% of such stock. The Common Code applies to these bids, including a pro rata take up rule. The Mandatory Bid requirements of the Common Code do not apply to these transactions; however, the transaction is subject to the rules for Insider Takeover or Merger Transactions in Section II.C if the Offeror is an Insider. The bid may be exempt under Section VI.A. This provision makes it clear that the Common Code applies to “mini-tender offers,” which are subject to regulation in the U.S., Canada, and the U.K. There can be abuses with these transactions, such as uninformed shareholders tendering into offers deliberately made at a price below the trading value of the shares.

## **7. Mergers or Similar Transactions.**

Where specifically made applicable, a provision of the Common Code applies to any Merger or Similar Transaction, which encompasses a merger, amalgamation, scheme of arrangement, sale of assets, reverse stock split, sale by an Offeree Issuer of its shares to an Offeror, or other similar transactions pursuant to which 20% or more of the stock or 40% or more of the assets of an Offeree Issuer are, directly or indirectly, combined with, or acquired by, or Controlled by an Offeror. For example, the Six Month Best Price Look-Back rule for determining the minimum price to be offered applies to a Merger or Similar Transaction, unless the transaction is also an Insider Takeover or Merger Transaction in which case the rules of Section II.C apply, including a 12-month look back for determining the minimum price. The Majority of Minority Voting Condition must be satisfied for a sale by the Offeree Issuer of its stock to the Offeror if, as a result of such sale, the Offeror would own 20% or more of such shares.

Also, such a transaction encompasses, for example, an issuance by an Offeror of more than 20% of its outstanding shares in a Takeover or Merger Transaction. In such case the Majority of the Minority Voting Condition with respect to the Offeror must be satisfied.

## **8. Issuer Bids.**

The Common Code applies to bids by an Issuer except for bids that are exempt under Section VI.B.

## **9. Related Transactions.**

The Common Code applies to any other transaction that is contingent upon, ancillary to, or in any other way related to the transaction in Sections I.C.1 to 8.

## **10. Disclosure Requirements by Persons who Are Not Offerors or Offeree Issuers**

To make the market for corporate control more transparent, Section VII of this Common Code sets out the following disclosure requirements for persons who are not Offerors or Offeree Issuers: (1) disclosures by Early Warning Shareholders of the acquisition of 5% or more of the shares of a Public Cross Listed Company, (2) disclosure by any Person of the acquisition of 1% or more of (or the establishment of a 1% or more short position in) the securities of an Offeree Issuer or Offeror, (3) reports by all Public Cross Listed Companies regarding change of control agreements, and (4) reports of stock ownership by officers and directors of all Public Cross Listed Companies.

## **§ II Applicability of the Common Code [Not in Can TO Reg]**

### ***A. Applicability of the Common Code to Public Cross Listed Issuers [Not in Can TO Reg]***

As set out in the Choice of Law Rules, this Common Code applies in any Takeover or Merger Transaction involving an Offeree Issuer that is (1) a Publicly-listed Company (as defined in the Choice of Law Rules), and (2) listed on exchanges in more than one of the Cooperating Jurisdictions. Such a Company is referred to herein as a Public Cross Listed Issuer. In such case, under the Choice of Law Rules, the SA within the Cooperating Jurisdictions that is granted exclusive jurisdiction over the transaction is required to apply this Common Code to the transaction.

### ***B. Guide to the Application of the Common Code [Not in Can TO Reg]***

#### **1. Guide to the Applicability of the Common Code to Prototypical Transactions**

Sections II.C through II.O discuss the manner in which this Common Code applies to various types of Takeover or Merger Transactions and related issues. This Section II.B.1 provides an introduction to these provisions, and Section II.B.2 sets out some basic guiding principles underlying this Common Code.

The starting point for application of this Common Code is to determine if the transaction is an Insider Takeover or Merger Transaction, which is addressed in Section II.C. The second-step is to determine if the transaction is a Mandatory Bid, which is addressed in Section II.D. All Mandatory Bids are also Insider Takeover transactions and, therefore, must comply with the rules governing such transactions in Section II.C, as well as the other provisions of this Common Code applicable to bids generally. A takeover bid that is not a Mandatory Bid will fall into one of the following three categories: (a) a Voluntary Any and All Bid, addressed in Section II.E, (b) a Mini or Other Partial Bid, addressed in Section II.F, and (c) an Issuer Bid, addressed in Section II.G. A Voluntary Any and All Bid and a Mini or Other Partial Bid could also be an Insider Takeover or Merger Transaction if, for example, the bid is made by a shareholder who, prior to the bid, holds more than 10% of the stock of the Offeree Issuer. Such a shareholder falls within the definition of Insider.

The guide to the applicability of this Common Code to Mergers or Similar Transactions, including amalgamations, is addressed in Section II.H. For example, these are transaction in which an Offeree Issuer enters into a merger agreement with the Offeror, pursuant to which upon the favorable vote of the shareholders of the Offeree Issuer, it will be merged into the Offeror or a subsidiary of the Offeror. Section II.I provides a guide to applicability of this Common Code to transactions that are related to any of the above transactions. .

Section II.J provides rules regarding disclosures by persons who are not Offerors or Offeree Issuers, including rules regarding disclosures by Early Warning Shareholders. Section II.K sets out the Company Law Savings Rule, which generally provides that the Common Code does not override the company laws in the Cooperating Jurisdictions, and Section II.L sets out the

Securities Fraud Savings Rule, which in certain circumstances permits an SA that is not the Applicable SA to bring a securities fraud action in a transaction. Section II.M makes it clear that the parties are not required to pre-clear with the Applicable SA documents prepared in compliance with this Common Code. Section II.N provides the Applicable SA and an aggrieved party with general enforcement authority. Finally, Section II.O addresses amendments to the Common Code.

The subsequent sections of this Common Code are organized as follows:

- Section III sets out Definitions and Other Basic Concepts,
- Section IV sets out General Rules Governing Takeover or Merger Transactions, as follows Section IV.A, Restrictions on Acquisitions or Sales; Section IV.B Making a Bid; Section IV.C, Offeree Issuer's Obligations; Section IV.D, Offeror's Obligations; and Section IV.E, Bid Mechanics;
- Section V, Filings and Certifications;
- Section VI, Exemptions for Takeover Bids and Issuer Bids;
- Section VII, Reports and Announcements of Acquisitions and Short Positions by Persons who are Not Offerors or Offeree Issuers, including, Section VII.B, Early Warning; Section VII.C, Acquisitions by Non-Offeror during a Takeover or Merger Transaction; Section VII.D, Reporting of Significant Short Position in the Equity Securities of an Offeree Issuer and Offeror; Section VII.G, Reporting by Public Cross Listed Issuers of Change of Control and Similar Provisions; and Section VII.H, Reporting by Officers and Directors of Public Cross Listed Issuers;
- Section VIII, Other Matters, that is, Section VIII.A, No False Markets; and Section VIII.B Sell-Out Right, which applies where an Offeror acquires 90% or more of the stock of an Offeree Issuer in a bid but does not elect to exercise its squeeze-out right;
- Section IX, General Exemptive Authority of the Applicable SA;
- Section X, Form 1, Takeover Bid Circular;
- Section XI, Form 2, Issuer Bid Circular;
- Section XII, Form 3, The Directors' Circular;
- Section XIII, Form 4, A Particular Director's or Officer's Circular;
- Section XIV, Form 5, Notice of Change or Notice of Variation; and
- Section XV, Form 6, Report of Early Warning Shareholder.

## **2. Guiding Principles [Not in Can TO Reg; based on Article 3, General Principles of the EU TO Dir]**

The interpretation and application of this Common Code is to be guided by the following general principles:

- (a) except where this Common Code otherwise provides, all holders of the same class of securities of an Offeree Issuer must be afforded equivalent treatment;
- (b) care must be taken in any Insider Takeover or Merger Transaction to ensure that the Non-Affiliated Shareholders receive fair treatment, including a fair price for their shares;
- (c) a Mandatory Bid must be made by a Person who acquires 30% or more of the voting power or value of the outstanding securities of an Offeree Issuer and by a Person who owns more than 30% of such securities and increases its ownership above certain thresholds;

- (d) the holders of the securities of an Offeree Issuer must have sufficient time and information from both the Offeror and the board of the Offeree Issuer to enable them to reach a properly informed decision on the Takeover or Merger Transaction;
- (e) the board of the Offeree Issuer must act in the interests of the company as a whole and must not deny the holders of securities the opportunity to decide on the merits of a Takeover or Merger Transaction;
- (f) false markets must not be created in the securities of the Offeree Issuer, of the Offeror, or of any other company concerned by the Takeover or Merger Transaction in such a way that the rise or fall of the prices of the securities becomes artificial and the normal functioning of the markets is distorted;
- (g) an Offeror must announce a Takeover Bid only after ensuring that any cash consideration is available and after taking all reasonable measures to ensure that any other type of consideration is available; and
- (h) an Offeree Issuer must not be hindered in the conduct of its affairs for longer than is reasonable for a Takeover or Merger Transaction and in any event not after the Drop Dead Date.

[**Comment:** Except for paragraph (b), relating to Insider Takeover or Merger Transactions, the above principles are similar to the General Principles in Article 3 of the E.U. TO Dir and in the U.K. Takeover Code.]

### ***C. Rules Governing Insider Takeover or Merger Transactions [Not in Can TO Reg]***

#### **1. Closing of an Insider Takeover or Merger Transaction.**

The Closing of any Insider Takeover or Merger Transaction is contingent upon the satisfaction of the following conditions.

##### **a) Twelve Month Best Price Look-Back Rule.**

For each class of the shares of the Offeree Issuer, the consideration paid must be in cash or accompanied by a cash alternative at not less than the highest price paid by the Offeror, an Associate of the Offeror, or any Person Acting Jointly or in Concert with the Offeror, for any interest in such shares during the 365 days prior to the Commencement of the offer. This is referred to as the Twelve Month Best Price Look-Back Rule.

[**Comment:** The Six Month Best Price Look-Back rule in Section IV.A.4 applies to Takeover and Merger Transactions that are not Insider Takeover or Merger Transactions.]

##### **b) Independent Valuation Expert.**

An Independent Valuation Expert must have rendered a Formal Valuation concluding that the consideration offered to the Non-Affiliated Shareholders is fair from a financial standpoint and is within the range of reasonableness, specifying precisely where the consideration fits within such range.

##### **c) Formal Valuation and Other Valuations.**

(i) Formal Valuation. The Formal Valuation must be:

- (A) filed with the Applicable SA,



- (B) made available by the Offeree Issuer to anyone requesting a copy thereof, and
- (C) fully described in the applicable disclosure document.

(ii) Other Valuations and Fairness Opinions. All other valuations and fairness opinions received by the board of the Offeree Issuer (A) with respect to the Insider Takeover or Merger Transaction, or (B) within the 24 months preceding the initiation of the Insider Takeover or Merger Transaction, must be fully described in the applicable disclosure document.

#### **d) Independent Committee, Majority of Minority Tendering Condition, and Disclosure in Bids.**

In addition to satisfaction of paragraphs (1)(a), (b), and (c), in the case of an Insider Takeover Bid, the Closing must be conditioned upon:

- (i) any recommendation of the board of the Offeree Issuer in support of the transaction must be approved by an Independent Committee of Directors of the Offeree Issuer;
- (ii) satisfaction of the Majority of the Minority Tendering Condition; and
- (iii) full disclosure in the applicable disclosure document of, *inter alia*:

- (A) the transaction;
- (B) the decision of the Independent Committee of Directors, including a discussion of any materially contrary view or abstention by a director and any material disagreement between the board and the Independent Committee of Directors;
- (C) the effect of the Majority of the Minority Tendering Condition, including the Offeror's identification, after reasonable investigation, of the shareholders who are not Non-Affiliated Shareholders;
- (D) any bona fide prior offer that relates to the Offeree Issuer or its securities or is otherwise relevant to the Insider Bid, which offer was received by the board of the Offeree Issuer during the 24 months before the Insider Takeover Bid.

#### **e) Independent Committee, Majority of Minority Voting Condition, and Disclosure in Mergers.**

In addition to satisfaction of paragraphs (1)(a), (b) and (c), in the case of an Insider Merger or Similar Transaction, the Closing must be conditioned upon;

- (i) the approval of all agreements and related documents with respect to such transaction by an Independent Committee of Directors of the Offeree Issuer;
- (ii) the satisfaction of the Majority of the Minority Voting Condition; and
- (iii) full disclosure in the applicable disclosure document of, *inter alia*:

- (A) the transaction;
- (B) the decision of the Independent Committee of Directors, including a discussion of any materially contrary view or abstention by a director and any material disagreement between the board and the Independent Committee of Directors;
- (C) the effect of the Majority of the Minority Voting Condition, including the Offeror's identification, after reasonable investigation, of the shareholders who are not Non-Affiliated Shareholders;

(D) any bona fide prior offer that relates to the Offeree Issuer or its securities or is otherwise relevant to the Insider Merger or Similar Transaction, which offer was received by the board of the Offeree Issuer during the 24 months before the Insider Bid.

**[Comment:** An Insider Takeover or Merger Transaction is defined broadly as a “Takeover or Merger Transaction, other than an Exempt Second-Step Merger, in which the Offeror, its Associates, or any Person Acting Jointly or in Concert with the Offeror, is an Insider of the Offeree Issuer or was such an Insider at any time within 12 months of the Commencement of the transaction.” The reason for exempting Exempt Second-Step Mergers is discussed in the Comments to the definition of Insider Takeover or Merger Transaction.

Section II.C.1 requires that all forms of Insider Takeover or Merger Transactions satisfy the following conditions: (1) the price must be in cash or with a cash alternative at the highest price paid in the last 12-months; (2) an Independent Valuation Expert must have determined through a Formal Valuation that the consideration is fair to the Non-Affiliated Shareholders; (3) in the case of an Insider Takeover Bid, only an Independent Committee of Directors of the Offeree Issuer may support the offer; (4) in the case of an Insider Merger or Similar Transaction, an Independent Committee of Directors of the Offeree Issuer must approve the transaction; (5) a Majority of the Minority Shareholders must approve the transaction; and (6) there must be full disclosure. These requirements are similar to the requirements for an Insider Bid under the Can Protection of Minority Shareholders rules.

The 12 month look-back period in paragraph 1(a) is based on Rule 9.5 of the U.K.’s Takeover Code, which applies to mandatory offers. *See also* EU TO Dir Art 5(4) (providing for a look-back period of from 6 to 12 months). Here the 12-month look-back applies to all Insider Takeover or Merger Transactions. Under the restrictions on purchases prior to an offer in Section IV.A.4, a 6 month look-back applies in Voluntary and other bids that are not also Insider Takeover or Merger Transactions. This difference in look-back periods should have the effect of encouraging Voluntary Offers and Mergers or Similar Transactions that are not Insider Takeover or Merger Transactions.

It should be noted that under paragraph 1(d), in an Insider Takeover Bid (as contrasted with an Insider Merger or Similar Transaction addressed in paragraph 1(e)), there is no requirement for approval of the transaction by an Independent Committee of Directors of the Offeree Issuer. However, only an Independent Committee of Directors can take a favorable position on the transaction, and of course, the Independent Committee of Directors could recommend against the transaction. In any event, Independent Directors will have to be involved in the selection of the Independent Valuation Expert. *See* the definition of Independent Valuation Expert. Otherwise, the Applicable SA will appoint the Independent Valuation Expert. *See* paragraph (d) of the definition of Independent Committee of Directors.

Although, it may be difficult to find Independent Directors, it is absolutely necessary to have such persons acting for the Non-Affiliated Shareholders in an Insider Merger or Similar Transaction. As indicated in the definition of Independent Committee of Directors, the board of the Offeree Issuer may appoint new Independent Directors who would act with regard to the particular transaction, provided it is permissible to do so under the Offeree Issuer’s organizational documents and governing company law. Also, as indicated in this definition, the Offeree Issuer could petition the Applicable SA or a court to make recommendations on the

members of an Independent Committee. The Applicable SA will decide in its sole discretion whether to make such a recommendation.]

## **2. Impact if 5% Dissenters.**

This paragraph applies if in an Insider Takeover or Merger Transaction

- (a) an Independent Committee of Directors was not appointed at the recommendation of the Applicable SA or a court pursuant to paragraph (c) of the definition of Independent Committee of Directors;
- (b) Non-Affiliated Shareholders holding in the aggregate more than 5% of the outstanding shares of the Offeree Issuer (i) do not tender their shares into an Insider Takeover Bid, or (ii) vote against an Insider Merger or Similar Transaction; and
- (c) such dissenting shareholders holding in the aggregate not less than 5% of such outstanding shares petition the Applicable SA for appointment of an Independent Valuator.

In such case, the Applicable SA shall promptly appoint a valuator who would otherwise satisfy the definition of an Independent Valuator and such valuator shall promptly determine the fair value of equity interest in the Offeree Issuer as a going concern as of the Closing of the transaction, without taking into account any discounts for marketability or lack of liquidity. In the event, the per-share fair value is determined to be less than the amount paid in the transaction, the petitioning shareholders shall receive that fair value plus interest calculated as set out below. However, if the per-share fair value is determined to be more than the price paid in the transaction, then all the Non-Affiliated Shareholders of the Offeree Issuer shall receive the higher consideration plus interest calculated as set out below, with those shareholders who had their shares acquired receiving the difference between the fair value and the amount received in the transaction. For this purpose, interest shall be compounded and computed on a monthly basis at the prime rate in the jurisdiction where the Applicable SA is located plus 2 percentage points. The Offeror shall be responsible for the costs of the valuation.

**[Comment:** Paragraph (2) is designed to force the Insider to pay a fair price in the transaction. It is only applicable if the Independent Committee is not selected in accordance with the recommendation of the Applicable SA or a court, which is permissible within the definition of an Independent Committee of Directors. To come within this paragraph, Non-Affiliated Shareholders holding at least 5% of the aggregate number of the Offeree Issuer's shares must dissent from the transaction and seek appraisal. This 5% rule is similar to the rule under California corporate law that provides that in the acquisition of a publicly-held target, there are no dissenters' rights unless 5% or more of the shares dissent from the transaction and seek appraisal.

Paragraph (2) adopts a "low price to dissenters" and "high price to all" rule, and therefore, the dissenting shareholders do not get a free ride in pursuing an appraisal, because there is risk that the valuator may find that the fair value of the stock of the Offeree Issuer was less than the amount paid, in which case the dissenters receive the lesser amount. However, if the fair value is found to be more than the price paid, all of the shareholders get the higher price.

In the U.S., the rule that gives all of the shareholders the higher price does not apply in appraisal actions, because in such actions only the dissenting shareholders get the higher or lower price;

however the “high price to all” rule applies in a class action where the directors have been found to have violated their fiduciary duty of loyalty in, for example, a management buyout.

Although some of the representatives of the Cooperating Jurisdictions expressed reservations about the high price to all rule, the Consultant is of the view that this is the correct rule. It only applies in the unique situation where in an Insider Takeover or Merger Transaction (1) the Independent Directors are not recommended by the Applicable SA or a court, (2) more than 5% of the Non-Affiliated Shareholders dissent, and (3) the fair value is found to be more than the consideration paid in the transaction.]

### **3. Presumption that Transaction is an Insider Transaction.**

It shall be presumed that any Takeover or Merger Transaction is an Insider Takeover or Merger Transaction, unless an Independent Committee of Directors of the Offeree Issuer makes a reasoned determination that the transaction is not an Insider Takeover or Merger Transaction and files with the Applicable SA the basis for such determination. A board’s determination that a transaction is an Insider Takeover or Merger Transaction shall be conclusive unless the Offeror convince the Applicable SA that the offer would not be an Insider Takeover or Merger Transaction.

[**Comment:** The purpose of the presumption in paragraph (3) is to put real teeth into this provision, by ensuring that a board of an Offeree Issuer does not casually determine that a transaction that is in essence an Insider Takeover or Merger is not such a transaction.]

## ***D. Rules Governing Mandatory Bids [Not in Can TO Reg]***

### **1. General Obligation to Make a Mandatory Bid**

In the event an acquisition of Equity Securities of an Offeree Issuer satisfies the definition of a Mandatory Bid, the Offeror shall extend an Any and All Bid to the shareholders of each Class of Equity Securities of the Offeree Issuer, provided however, that this requirement does not apply if the acquisition giving rise to the Mandatory Bid obligation resulted from a Voluntary Any and All Bid. The Mandatory Bid must:

- (a) comply with all the rules in Section II.C governing an Insider Takeover or Merger Transaction;
- (b) Commence promptly after occurrence of the event giving rise to the Mandatory Bid and in no case more than 3 Business Days after the date of such occurrence;
- (c) contain no condition except for satisfaction of the Majority of Minority Tendering Condition; and
- (d) comply with the other applicable provisions of this Common Code.

[**Comments:** As discussed below, this Mandatory Bid requirement follows with modifications the rule in the U.K.’s Takeover Code. By giving the Non-Affiliated Shareholders an opportunity to sell to a Controlling shareholder, the Mandatory Bid requirement prevents a Controlling shareholder from locking Non-Affiliated Shareholders into a non-Controlling position in the Offeree Issuer. It also has the effect of forcing the Controlling shareholder to share any control premium that it pays for the Offeree Issuer with all of the shareholders of the Offeree Issuer. Although there is no requirement in the U.S. for a sharing of control premiums with all shareholders, poison pills, which virtually all U.S. public companies can adopt, have the effect of forcing the sharing of any control premium.

The requirement that the Mandatory Bid comply with the Insider Takeover or Merger Transaction rules makes the following rules applicable to such bids: (1) the 12-month look-back on price to be offered, (2) the Independent Valuation Expert, (3) the Formal Valuation, (4) the Majority of the Minority Tendering Condition, and (5) the Independent Committee of Directors of the Offeree Issuer. Thus, while such bids are mandatory they have to comply with provisions designed to ensure the substantive fairness of such bids.

The Majority of the Minority Tendering Condition, as well as the other Insider provisions, applies to all forms of Mandatory Bid: (a) a 30% Threshold Mandatory Bid, (b) a 30% Ownership and 2 Percentage Point Increase Mandatory Bid, and (c) a 50% Ownership and 5 Percentage Point Increase Mandatory Bid. For example, if an Offeror purchased 35% of the Equity Securities of an Offeree Issuer, which has only one class of Equity Securities outstanding, then under the 30% Threshold Mandatory Bid, the Offeror would have to make an Any and All Bid to the other 65% of the shareholders. The only condition to the closing of the Any and All Bid would be the requirement that the Majority of Minority Tendering Condition be satisfied. This means that a majority of the Offeree Issuer's Non-Affiliated Shareholders would have to tender. If for example, only 50% of the Offeree Issuer's shareholders were Non-Affiliated, then more than half of these shareholders would have to tender. Otherwise, the Offeror could not Close the bid. This Majority of Minority Tendering Condition could mean that an Offeror could only Close a 30% Threshold Mandatory Bid if it would own approximately 65% of the Offeree Issuer's outstanding shares. This can be seen from the following example: Assume that an Offeror triggers a 30% Threshold Mandatory Bid by acquiring exactly 30% of the outstanding Equity Securities of an Offeree Issuer. Assume also, that all of the other 70% of the shareholders of the Offeree Issuer are Non-Affiliated Shareholders. As a consequence, to Close the Any and All Bid, approximately 51% of this 70% or 35.70%, would have to tender. Adding the initial 30% to the 35.70% results in 65.70%.

While the Mandatory Bid requirement is similar to Rule 9.1 of the U.K.'s Takeover Code, the Majority of Minority Tendering Condition is different from the minimum condition requirement in Rule 9.3 of the U.K.'s Takeover Code, which only requires the Offeror to hold shares carrying more than 50% of the voting power of the Offeree Issuer. The Majority of Minority Tendering Condition and other Insider bid requirements will eliminate the possibility under Rule 9.3 that an Offeror will deliberately set a low price in a Mandatory Bid so that it can gain 50% Control without purchasing a significant number of shares above the 50% threshold. With a Majority of Minority Tendering Condition, the Offeror has an incentive to make the offer price attractive to most of the Non-Affiliated Shareholders. Also, the Majority of the Minority Tendering Condition puts in the hands of the Non-Affiliated Shareholders the decision of whether the Offeror will be locked into a less than 30% position in the Offeree Issuer as a result of the disgorgement obligation discussed below where the Mandatory Bid does not Close.]

## **2. Exemption for Certain Rehabilitation Transactions**

The Applicable SA may in a published written decision, issued a reasonable time prior to the effectuation of the transaction, exempt from the requirement to make a Mandatory Bid under Section II.D.1 any transaction in which shares of an Offeree Issuer are acquired by an Offeror for the purpose of recapitalizing or rehabilitating the Offeree Issuer in order to restore it to solvency and to enable it to continue to carry on its business as a going concern.

[**Comment:** This provision is based on Section 26(2)(b) of the Jamaican TO Reg.]

### **3. Obligation to Disgorge If Mandatory Bid Does Not Close [Not in Can TO Reg]**

If a Mandatory Bid does not Close for any reason, the Offeror, its Associates, and Persons Acting Jointly or in Concert with the Offeror (the Purchasing Parties) must promptly sell or otherwise dispose of, to a Person or Persons who are unrelated to the Purchasing Parties, enough shares so that the shares held by the Purchasing Parties are below the level of shares that gave rise to the obligation to make the Mandatory Bid.

[**Comment:** This rule prevents an Offeror who deliberately makes a Mandatory Offer that does not Close from retaining the shares that gave rise to the obligation to make the offer, that is, the shares above the applicable trigger for the Mandatory Bid. Thus, for example, if the Offeror purchased from a shareholder 36% of the shares of an Offeree Issuer and the required Mandatory Bid did not Close, the Offeror would have to sell shares that would reduce its position to less than 30%. Also, if an Offeror were required to make a Mandatory Bid because it acquired more than 2% of an Offeree Issuer's shares and the bid did not Close, the Offeror would have to sell sufficient shares to reduce its position below the 2% threshold. Apparently, in the U.K. there is no prohibition on making a "low ball" mandatory offer, but the Common Code is structured to prevent such offers.]

#### ***E. Rules Governing Voluntary Any and All Bids***

All of the provisions of this Common Code apply to a Voluntary Any and All Bid, except as otherwise provided or where a provision applies specifically to a Mandatory Bid, a Mini and Other Partial Bid, an Issuer Bid, or a Merger or Similar Transaction.

#### ***F. Rules Governing Mini and Other Partial Bids***

All of the provisions of this Common Code apply to a Mini or Other Partial Bid, except as otherwise provided or where a provision applies specifically to a Mandatory Bid, an Issuer Bid, or a Merger or Similar Transaction.

#### ***G. Rules Governing Issuer Bids***

All of the provisions of this Common Code apply to an Issuer Bid, except as otherwise provided or where a provision applies specifically to a Mandatory Bid, a Mini and Other Partial Bid, or a Merger or Similar Transaction. As indicated in the definition of Insider Takeover or Merger Transaction, such transactions include any Issuer Bid in which the Issuer proposes to acquire more than 10% of a class of the Issuer's outstanding publicly traded Equity Securities.

#### ***H. Rules Governing Mergers or Similar Transactions***

Only the provisions of this Common Code that specifically apply to Mergers or Similar Transactions are applicable to such transactions.

#### ***I. Rules Governing Related Transactions***

The Common Code applies to any other transaction that is contingent upon, ancillary to, or in any other way related to the transactions in Section II.C through Section II.H.

## ***J. Rules Regarding Disclosures by Persons Who Are Not Offerors or Offeree Issuers***

Section VII of the Common Code sets out the following disclosure requirements for persons who are not Offerors or Offeree Issuers: (1) disclosures by Early Warning Shareholders of the acquisition of 5% or more of the shares of a Public Cross Listed Company (Section VII.B); (2) after the Commencement of a Takeover or Merger Transaction, disclosure by any Person of the acquisition of 1% or more of (or the establishment of a 1% or more short position in) the securities of the Offeree Issuer or Offeror (Section VII.C and D); (3) reports by all Public Cross Listed Companies regarding change of control agreements (Section VII.G); and (4) reports of stock ownership by officers and directors of all Public Cross Listed Companies (Section VII.H).

## ***K. The Company Law Savings Rule [No Similar Provision in Can TO Reg]***

Nothing in this Common Code shall override any provision of a Cooperating Jurisdiction's company law; provided however, that nothing in a Cooperating Jurisdiction's company law shall take precedence over the provisions of this Common Code relating to (1) the requirement to make a Mandatory Bid, (2) the determination of the price that must be offered to the Non-Affiliated Shareholders of an Offeree Issuer, (3) the prohibition against frustrating actions, (4) the requirements for effectuating an Insider Takeover or Merger Transaction, and (5) any other provision specified by the SAs in the Cooperating Jurisdictions pursuant to Section XIII of the Choice of Law Rules.

[**Comments:** This principle can be illustrated by the following three examples. First, even though certain provisions of this Common Code apply to mergers and amalgamation transactions, any merger or amalgamation would have to comply with the amalgamation provisions of the applicable companies act or acts.

Second, the ability of an Offeror to “squeeze-out” minority shareholders of the Offeree Issuer after the Offeror has acquired 90% of an Offeree Issuer's shares in a Takeover Bid would be governed by the squeeze-out provisions of the applicable companies act. As indicated in the Table Comparing TO Regs, the companies acts in all of the surveyed Cooperating Jurisdictions contain a squeeze-out right provision, and for that reason, this Common Code does not have a squeeze-out right. Therefore, any squeeze-out would be effectuated pursuant to the applicable companies act.

Third, it is common for countries to provide for “sell-out” rights, which give the minority shareholders the right to sell their shares to the Offeror if the Offeror does not exercise its squeeze-out right. As indicated in the Table Comparing TO Regs, only St. Kitts has a sell-out right in its companies act. Section VIII.B of this Common Code adopts a sell-out right that, pursuant to the Company Law Savings Rule, is applicable only if a similar provision is not contained in the applicable companies law. Consequently, under the current state of the law, if a St Kitts company is an Offeree Issuer, the sell-out right would be determined by St. Kitts law, but if the Offeree Issuer is incorporated in any other of the Cooperating Jurisdictions, then the sell-out right in this Common Code would apply.]

## ***L. The “Securities Fraud Savings Rule” [No Similar Provision in Can TO Reg]***

For the avoidance of doubt, nothing in this Common Code on Takeovers shall override any provision of a Cooperating Jurisdiction’s securities laws relating to the right of a Cooperating Jurisdiction’s SA to bring an action for securities fraud.

[**Comment:** This provision eliminates any argument that the Common Code prevents an SA that does not have exclusive jurisdiction over the transaction from bringing a securities fraud action in an appropriate case. This principle can be illustrated as follows: Assume a Takeover or Merger Transaction involves the acquisition of a Jamaican Offeree Issuer that is listed on exchanges in Jamaica, Barbados, and Trinidad and Tobago. Pursuant to the Bulk of the Trading Rule of the Choice of Law Rules, the SA in Trinidad and Tobago has exclusive jurisdiction of the transaction. Certain individuals, unrelated to both the Offeree Issuer and the Offeror, engage in fraudulent market manipulation in the shares of the Offeree Issuer on the Barbados Exchange. The SA in Trinidad and Tobago does not take action in the matter. The Securities Fraud Savings Rule makes it clear that the Barbados SA could bring a securities fraud action under the Barbados Securities Act in the matter. Thus, the provision eliminates any argument that the Barbados SA cannot bring a securities fraud action.]

## ***M. No Preclearance Required***

### **1. Basic Rule**

No preclearance by the Applicable SA is required for Takeover Bid documents prepared in compliance with this Common Code, such as the Offeror’s circular under Section IV.B.3 and the Directors’ circular under Section IV.C.2. However, any Material defects in the required documents will have to be corrected and this could delay the timing provisions of this Common Code.

### **2. Applicable SA Can Stop the Running of the Clock**

If Material defects are not promptly corrected, the Applicable SA may stop the running of the 25 Business Day period during which a bid must stay open under Section IV.E.1. The Applicable SA cannot stop the running of the 50 Business Day period used in calculating the Drop Dead Date in Section IV.B.10.

### **3. Comments by Applicable SA**

The parties may consider requesting that the Applicable SA provide comments on drafts of the required documents prior to the date the documents are mailed to shareholders or otherwise made publicly available. The Applicable SA will make a good faith attempt to comply with any such request; however, any such review will not prevent the Applicable SA from later insisting upon corrections of subsequently discovered Material inaccuracies in such documents.

### **4. Consideration of the Views of Affected Parties**

The Applicable SA will consider the views of the affected parties concerning compliance with the disclosure and other requirements of the Common Code.



## **N. Enforcement**

### **1. Enforcement by the Applicable SA**

In addition to the enforcement provisions available under the securities laws of the Applicable SA, if the Applicable SA considers that a Person, its Associates, and Persons Acting Jointly or in Concert (hereinafter the Applicable Parties) have not complied or are not complying with this Common Code, the Applicable SA may issue an order—

- (a) restraining the distribution of any document used or issued in connection with a Takeover or Merger Transaction;
- (b) requiring an amendment to or variation of any document used or issued in connection with a Takeover or Merger Transaction and requiring the distribution of any amended, varied or corrected document;
- (c) directing the Applicable Parties to comply with this Common Code or restraining the Applicable Parties from contravening this Common Code and directing the directors and senior officers of the Applicable Parties to cause the relevant Persons to comply with or to cease contravening this Common Code;
- (d) if the non-compliance is not cured within a reasonable period, prohibiting the Applicable Parties from engaging in a Takeover or Merger Transaction or a period of up to 5 years; and
- (e) otherwise enforcing the purposes of this Common Code.

### **2. Enforcement by an Aggrieved Party**

In addition to the enforcement provisions available to an aggrieved party to a Takeover or Merger Transaction under the applicable securities laws, including a right to seek relief in court, such a party may petition the Applicable SA to issue an order under Section II.N.1.

[**Comment:** Section IV.N.1 was added in response to a comment by the T&T SEC. *See* T&T SEC Comment No. 6. The private enforcement provision in Section IV.N.2 was added at the suggestion of officials in Jamaica and Canada. Both of these remedies are in addition to the remedies otherwise available to both the Applicable SA and the private party under the applicable securities laws.]

## **O. Amendments**

Pursuant to Section XIII of the Choice of Law Rules, this Common Code may be periodically amended.

## **§ III Definitions and Other Basic Concepts [See Part I, of Can TO Reg]**

[**Comment:** Section III.A sets out a substantial number of definitions used in this Common Code. For ease of use, all defined terms are capitalized wherever they are used in this Common Code. Section III.B sets out certain important concepts, including the Control concept, that are not technically defined terms. This follows the structure of the Can TO Reg.]

### ***A. Definitions [See § 1.1 of Can TO Reg]***

#### **1. 1% Purchasing Non-Offeror [Not in the Can TO Reg]**

“1% Purchasing Non-Offeror” is defined in Section VII.C.1, and Purchasing Non-Offeror is defined in Section VII.A.3.

#### **2. 30% Threshold Mandatory Bid [Not in the Can TO Reg]**

##### **a) Basic Definition**

“30% Threshold Mandatory Bid” means a transaction or series of transactions not involving a Takeover Bid in which an Offeror, its Associates, or any Person Acting Jointly or in Concert with the Offeror (the Purchasing Parties) that have less than 30% Beneficial Ownership of the voting power or value of the outstanding Equity Securities of such Offeree Issuer, directly or indirectly, acquire from one or more Persons, including the Offeree Issuer, Equity Securities of the Offeree Issuer where, immediately after the acquisition, the Purchasing Parties have Beneficial Ownership of at least 30% of the voting power or value of the outstanding Equity Securities of such Offeree Issuer.

##### **b) The Relevant Transactions**

The relevant transaction or series of transactions include a Merger or Similar Transaction in which less than all of the shares of the Offeree Issuer are acquired.

##### **c) Scope of “Acquisition”**

An acquisition by the Purchasing Parties does not include an increase in their share ownership resulting from: (i) a redemption of another shareholder’s shares (except for a redemption made as an accommodation to the Purchasing Parties), (ii) a gift, (iii) an inheritance, or (iv) another similar non-voluntary action.

##### **d) Resolution of Doubt**

Any doubt about whether the 30% Beneficial Ownership test is satisfied shall be resolved in favor of a finding that the test has been satisfied.

##### **e) Concentration of Ownership Exception**

No such Mandatory Bid occurs where (i) another shareholder, its Associates, and any Person Acting Jointly or in Concert with such shareholder owns more than 50% of the stock of the Offeree Issuer, or (ii) because of concentration of ownership of the Offeree Issuer, the Applicable SA declares that the Takeover Bid does not fall within this definition.

[**Comment:** The Mandatory Bid requirements of the Common Code will apply to these transactions, which means that the Offeror that acquires at least a 30% ownership stake in the Offeree Issuer must make an “any and all” bid for the shares of the target. *See* Section II.D, Rules Governing Mandatory Bids. The U.K. has a similar rule that also kicks in at 30%. The economic effect of this rule is to require the sharing of any control premium with all of the shareholders.]

One commenter suggested that the threshold be set at 34%, which would permit an acquirer to block any transaction that required a two-thirds shareholder vote. The “direct or indirect” acquisition concept does not encompass a situation in which a major shareholder goes over the 30% threshold by reason of a redemption of another shareholder, unless the redemption is made at the behest of the major shareholder. The exemption for Takeover Bids where there is another 50% shareholder is similar to an exemption in Section 24 of the Austrian TO Reg.

These bids are subject to regulation in both Canada and the U.S., but there is no Mandatory Bid requirement.]

### **3. 30% Ownership and 2 Percentage Point Increase Mandatory Bid [Not in the Can TO Reg]**

#### **a) Basic Definition**

“30% Ownership and 2 Percentage Point Increase Mandatory Bid” means a transaction or series of transactions where within a 12 month period, an Offeror, its Associates, or any Person Acting Jointly or in Concert with the Offeror (the Purchasing Parties) that, directly or indirectly, have Beneficial Ownership of 30% or more but less than 50% of the voting power or value of the outstanding Equity Securities of an Offeree Issuer acquire from one or more Persons, including the Offeree Issuer, additional shares of such Offeree Issuer and as a result of the acquisition the Beneficial Ownership of the voting power or value of the outstanding Equity Securities of such Offeree Issuer held by the Purchasing Parties, increases by two percentage points or more.

#### **b) The Relevant Transactions**

The relevant transaction or series of transactions include any Merger or Similar Transaction in which less than all of the shares of the Offeree Issuer are acquired.

#### **c) Scope of “Acquisition”**

An acquisition by the Purchasing Parties does not include an increase in their share ownership resulting from: (i) a redemption of another shareholder’s shares (except for a redemption made as an accommodation to the Purchasing Parties), (ii) a gift, (iii) an inheritance, or (iv) another similar non-voluntary action.

#### **d) Resolution of Doubt**

Any doubt about whether the 30% to 50% Beneficial Ownership test or the two percentage point Beneficial Ownership test is satisfied shall be resolved in favor of a finding that the test has been satisfied.

### **e) Concentration of Ownership Exception**

No such Mandatory Bid occurs where (i) another shareholder, its Associates, and any Person Acting Jointly or in Concert with such shareholder owns more than 50% of the stock of the Offeree Issuer, or (ii) because of concentration of ownership of the Offeree Issuer, the Applicable SA declares that the Takeover Bid does not fall within this definition.

[**Comment:** The Mandatory Bid requirements of the Common Code apply to these transactions, which mean that the Offeror must make an “any and all” bid for the shares of the target. *See* Section II.D, Rules Governing Mandatory Bids. This rule permits an Offeror that owns more than 30% but less than 50% of the Offeree Issuer’s shares to “creep-up” 2 percentage points during each 12 month period. The U.K. has a similar rule; but it applies to any increases in ownership above the 30% and below the 50% levels. The 2% creep rule was adopted to provide the Offeror with a degree of flexibility. The exemption for Takeover Bids where there is another 50% shareholder is similar to an exemption in Section 24 of the Austrian TO Reg. These bids are subject to regulation in both Canada and the U.S., but there is no Mandatory Bid requirement. The economic effect of this rule is to require the sharing of any control premium with all of the shareholders.]

## **4. 50% Ownership and 5 Percentage Point Increase Mandatory Bid [Not in the Can TO Reg]**

### **a) Basic Definition**

“50% Ownership and 5 Percentage Point Increase Mandatory Bid” means a transaction or series of transactions where within a 12 month period, an Offeror, its Associates, or any Person Acting Jointly or in Concert with the Offeror (the Purchasing Parties), directly or indirectly, acquire from one or more Persons, including the Offeree Issuer, Equity Securities of an Offeree Issuer and immediately after the acquisition, the direct or indirect Beneficial Ownership of the voting power or value of the outstanding Equity Securities of the Offeree Issuer held by the Purchasing Parties increases from (a) an amount that is 50% or more (the Starting Amount), to (b) an amount that is at least five percentage points above the Starting Amount.

### **b) The Relevant Transactions**

The relevant transaction or series of transactions include any Merger or Similar Transaction in which less than all of the shares of the Offeree Issuer are acquired.

### **c) Scope of “Acquisition”**

An acquisition by the Purchasing Parties does not include an increase in their share ownership resulting from: (i) a redemption of another shareholder’s shares (except for a redemption made as an accommodation to the Purchasing Parties), (ii) a gift, (iii) an inheritance, or (iv) another similar non-voluntary action.

### **d) Resolution of Doubt**

Any doubt about whether the 50% or more Beneficial Ownership test or the five percentage points Beneficial Ownership test is satisfied shall be resolved in favor of a finding that the test has been satisfied.

[**Comment:** The Mandatory Bid requirements of the Common Code apply to these transactions. *See* Section II.D, Rules Governing Mandatory Bids. Thus, under this rule, if, for example, an

Offeror owned 75% of the shares of the Offeree Issuer and the Offeror increased its ownership to 82% by purchasing the shares of a 7% shareholder, then the Offeror would be obligated to make a Mandatory Bid. A Mandatory Bid would also be required if the 7% were acquired directly from the Offeree Issuer. This rule permits an Offeror that owns 50% or more of the Offeree Issuer's shares to "creep-up" 5 percentage points during each 12 month period.

This Mandatory Bid requirement is sensible in this type of Insider bid because any significant decrease in the number of shares held by Non-Affiliated Shareholders is likely to reduce the marketability of the remaining outstanding shares held by Non-Affiliated Shareholders, thereby suppressing the value of such remaining shares. An example of this likely decrease in marketability and the correlative increase in the trading discount for shares held by Non-Affiliated Shareholders as the number of such Shareholders decreases can be found in the following statement in Revenue Ruling 77-287, 1977-2 C.B. 319, which sets out the U.S. Internal Revenue Service's guidelines for valuing restricted stock:

Trading Market. The market in which publicly held securities are traded also reflects variances in the amount of discount that is applied to restricted securities purchases. According to the study, discount rates were greatest on restricted stocks with unrestricted counterparts traded over-the-counter [generally the least liquid public market], followed by those with unrestricted counterparts listed on the American Stock Exchange [generally a public market with intermediated liquidity], while the discount rates for those stocks with unrestricted counterparts listed on the New York Stock Exchange [generally the most liquid public market] were the smallest.

This finding indicates that the greater the marketability of shares the less the trading discount for such shares. Consequently, other things being equal, as the number of shares of a publicly held firm held by Non-Affiliated Shareholders decreases, the marketability of such shares will decrease resulting in a greater discount from intrinsic fair market value realized by the Non-Affiliated Shareholders on the sale of such shares. This empirical finding supports this 50% Ownership and 5 Percentage Point Increase Mandatory Bid, because the requirement limits the ability of a Controlling shareholder to significantly increase its share ownership, thereby locking Non-Affiliated Shareholders into a less marketable position.

The Cooperating Jurisdictions may consider eliminating this Mandatory Bid and extending the 30% Ownership and two Percentage Point Increase Mandatory Bid to all bids where the Offeror owns 30% or more of the shares of the Offeree Issuer. This would limit the ability to creep-up to two percentage points in each 12 month period. The five percentage point creep rule was adopted because it permits the Offeror to provide some liquidity to the market without having a significant lock-in effect for Non-Affiliated Shareholders.

The U.K. mandatory bid requirement does not operate where the acquirer owns more than 50% of the target's shares; however, the Canada bid requirement would operate, subject to certain exceptions. Also, the U.S. tender offer rules would apply to a public bid by such an acquirer, but not to private purchases.]

## **5. Announcement Requirement [Not in the Can TO Reg]**

"Announcement Requirement" has the meaning given in Section IV.B.1.a

## **6. Any and All Bid [Not in the Can TO Reg]**

“Any and All Bid” means an offer made to any and all of the holders of each class of Equity Securities of an Offeree Issuer for the purchase of all of their shares.

## **7. Applicable Parties**

“Applicable Parties” is defined in Section II.N.1.

## **8. Applicable SA [Not in the Can TO Reg]**

“Applicable SA” means the Supervisory Authority with exclusive jurisdiction of the Takeover or Merger Transaction under the Choice of Law Rules.

## **9. Associate**

"Associate," when used to indicate a relationship with a Person, means

- (a) Controlled Entities. An Issuer of which the Person beneficially owns or controls, directly or indirectly, voting securities entitling the Person to 10% or more of the voting rights attached to outstanding securities of the Issuer;
- (b) A Controlling Parent and Controlled Sister Issuers. In the case of a Person that is an Issuer, (i) a second Person that owns or controls, directly or indirectly, voting securities of such Issuer entitling such second Person to 10% or more of the voting rights attached to outstanding securities of the Issuer, and (ii) a third Person that is an Issuer and in which such second Person owns or controls, directly or indirectly, voting securities of such third Person Issuer entitling such second Person to 10% or more of the voting rights attached to outstanding securities of the third Person Issuer;
- (c) Directors and Senior Officers. The directors and senior executive officers of such Person and of the Issuers that are Associates of such Person under paragraphs (a) and (b);
- (d) Partners. Any general partner in the Person, and any Issuers controlled by such general partner within the meaning of paragraph (a);
- (e) Trust and Estates. Any trust or estate in which the Person has a substantial beneficial interest or in respect of which a Person serves as trustee or in a similar capacity, and any Issuers controlled by such trust or estate within the meaning of paragraph (a); and
- (f) Relative. A Relative of that Person and of any Associate of that Person and any Issuers controlled by such Relatives within the meaning of paragraph (a).

**[Comment:** The purpose of the term Associate as used in this Common Code is, for example, to pick up Persons who are closely related to the Offeror, so that certain regulations would apply broadly to the Offeror and its Associates.

The Can TO Reg does not include within the definition of Associate paragraph (b). Paragraph (b) picks up the concepts embodied in the definition of Affiliate in Section 1.3 of the Can TO Reg. This Common Code does not contain a definition of Affiliate, as the concept is incorporated into the term Associate. Also, the Can TO Reg does not include paragraph (c) and the provision of paragraph (f), relating to Associates of Relatives.

Under paragraph (a), an Associate of a Person includes, for example, a corporation (C) of which the Person owns 10% or more of the voting rights of C. Therefore, a subsidiary (measured at a 10% ownership level) is an Associate of its parent corporation. Under paragraph (b)(i), in the case of a Person that is an Issuer, such as a corporation, an Associate includes, for example, a

shareholder who owns 10% or more of the voting rights of the corporation. Therefore, a parent corporation is an Associate of its subsidiary (measured at a 10% ownership level). Under paragraph (b)(ii), for example, two corporations under common control (measured at the 10% level) are Associates of each other. Therefore, sister subsidiaries are Associates of each other.

Under paragraph (c), which is not in the Can TO Reg, the directors and senior executive officers of the Person are Associates of the Person, and the directors and senior executive officers of all the Issuers that are Associates of such Person are also Associates of such Person. For example, assume that Corporation P, which owns all of the stock of Corporation S, makes a bid for an Offeree Issuer (OI). Under paragraph (a), S is an Associate of P. Under paragraph (c), the directors and senior executive officers of both P and S are Associates of P.

Paragraphs (d), (e), and (f) not only deal with certain partners, trust, estates, and Relatives, but also pick up any Issuers controlled by such Persons within the meaning of paragraph (a). Thus, for example, an Associate of a wife includes her husband and any Issuers in which the husband holds 10% of more of the voting equity interests.

Paragraph (f) relating to Relatives treats Relatives of a Person as Associates. For example, assume Corporation P, which makes a bid for an Offeree Issuer, is owned to the extent of 25% by individual I, who is married to W. W owns all of the stock of Corporation Z. Under paragraph (a), individual I is an Associate of P, under paragraph (f), both W and Z are Associates of P.

There is some overlap between the definitions of Associate and the definition of Insider. The term Insider has specific application to Insider Takeover or Merger Transactions.]

## **10. Beneficial Ownership [Not in the Can TO Reg]**

### **a) Basic Definition of Beneficial Ownership**

“Beneficial Ownership” means the direct or indirect (through any contract; arrangement; understanding; relationship; lock-up, such as an agreement to tender into a Takeover or Issuer Bid or to vote in support of a Merger or Similar Transaction; or otherwise) possession or sharing of:

- (i) Voting power which includes the power to vote, or to direct the voting of, such security; and/or,
- (ii) Investment power which includes the power to dispose of, or to direct the disposition of, such security.

### **b) Plans to Evade**

Any Person who, directly or indirectly, creates or uses a trust, proxy, power of attorney, pooling arrangement, total return or similar swap or derivative, or any other contract, arrangement, or device with the purpose or effect of divesting such Person of Beneficial Ownership of a security or preventing the vesting of such Beneficial Ownership as part of a plan or scheme to evade the requirements of this Common Code shall be deemed to be the Beneficial Owner of such security.

### **c) Aggregation of Shares**

All securities of the same class beneficially owned by a Person, regardless of the form which such Beneficial Ownership takes, shall be aggregated in calculating the number of shares Beneficially Owned by such Person.

### **d) Options**

Notwithstanding the provisions of paragraphs (a) and (b) of this definition, a Person shall be deemed to be the Beneficial Owner of a security if that Person has the right to acquire Beneficial Ownership of such security, as defined in paragraph (a) within 50 Business Days, including but not limited to any right to acquire: (i) Through the exercise of any option, warrant or right; (ii) Through the conversion of a security; (iii) Pursuant to the power to revoke a trust, discretionary account, or similar arrangement; or (iv) Pursuant to the automatic termination of a trust, discretionary account or similar arrangement; provided, however, any Person who acquires a security or power specified in paragraphs (a) or (b), above, with the purpose or effect of changing or influencing the Control of the Issuer, or in connection with or as a participant in any transaction having such purpose or effect, immediately upon such acquisition shall be deemed to be the Beneficial Owner of the securities which may be acquired through the exercise or conversion of such security or power. Any securities not outstanding which are subject to such options, warrants, rights or conversion privileges shall be deemed to be outstanding for the purpose of computing the percentage of outstanding securities of the class owned by such Person but shall not be deemed to be outstanding for the purpose of computing the percentage of the class owned by any other Person.

### **e) Securities Dealer**

Notwithstanding the provisions of paragraphs (a) and (b) of this definition, a securities dealer shall not be deemed to be a Beneficial Owner of securities held directly or indirectly by it on behalf of another Person solely because such dealer is the record holder of such securities and may direct the vote of such securities, without instruction, on non-contested matters.

### **f) Pledgee**

Notwithstanding the provisions of paragraphs (a) and (b) of this definition, a Person who in the ordinary course of his business is a pledgee of securities under a written pledge agreement as to which there has been a default shall not be deemed to be the Beneficial Owner of such pledged securities until the pledgee has taken all formal steps necessary which are required to declare such default and determines that the power to vote or to direct the vote or to dispose or to direct the disposition of such pledged securities will be exercised: Provided, that:

- (i) The pledgee agreement is bona fide and was not entered into with the purpose nor with the effect of changing or influencing the Control of the Issuer, nor in connection with any transaction having such purpose or effect;
- (ii) The pledgee is a bona fide pledgee; and
- (iii) The pledgee agreement, prior to default, does not grant to the pledge:
  - (A) The power to vote or to direct the vote of the pledged securities; or
  - (B) The power to dispose of or direct the disposition of the pledged securities.



### **g) Underwriter**

Notwithstanding the provisions of paragraphs (a) and (b) of this definition, a Person engaged in business as an underwriter of securities who acquires securities through his participation in good faith in a firm commitment underwriting shall not be deemed to be the Beneficial Owner of such securities until after the date of the closing of the underwriting.

### **h) Outstanding Securities Owned**

The number of outstanding securities of a class in respect of an Offer to Acquire includes securities that are Beneficially Owned as determined in accordance with the above rules.

[**Comment:** This definition of Beneficial Ownership is based on Rule 13d-3 under Section 13(d) of the U.S. Securities Exchange Act of 1934. Section 13(d) is the U.S. early warning system, requiring disclosure by Persons who acquire more than 5% of the shares of a public company. As indicated in paragraph (a) an Offeror is deemed to have Beneficial Ownership of any shares of an Offeree Issuer that are subject to a lock-up, such as an agreement by a shareholder of the Offeree Issuer to either tender into a Takeover or Issuer Bid or to vote in support of a Merger or Similar Transaction. However, as indicated in Section III.B.5.c, the Person giving the lock-up is not solely for that reason treated as Acting Jointly or in Concert with the Offeror.]

The reference in paragraph (b) to “total return or similar swap” is designed to adopt the holding of the *CSX* case,<sup>1</sup> which found that Section 13(d) was applicable where certain hedge funds used total return swaps to gain influence over a company. Consideration should be given to adopting a more comprehensive approach to the treatment of derivatives. In its March 2009 Policy Statement 09/3,<sup>2</sup> the Financial Services Authority (FSA) of the U.K. expanded its early warning reporting requirements to encompass positions in derivatives, such as the total return swaps at issue in *CSX*. Also, the Ontario Securities Commission currently has a project addressing “Hidden Ownership,” and once the Ontario Securities Commission has finalized its rules, the Cooperating Jurisdictions should, pursuant to the Cooperation, Periodic Review, and Amendment Rules of the Choice of Law Rules, consider amending the Common Code by adopting those rules.]

## **11. Bid Circular**

"Bid Circular" means a Takeover Bid Circular and an Issuer Bid Circular prepared in accordance with Section IV.B.2.

## **12. Business Day**

"Business Day" means a day other than a Saturday, a Sunday, or a day that is a statutory holiday in the jurisdiction of the Applicable SA.

## **13. Can Protection of Minority Shareholders**

“Can Protection of Minority Shareholders” is defined in Section I.B.

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<sup>1</sup> *CSX Corp. v. Children’s Inv. Fund Mgmt. (UK) LLP*, 562 F.Supp. 2d 511 (S.D.N.Y. 2008), aff’d without opinion, 2008 U.S. App. LEXIS 19788 (2d Cir. N.Y., Sept. 15, 2008).

<sup>2</sup> U.K. Fin. Servs. Auth., Policy Statement 09/3 (Mar. 2009) available at [http://www.fsa.gov.uk/pubs/policy/ps09\\_03.pdf](http://www.fsa.gov.uk/pubs/policy/ps09_03.pdf).

#### **14. Can TO Reg**

“Can TO Reg” is defined in Section I.B.

#### **15. Choice of Law Rules**

“Choice of Law Rules” is defined in Section I.A.1.

#### **16. Class of Equity Securities**

"Class of Equity Securities" includes a series of a Class of Equity Securities.

#### **17. Close [Not in the Can TO Reg]**

“Close” or “Closing” means the transaction in which the Offeror takes-up and pays for the securities of an Offeree Issuer that are acquired in a Takeover or Merger Transaction.

[**Comment:** The term Close is used, *inter alia*, in connection with the provisions affecting Bid Mechanics in Section IV.E.]

#### **18. Commence or Commencement [Not in the Can TO Reg]**

“Commence” or “Commencement” means (a) the day on which a bid is first announced, and (b) the day an agreement for a Merger or Similar Transaction is first announced.

[**Comment:** The concept of Commencement, which is addressed in Section IV.B.1, is important for several reasons, including the date of the beginning of restrictions on purchases outside of a Takeover Bid by an Offeror of securities of an Offeree Issuer. *See* Section IV.A.2.]

#### **19. Common Code**

“Common Code” means this Common Takeover Code.

#### **20. Condition Satisfaction Date [Not in the Can TO Reg]**

“Condition Satisfaction Date” has the meaning given in Section IV.E.5.

#### **21. Consultant**

“Consultant” means, for an Issuer, a Person, other than an employee, executive officer, or director of the Issuer or of a related entity of the Issuer, who

- (a) is engaged to provide services to the Issuer or a related entity of the Issuer, other than services provided in relation to a distribution of securities,
- (b) provides the services under a written contract with the Issuer or a related entity of the Issuer, and
- (c) spends or will spend a significant amount of time and attention on the affairs and business of the Issuer or a related entity of the Issuer and includes, for an individual Consultant, a corporation of which the individual Consultant is an employee or shareholder, and a partnership of which the individual Consultant is an employee or partner.

[**Comment:** The definition is taken from Canada National Common Code 45-106]

## **22. Cooperating Jurisdictions [Not in the Can TO Reg]**

“Cooperating Jurisdictions” means the following countries: the Bahamas, Barbados, Guyana, Jamaica, Trinidad and Tobago, and the member countries of the Eastern Caribbean Securities Market.

## **23. Deemed Start Date [Not in the Can TO Reg]**

“Deemed Start Date” has the meaning given in Section IV.B.9, relating to the start date of a Takeover Bid.

[**Comment:** The term Deemed Start Date is important for purposes of determining, *inter alia*, how long a Takeover Bid must remain open.]

## **24. Delivery Mechanics [Not in the Can TO Reg]**

“Delivery Mechanics” means the requirements for delivery of bid documents set out in Section IV.B.9.

## **25. Directors’ Circular**

“Directors’ Circular” means a directors’ circular prepared in accordance with Section IV.C.2.

## **26. Drop Dead Date [Not in the Can TO Reg]**

“Drop Dead Date” is defined in Section IV.B.10.

## **27. Early Warning Shareholder [Not in the Can TO Reg]**

“Early Warning Shareholder” is defined in Section VII.B.1.a, relating to the early warning system, which requires that any shareholder acquiring 5% or more of a Publicly Listed Company file a report and news release.

[**Comment:** As seen in Section VII.B, an Early Warning Shareholder is a Person who has acquired 5% or more of an Issuer’s shares in a transaction that is not a Takeover or Merger Transaction.]

## **28. Equity Security**

"Equity Security" means a security of an Issuer that carries a residual right to participate in the earnings of the Issuer and, on liquidation or winding up of the Issuer, in its assets and any Convertible Security that is convertible into or otherwise exchangeable for an Equity Security.

[**Comment:** The convertible concept is not in the Canadian definition.]

## **29. EU TO Dir**

“EU TO Dir” is defined in Section I.B.

## **30. Exempt Second-Step Merger [Not in the Can TO Reg but in Can Protection of Minority Shareholders]**

“Exempt Second-Step Merger” means a second-step Merger or Similar Transaction in which an Offeror acquires the balance of an Offeree Issuer’s outstanding shares within 6 months of the closing of a first-step Voluntary Any and All Bid or Mandatory Bid, provided (a) the per-share consideration paid in the second-step Merger or Similar Transaction to Non-Affiliated

Shareholders is the same type and the same (or higher) amount as the per-share consideration paid in the first-step Bid, (b) the intent of the Offeror to complete the second-step was fully disclosed in the documents relating to the first-step bid, and (c) the second-step is completed substantially in accordance with the manner in which it was disclosed in the bid documents.

[**Comment:** As indicated in the definition of Insider Takeover or Merger Transaction, Exempt Second-Step Mergers are exempt from these Insider rules. Consequently, an Exempt Second-Step Merger may take place after the closing of a Voluntary Any and All Bid or a Mandatory Bid. The reasoning behind this exemption, which is similar to an exemption in the U.S. going private rules, is discussed in the comments to the definition of Insider Takeover or Merger Transaction.]

### **31. Formal Valuation [Not in the Can TO Reg but in Can Protection of Minority Shareholders]**

“Formal Valuation” means a written valuation employing customary valuation concepts and techniques generally employed by professional valuers, such as discounted cash flow, comparable companies, and comparable transactions, in valuing similar businesses in the context of the particular Takeover or Merger Transaction. Such valuation shall be based on relevant and appropriate assumptions, and must contain the valuer’s opinion as to a value or range of values, without any downward adjustments in value on account of any of the participating securities not being part of a Controlling interest. As indicated in Section II.C.1.b, in order to Close an Insider Takeover or Merger Transaction, the Independent Valuation Expert must have rendered a Formal Valuation concluding that the consideration offered to the Non-Affiliated Shareholders is fair from a financial standpoint and is within the range of reasonableness, specifying precisely where the consideration fits within such range.

[**Comment:** This definition is based in part on (1) Section 7.22 of the American Law Institute’s Corporate Governance Project, addressing the determination of “fair value” in appraisal proceedings, and (2) the Trinidad & Tobago Takeover Bylaw.]

### **32. Independent Committee of Directors [Not in the Can TO Reg but in Can Protection of Minority Shareholders]**

#### **a) Basic Definition**

“Independent Committee of Directors” means a committee of an Offeree Issuer’s board consisting of at least 2 members, where (i) the board of directors of the Offeree Issuer certifies in writing that each member of the Independent Committee of Directors is an Independent Director, and (ii) each member is in fact an Independent Director.

#### **b) Appointment of New Independent Directors**

As an alternative to appointing Independent Directors from its current board with respect to a particular Takeover or Merger Transaction, the Offeree Issuer’s board may appoint from non-board members an Independent Director or Directors to serve on the Independent Committee of Directors with regard to the particular transaction, provided it is permissible to do so under the Offeree Issuer’s organizational documents and governing company law. Such Independent Directors would serve at least until the particular transaction is completed or terminated. The Offeree Issuer will be responsible for the fees paid to such Independent Directors.

### **c) Recommendation of Applicable SA or Court**

At the election of the board of an Offeree Issuer, the board may petition the Applicable SA (or a court of competent jurisdiction) to recommend to the board persons who would constitute an Independent Committee of Directors with regard to a particular Takeover or Merger Transaction.

### **d) Presumption if Appointment at Recommendation of Applicable SA or Court**

In the event, (i) the Applicable SA or court, in the exercise of its sole discretion, makes a recommendation (which would be based on the application by the Applicable SA or court of the definition of Independent Director and could include present members of the board of the Offeree Issuer), and (ii) the board of the Offeree Issuer accepts in full the recommendation and appoints the recommended Independent Committee of Directors, then in absence of a failure to disclose to the Applicable SA or court all Material facts relating to its determination, such committee will be presumed for all purposes of the Common Code to be an Independent Committee of Directors. In addition, if this provision is satisfied, pursuant to Section IV.C.1.c, there is a presumption that the Offeree Issuer has complied with certain obligations (*i.e.*, to act for the Offeree Issuer as a whole and to get competent advice), and pursuant to Section II.C.2, the 5% dissenters rule is not applicable.

### **e) Sole Discretion of Applicable SA and Court**

In the interest of protecting Non-Affiliated Shareholders, particularly in an Insider Takeover or Merger Transaction, the Applicable SA or court will make a good faith attempt to respond favorably to any request under this provision. However, the ultimate decision on whether to respond to such a request is within the sole discretion of the Applicable SA or court.

### **f) Timing of Recommendation of Applicable SA or Court**

Any recommendation by the Applicable SA or court must be made no later than the tenth Business Day after the date of receipt of the formal request. Any time period applicable under this Common Code will be tolled from the date of the formal request to the earliest of (a) five Business Days after receipt of the recommendation, or (b) ten Business Days after the date of the formal request if no recommendation is made.

### **g) Effective Date of Provision Regarding Recommendations by Applicable SA or Court and Shareholders Right to Elect-Out**

This provision shall take effect one year after the general effective date of this Common Code, and unless within such year or at some later point the Non-Affiliated Shareholders of a Public Cross Listed Company affirmatively vote to not have this provision apply to it (in which case the Applicable SA or court will not make a recommendation), then the shareholders of a Public Cross Listed Company are hereby deemed to waive any rights they may otherwise have against the Applicable SA or court with regard to actions taken in recommending Independent Directors.

### **h) Consequences if No Independent Committee of Directors in an Insider Takeover Bid: Applicable SA Appoints the Independent Valuation Expert**

If in connection with an Insider Takeover Bid, as distinguished from an Insider Merger or Similar Transaction, the board of the Offeree Issuer does not appoint an Independent Committee

of Directors (or file a request with the Applicable SA or a court for recommendations of Independent Directors) within 5 Business Days after the receipt of a formal notice from an Insider of an intent to make an Insider Takeover Bid, then the Applicable SA shall promptly appoint an Independent Valuation Expert who shall render the Formal Valuation. Further, if within 5 Business Days of the receipt of a recommendation for Independent Directors from the Applicable SA or a court, the board of an Offeree Issuer does not appoint an Independent Committee of Directors, then the Applicable SA shall promptly appoint an Independent Valuation Expert who shall render the Formal Valuation.

**[Comment:** In small economies like those of the Cooperating Jurisdictions it is often difficult to appoint an Independent Committee of Directors. However, in Insider Takeover or Merger Transactions it is absolutely necessary that such a committee be available to protect the rights of the Non-Affiliated Shareholders. Otherwise the Insiders will be acting on both sides of the transaction.

The definition of Independent Committee of Directors provides three avenues for addressing this issue for Insider and non-Insider Takeover or Merger Transactions. First, paragraph (a) permits the current board of the Offeree Issuer to appoint an Independent Committee from its current board members. Second, paragraph (b) makes it clear that assuming it is legally possible to do so, the Offeree Issuer's board could appoint new directors to serve on an Independent Committee for the transaction. Third, pursuant to paragraph (c), the Offeree Issuer's board could request that the Applicable SA (or court of competent jurisdiction), in essence, pick the Committee. Although the SA or court would not have to make a recommendation, if it did so and the recommendation was accepted, then the committee would be presumed to be Independent. The shareholders of a Public Cross Listed Company have the right to elect-out of this provision, but if they did not, then such shareholders are deemed to waive any rights they may otherwise have against the Applicable SA or court with regard to recommendations made.

Although SAs may be reluctant to get into the business of recommending Independent Directors, having knowledgeable and active independent directors, particularly in Insider Takeover or Merger Transactions, is the best way to ensure that the Non-Affiliated shareholders are protected. Therefore, the Applicable SA should be willing to make a good faith effort to comply with any such request. To prepare for potential requests, the SAs might prepare lists of knowledgeable persons who might be called on to serve provided they did not have a conflict relating to the particular transaction. Indeed, the SAs in the Cooperating Jurisdictions might prepare a unified list of qualified persons resident in both the Cooperating Jurisdictions and elsewhere.

Although the concept of having independent directors selected by an SA has not been adopted in the U.K., the U.S., Canada, or any of the Cooperating Jurisdictions, similar concepts have been proposed by at least two sources. First, the E.U's Directive Concerning Mergers of Public Limited Companies (October 1978), provides in Article 10(1):

**Article 10.** 1. One or more experts, acting on behalf of each of the merging companies but independent of them, *appointed or approved by a judicial or administrative authority*, shall examine the draft terms of merger and draw up a written report to shareholders. (emphasis added)

Thus, if this Directive applied in the Cooperating Jurisdictions, the Applicable SA or a court would have to either appoint or approve the appointment of the independent valuator. Under the requirements of paragraph (c), the independent valuator would be appointed by the Independent Committee of the Board, which would be appointed at the recommendation of the Applicable SA.

The second source supporting the appointment of Independent Directors by the Applicable SA or court is a 2007 article in the American Bar Association's Business Lawyer,<sup>3</sup> which proposes that in any merger or acquisition in which a public company is the target, the SEC's Office of Mergers and Acquisitions would appoint a Change of Control Board consisting of independent directors (which could include a member of the target's regular board) to act for the target in all aspects of the transaction. The purpose of the proposal is to ensure that truly independent board members act for each publicly held target in an acquisition transaction thereby enhancing the efficiency of the acquisition process and reducing, if not eliminating, the litigation that accompanies most public company acquisitions in the U.S. The independent shareholders of a target could elect to "opt out" of the Change of control provision. The concept set out in paragraph (c) is similar to the Change of Control Board concept, including the shareholder elect-out provision. However, (1) the Applicable SA would only have an obligation to make a good faith attempt to appoint a Committee of Independent Directors, and (2) the regular board would not have to accept the recommendation of the Applicable SA. Thus, paragraph (c) merely gives the board of the Offeree Issuer another option for establishing an Independent Committee of the Board.

Although the Applicable SA may be reluctant to make this type of *ex ante* (i.e., before the appointment of the Independent Directors) judgment concerning independence, by doing so the Applicable SA will in most cases eliminate the obligation on it to resolve *ex post* (i.e., after the appointment by the Offeree Issuer of Independent Directors) disputes in which shareholders of the Offeree Issuer claim that the Independent Committee of the Board was not in fact independent.

In preparing for a potential Takeover or Merger Transactions, a company's board may seek to amend the company's organizational documents to permit the appointment of new board members who could satisfy the independence requirement in the event the company becomes the target of such a transaction.

The purpose of paragraph (h) is to deter the board of the Offeree Issuer from attempting to frustrate an Insider Takeover Bid (see Section IV.C.1.d, prohibition against frustrating actions) by (1) acting slowly in appointing an Independent Committee of Directors (who would in turn appoint the required the Independent Valuation Expert), or (2) not requesting that the Applicable SA recommend members of such a committee. Paragraph (h) addresses these concerns by providing that if in connection with such a bid, as distinguished from an Insider Merger or Similar Transaction, the board of the Offeree Issuer does not promptly appoint an Independent Committee of Directors, then the Applicable SA will promptly appoint an Independent Valuation Expert who shall render the Formal Valuation. Thus, it is possible that in an Insider Takeover Bid, there may not be an Independent Committee of Directors, but there will always be an

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<sup>3</sup> Samuel C. Thompson, Jr., *The Missing Link in Sarbanes-Oxley: Enactment of the "Change of Control Board" Concept, or Extension of the Audit Committee Provisions to Mergers and Acquisitions*, 63 THE BUSINESS LAWYER, 81 (Nov. 2007)

Independent Valuation Expert who will render the Formal Valuation. This mechanism is reasonable because it prevents the board of the Offeree Issuer from standing in the way of an Insider Takeover Bid. In all Insider Takeover or Merger Transactions, the Offeror is responsible for the cost of the Independent Valuator. See paragraph (d) of the definition of Independent Valuation Expert. It should be noted that the board is not required to enter into an Insider Merger or Similar Transaction; it just cannot stand in the way of an Insider Takeover bid.]

### **33. Independent Director [Not in the Can TO Reg but in Can Protection of Minority Shareholders]**

“Independent Director” means a director of an Issuer who satisfies all of the following requirements:

- (a) The director does not have a material economic relationship with the Issuer (either directly or as a partner, shareholder or officer of an organization that has a relationship with the Issuer);
- (b) The director has not been within the last three years, an employee of the Issuer or of any of its Associates (for purposes of this definition the term Issuer means Issuer and any of its Associates), and no Relative of the director is, or has been within the last three years, an executive officer of the Issuer;
- (c) The director has not received, and no Relative of the director has received, during any 12-month period within the last three years, more than [\$US 75,000] in direct compensation from the Issuer, other than director and committee fees and pension or other forms of deferred compensation for prior service (provided such compensation is not contingent in any way on continued service);
- (d) (i) The director is not a current partner or employee of a firm that is the Issuer’s internal or external auditor; (ii) the director does not have a Relative who is a current partner of such a firm; (iii) the director does not have a Relative who is a current employee of such a firm and personally works on the Issuer’s audit; and (iv) the director and each of his or her Relatives has not within the last three years been a partner or employee of such a firm and Personally worked on the Issuer’s audit within that time;
- (e) Neither the director nor any Relative is, or has been within the last three years, employed as an executive officer of another company where any of the Issuer’s present executive officers at the same time serves or served on that company's compensation committee;
- (f) The director is not a current employee, and a Relative is not a current executive officer, of a company that has made payments to, or received payments from, the Issuer for property or services in an amount which, in any of the last three fiscal years, exceeds the lesser of U.S \$1 million, or 2% of such other company's consolidated gross revenues;
- (g) The director and his or her Affiliates are not in the aggregate the holders of five per cent or more of the shares of the Issuer;
- (h) The director and his or her Affiliates do not have a material relationship with, and are not in any way subservient to, (i) another director who is not an Independent Director, (ii) a shareholder of the Issuer who holds five per cent or more of the shares of the Issuer, or (iii) another Person who is an Interested Party in the transaction;
- (i) The director and his or her Affiliates are not in the aggregate indebted to the Issuer other than by virtue of:
  - (i) a fully collateralized loan; or
  - (ii) an outstanding credit card balance not exceeding ten thousand dollars US;



- (j) The director is not a professional adviser to the Issuer;
- (k) The director does not have the right to receive and has not received compensation that is contingent on the completion of the Takeover or Merger Transaction that is at issue; and
- (l) The director has been designated as an independent director by the board of directors of the Issuer after the board has

- (i) affirmatively determined that (A) each of paragraphs (a) to (k) are satisfied, and (B) the director does not otherwise have a material relationship with the Issuer (either directly or as a partner, shareholder or officer of an organization that has a relationship with the Issuer), and
- (ii) filed with the Applicable SA the basis for such determination.

**[Comment:** This definition is based principally on (1) the definition of independent director in the Corporate Governance rule of the New York Stock Exchange, and (2) the definition of independent director in the Trinidad and Tobago Financial Institution Act, 2008. Paragraph (h) is not in either the NYSE or the Trinidad and Tobago rules. As indicated in the comments to the definition of Independent Committee of Directors, a board could appoint new members to serve on such a committee or request that the Applicable SA or court make recommendations of Independent Directors who would serve on such a committee. The board of an Issuer may want to consult with representatives of the Non-Affiliated Shareholders concerning this determination of independence.]

#### **34. Independent Valuation Expert [Not in the Can TO Reg but in Can Protection of Minority Shareholders]**

“Independent Valuation Expert” means a valuator (including any affiliated entity) that meets all of the following conditions:

- (a) The valuator is commonly recognized by professional valutors engaged in providing the specific type of valuation required by this Common Code in the applicable Takeover or Merger Transaction, as an expert in performing such valuations;
- (b) The facts and circumstances clearly demonstrate that the valuator does not have a conflict of interest and is independent of all Interested Parties in the applicable Takeover or Merger Transaction, however, a valuator is not independent if:
  - (i) the valuator is itself an Insider or is an Associate of (A) the Offeror, (B) the Offeree Issuer, (C) other Interested Party to the transaction, or (D) any Insider of any of such Persons;
  - (ii) the valuator acts as an advisor to an Interested Party (other than the Offeree Issuer) with respect to the transaction,
  - (iii) the compensation of the valuator depends, in whole or in part, on an agreement, arrangement or understanding that gives the valuator a financial incentive in respect of the conclusion reached in the Formal Valuation or the outcome of the transaction;
  - (iv) the valuator is a member of a soliciting dealer group for the transaction,
  - (v) the valuator is the external auditor of the Offeree Issuer, the Offeror, or any other Interested Party to the transaction; or

(v) the valuator has a Material financial interest in the completion of the transaction; and

(c) Either (i) An Independent Committee of Directors of the Offeree Issuer (A) makes a reasoned determination that the valuator does not have a conflict of interest and is independent, and (B) files with the Applicable SA the basis for such determination prior to the commencement of the valuator's work, or (ii) the Independent Valuator is appointed by the Applicable SA pursuant to paragraph (h) of the definition of Independent Committee of Directors.

(d) In the case of an Insider Takeover or Merger Transaction, the cost of the Independent Valuation Expert shall be the responsibility of the Offeror.

**[Comment:** This definition is based in part on Section 6.1 of Can Protection of Minority Shareholders. A Formal Valuation by an Independent Valuation Expert is required in all Insider Takeover or Merger Transactions, and therefore, it is essential to have an Independent Valuation Expert for each Insider Takeover or Merger Transaction. To prevent the Offeree Issuer's board from delaying the appointment of an Independent Committee of Directors, which in turn would be delayed in appointing the Independent Valuation Expert, pursuant to paragraph (h) of the definition of Independent Committee of Directors, the Applicable SA would appoint the Independent Valuation Expert if the board of the Offeree Issuer does not appoint the Independent Committee of Directors within 5 Business Days. Although it may be difficult to find independent directors, they are an absolute necessity in an Insider Takeover or Merger Transaction, because some directors of the Offeree Issuer must be looking out for the Non-Affiliated Shareholders.]

### **35. Insider [Not in the Can TO Reg but in Can Protection of Minority Shareholders]**

“Insider” means with respect to an Issuer:

- (a) a director or senior officer of the Issuer,
- (b) any Person who has been a director or senior officer of the Issuer within 12 months of the date of the Commencement of the relevant Takeover or Merger Transaction,
- (c) a director or senior officer of a Person that is itself an Insider of the Issuer or a Subsidiary of the Issuer,
- (d) a Person that has Beneficial Ownership of or Control or direction over, directly or indirectly (including through ownership by an Associate) of securities of the Issuer carrying 10% or more of the voting rights attached to all the Issuer's outstanding securities,
- (e) any Associate of any Person specified in paragraphs (a) through (d), and
- (f) any Person Acting Jointly or in Concert with any of the above.

**[Comment:** This definition is important for determining whether a transaction is an Insider Takeover or Merger Transaction. This definition is adapted from Section 1.1 of Can Protection of Minority Shareholders; however, paragraphs (b), (e), and (f) are not included in Section 1.1. Under this definition, any shareholder of the Issuer holding 10% or more of the stock of the Issuer is an Insider. Also, if, for example, a shareholder (A) owns only 6% of an Issuer's shares but an Associate (*e.g.*, A's wife (W) or a corporation in which A owns 10% or more of the shares (C)) owns 4% of the Issuer's shares, then A is an Insider. Also, W and C are Insiders.]

### **36. Insider Merger or Similar Transaction [Not in the Can TO Reg but in Can Protection of Minority Shareholders]**

“Insider Merger or Similar Transaction” means an Insider Takeover or Merger Transaction that is structured as a Merger or Similar Transaction and not as a Takeover Bid or an Issuer Bid.

### **37. Insider Takeover Bid [Not in the Can TO Reg but in Can Protection of Minority Shareholders]**

“Insider Takeover Bid” is an Insider Takeover or Merger Transaction that is structured as a Takeover Bid.

### **38. Insider Takeover or Merger Transaction [Not in the Can TO Reg but in Can Protection of Minority Shareholders]**

#### **a) General Rule**

“Insider Takeover or Merger Transaction” means a Takeover or Merger Transaction, other than an Exempt Second-Step Merger, in which the Offeror, its Associates, or any Person Acting Jointly or in Concert with the Offeror, is an Insider of the Offeree Issuer.

#### **b) Issuer Bid as an Insider Takeover or Merger Transaction**

An Insider Takeover or Merger Transaction includes any Issuer Bid in which the Issuer proposes to acquire more than 10% of a class of the Issuer’s outstanding publicly traded Equity Securities within any 12-month period.

[**Comment:** The definition in paragraph a, is similar to the definition of “insider bid” in Section 1.1 of the Can Protect Minority Shareholders. However, the definition encompasses not just Takeovers, but also Mergers or Similar Transactions. The definition would treat any management buyout (MBO) as an Insider Takeover or Merger Transaction if, for example, a director or senior officer of the Offeree Issuer participated with the Offeror in the acquisition, because directors and senior officers of an Offeree Issuer fall within the definition of Insider. Also, if a non-management shareholder of the Offeree Issuer who owned more than 10% of the shares of the Offeree Issuer participated with the Offeror in the acquisition, the transaction would be an Insider Takeover or Merger Transaction, because more than 10% shareholders are considered Insiders. Pursuant to Section II.C, rules requiring, *inter alia*, an Independent Committee of Directors, an Independent Valuation Expert, and a Majority of Minority Shareholders apply to an Insider Takeover or Merger Transaction.

The exception for Exempt Second-Step Mergers is similar to the exemption to the going private rule (Rule 13e-3) promulgated by the U.S. SEC; however under Rule 13e-3, the exemption applies if the second-step occurs within 12 months of the first-step, whereas under the rule here the second-step must occur within 6 months of the first-step.

Since a Voluntary Any and All Offer and a Mandatory Bid cannot Close without satisfaction of the Majority of the Minority Tendering Condition, it is appropriate to exempt any follow-on Second-Step Merger or Similar Transaction from the rules governing Insider Takeover or Merger Transactions, provided (1) the second-step merger takes place shortly after completion of the first-step bid, (2) the consideration paid in the second-step is the same type and the same or

higher amount as the consideration paid in the bid, and (3) there is proper disclosure of the intention to effectuate the second-step in the bid documents. This type of Exempt Second-Step Merger can be illustrated as follows:

Assume that upon the completion of a Voluntary Any and All Offer or a Mandatory Bid, the Offeror owns 75% of the stock of the Offeree Issuer. (This can occur only if a majority of the Non-Affiliated shareholders have tendered their shares.) The Offeror now proposes to acquire the balance of the outstanding shares of the Offeree Issuer in the following amalgamation transaction. The Offeror forms a new wholly-owned subsidiary (Sub) and pursuant to the amalgamation provisions of the company law applicable to the Offeree Issuer, Sub and the Offeree Issuer enter into an amalgamation agreement, pursuant to which Sub and Offeree Issuer will be amalgamated into a new corporation, Amalco, which will be a wholly-owned subsidiary of Offeror. In the amalgamation, the shareholders of the Offeree Issuer, other than Offeror, receive the same consideration that was paid in the first-step bid. Under the applicable company law, a 66 and two thirds vote is required to effectuate the amalgamation, and since Offeror owns 75% of the shares of the Offeree Issuer, an affirmative vote is assured. However, the public shareholders have dissenters' rights pursuant to the amalgamation provisions and can elect to have their shares appraised by a court. As long as this second-step takes place within 6 months of the completion of the first-step bid, the second-step is an Exempt Second-Step Merger and not subject to the rules governing Insider Takeover or Merger Transactions.

As indicated in the Transactions Report, this type of amalgamation transaction was utilized by the Royal Bank of Canada in acquiring RBTT, a company organized in Trinidad and Tobago; however, there was no first-step tender offer. The second-step could also be effectuated (1) through the use of the merger provisions of the applicable company law, or (2) pursuant to the squeeze-out provisions of company law if the Offeror receives more than 90% of the shares of the Offeree Issuer in the bid.

In the event a Issuer makes a bid for more than 10% of a class of its outstanding publicly traded shares, rules applicable to Insider Takeover or Merger Transactions are applicable. These Issuer Bids could be a surrogate for an Insider transaction.]

### **39. Interested Party [Not in the Can TO Reg but in Can Protection of Minority Shareholders]**

“Interested Party” means any party with a material financial interest in a Takeover or Merger Transaction.

[**Comment:** Interested Party is used in the definitions of Independent Director, Independent Valuation Expert, and Non-Affiliated Shareholders.]

### **40. Issuer**

“Issuer” means a Person, including a partnership and limited liability company, that issues securities or similar interests in itself.

#### **41. Issuer Bid**

"Issuer Bid" means an Offer to Acquire or redeem Equity Securities of an Issuer made by or on behalf of an Issuer which could result in the acquisition of a class of Equity Securities, provided such bid is not exempt under Section VI.B. An Issuer Bid does not include an Offer to Acquire or redeem, or an acquisition or redemption if the Offer to Acquire or redeem, or the acquisition or redemption is a step in a Merger or Similar Transaction that requires approval in a vote of security holders. An Issuer Bid cannot be a Mandatory Bid, but pursuant to the definition of Insider Takeover or Merger Transaction an Issuer Bid can be such an Insider transaction.

[**Comment:** This definition is similar to the Canadian definition, except for the provisions that can treat an Issuer Bid as an Insider transaction. The ten person limit in the normal course exemption in Section IV.B.3 is based on a U.S. SEC proposed, but not adopted, definition of the term "tender offer." Thus, as a practical matter, an Issuer Bid will be made to more than ten persons.]

#### **42. Issuer Bid Circular**

"Issuer Bid Circular" means a circular prepared in accordance with Section IV.B.2.

#### **43. Majority of the Minority Tendering Condition [Not in the Can TO Reg but in Can Protection of Minority Shareholders]**

"Majority of the Minority Tendering Condition" is satisfied only if a majority of each Class of outstanding Equity Securities, including voting and non-voting shares, held by Non-Affiliated Shareholders is tendered into the applicable bid.

[**Comment:** For example, if an Offeree Issuer has two classes of stock outstanding, Class A voting and Class B non-voting, the Majority of Minority Tendering Condition is satisfied only if a majority of each of the Class A and the Class B shares held by Non-Affiliated Shareholders is tendered.]

#### **44. Majority of the Minority Voting Condition [Not in the Can TO Reg but in Can Protection of Minority Shareholders]**

"Majority of the Minority Voting Condition" is satisfied only if a majority of each Class of outstanding Equity Securities, including voting and non-voting shares, held by Non-Affiliated Shareholders is voted in favor of the applicable proposal.

[**Comment:** For example, if an Offeree Issuer has two classes of stock outstanding, Class A voting and Class B non-voting, the Majority of Minority Voting Condition is satisfied only if a majority of the Class A and a majority of the Class B held by Non-Affiliated Shareholders are voted in favor of the applicable proposal. A similar class voting requirement is required by the American Bar Association's Model Business Corporation Act and by California law; however, Delaware law does not provide for class voting in a merger. This class voting requirement only applies in an Insider Takeover or Merger Transaction.]

#### **45. Mandatory Bid [Not in the Can TO Reg]**

“Mandatory Bid” means (a) a 30% Threshold Mandatory Bid, (b) a 30% Ownership and 2 Percentage Point Increase Mandatory Bid, and (c) a 50% Ownership and 5 Percentage Point Increase Mandatory Bid.

#### **46. Material**

“Material” when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to (a) sell or purchase the applicable security, (b) accept or reject the applicable bid, (c) vote in favor of or against the applicable matter, or (d) otherwise make an investment decision.

#### **47. Merger or Similar Transaction [Not in the Can TO Reg]**

##### **a) Definition with respect to an Offeree Issuer**

“Merger or Similar Transaction” means with respect to an Issuer any merger, amalgamation, scheme of arrangement, sale of assets, reverse stock split, sale by such Issuer of its shares to an Offeror, or other similar transaction as a result of which, in the aggregate, 20% or more of the voting Equity Securities of such Issuer or 40% or more of the assets of such Issuer are, directly or indirectly, to be combined with, acquired by, or Controlled by, an Offeror, its Associates or any Person Acting Jointly or in Concert with the Offeror (the Purchasing Parties). If such an Issuer is a Public Cross Listed Issuer, it is an Offeree Issuer.

##### **b) Definition with respect to an Offeror Making a Large Acquisition**

“Merger or Similar Transaction” means with respect to a Public Cross Listed Issuer that is an Offeror, any merger, amalgamation, scheme of arrangement, purchase of stock, purchase of assets, or other similar transaction in which such Offeror:

- (i) issues its voting Equity Securities in an amount equal to at least 20% of the outstanding voting Equity Securities at the Commencement of the transaction;
- (ii) pays in cash an amount equal to at least 20% of the average trading value of the Offeror’s outstanding voting Equity Securities over the five Business Days prior to the Commencement of the transaction; or
- (iii) pays in property other than voting Equity Securities, which property has a fair market value equal to at least 20% of the average trading value of the Offeror’s outstanding voting Equity Securities over the five Business Days prior to the Commencement of the transaction.

##### **c) Voting and Disclosure Requirements**

Without respect to any shareholder voting requirement under the applicable company law, any Merger or Similar Transaction that is not an Exempt Second-Step Merger must also satisfy the Majority of Minority Voting Condition and all of the Material facts concerning the transaction must be disclosed.

##### **d) Overlap with a Mandatory Bid**

A Merger or Similar Transaction may also give rise to a requirement to make a Mandatory Bid.

[**Comment:** Paragraph (a) is basically consistent with the rule in the U.K, although the concept of Merger or Similar Transaction is broader than the U.K. concept. As in the U.K., the Common Code specifies the provisions that are applicable to a Merger or Similar Transaction.

A Merger or Similar Transaction within paragraph (a) includes, for example, a purchase by an Offeror of stock from the Offeree Issuer if as a result of the purchase the Offeror would own at least 20% of the stock of the Offeree Issuer. As indicated in paragraph (c), any such transaction would have to satisfy the Majority of Minority Voting Condition and would have to be fully disclosed. If the Offeror is an Insider, such as a 10% shareholder, then the transaction is also an Insider Takeover or Merger Transaction, and must satisfy all of the conditions for such a transaction.

A Merger or Similar Transaction also includes a sale by the Offeree Issuer of 40% or more of its assets to an Offeror, and without regard to the voting requirements under the applicable company law, such a transaction would be subject to the Majority of Minority Voting Condition. Any sale of less than 40% could be made on the authority of the directors, without being subject to the Common Code and the Majority of Minority Voting Condition.

Nothing in the Common Code would prevent an Offeror that owns a Controlling interest in an Offeree Issuer from acquiring the Offeree Issuer in a Merger or Similar Transaction; however, except as noted below, such a transaction would also be an Insider Takeover or Merger Transaction and would have to satisfy all of the conditions for such transactions, including the Majority of the Minority Voting Condition. Thus, for example, if in a Voluntary Any and All Offer, an Offeror becomes the holder of 60% of the Offeree Issuer's shares, the Offeror could acquire the balance of the Offeree Issuer's shares in a Merger or Similar Transaction that satisfied all of the conditions for an Insider Takeover or Merger Transaction. However, if the second-step Merger or Similar Transaction occurred within 6 months of the closing of the bid, the Insider Takeover or Merger Transaction rules would not apply as long as (1) the per-share consideration paid in the second-step transaction is at least as high as the per-share consideration paid in the first-step bid, (2) there is full disclosure. *See* definition of Insider Takeover of Merger Transaction.

The Merger or Similar Transaction specified in paragraph (b) encompasses, *inter alia*, any transaction in which an Offeror that is a Public Cross Listed Company acquires the stock or assets of any Issuer in exchange for voting Equity Securities of the Offeror in an amount equal to at least 20% of the Offeror's outstanding voting Equity Securities at the Commencement of the transaction. For example, assume that such an Offeror has a million voting common shares outstanding (its only class of stock), and the shares are trading at \$1 each for an aggregate trading value of \$1 million. The Offeror issues 300,000 new shares in the acquisition of an Issuer. The transaction is a Merger or Similar Transaction with respect to the Offeror, and as a consequence, the Majority of Minority Voting Condition and disclosure requirements in paragraph (c) must be satisfied. Also, if instead of paying in its stock, the Offeror paid \$300,000 in cash or in its debt instruments, the transaction would also be a Merger or Similar Transaction with respect to the Offeror, and as a consequence, the conditions in paragraph (c) would have to be satisfied. The rule with respect to stock is similar to the rules on all U.S. stock exchanges. The rule with respect to cash and non-voting stock consideration is similar to the rule in several European countries, including Belgium. Finally, if the target Issuer is also an Offeree Issuer, then the transaction is also a Merger or Similar Transaction with respect to the Offeree Issuer.

The following is an illustration of how a Merger or Similar Transaction could give rise to a Mandatory Bid as addressed in paragraph (d). Assume that a Public Cross Listed Issuer issues to an Offeror 35% of its outstanding Voting Equity Securities. In addition to satisfying the Majority of Minority Voting Condition and disclosure requirements in paragraph (c), the transaction also is a 30% Threshold Mandatory Bid.]

#### **48. Mini and Other Partial Bids [Not in the Can TO Reg]**

“Mini and Other Partial Bids” means, except where otherwise exempt under Section VI.A, a transaction or series of transactions in which an Offeror, its Associates, or any Person Acting Jointly or in Concert with the Offeror, directly or indirectly, acquires or intends to acquire, Equity Securities of an Offeree Issuer in a situation that does not require a Mandatory Bid and is not a Voluntary Any and All Bid. A Mini and Other Partial Bid could be an Insider Takeover or Merger Transaction. For the avoidance of doubt, if as a result of the Closing of the Takeover Bid, the Offeror would have Beneficial Ownership of 30% or more of the voting power or value of the shares of the Offeree Issuer, then the bid is not a Mini or Other Partial Bid and the Offeror is required to make a 30% Threshold Mandatory Bid.

[**Comment:** These bids include (1) a bid for less than 30% of the shares of the Offeree Issuer (*i.e.*, no Mandatory Bid is required because the 30% threshold is not exceeded), (2) a bid by a shareholder who owns between 30% and 50% of an Offeree Issuer’s shares for less than 2% of such shares (*i.e.*, no Mandatory Bid is required because of the 2% creep rule, assuming the bid together with other purchases during the 12 month period do not exceed 2% of the outstanding shares of the Offeree Issuer), and (3) a bid by a shareholder who owns 50% or more of an Offeree Issuer’s shares for less than 5% of such shares (*i.e.*, no Mandatory Bid is required because of the 5% creep rule, assuming the bid together with other purchases during the 12 month period do not exceed 5% of the outstanding shares of the Offeree Issuer).

One purpose of this provision is to make it clear that the Common Code applies to “mini-tender offers,” which are subject to regulation in the U.S., Canada, and the U.K. (through its Tender Offer Rules in Appendix 5 of the Takeover Code). There can be abuses with mini bids, such as uninformed shareholders tendering into offers deliberately made at a price below the trading value of the shares. The Mandatory Bid requirements of the Common Code do not apply to these transactions, but the disclosure and all holders rules apply. These transactions are partial tender offers, and the pro rata take-up rules of the Common Code (*see* Section IV.D.4) apply, except for tenders of less than 100 shares. In the U.S., a tender offer that would result in an Offeror owning more than 5% of the shares of a listed Offeree Issuer is subject to the tender offer rules under Section 14(d) (substantive and disclosure rules) and 14(e) (antifraud rules) of the Securities Exchange Act of 1934; however, a tender offer for 5% or less is subject only to the antifraud rules under Section 14(e).]

#### **49. Net Short Position [Not in the Can TO Reg]**

“Net Short Position” means the net of (a) a Person’s long positions in a security, and (b) the Person’s short positions (by way of short sales; the acquisition of put options, or other short derivatives; or otherwise).

#### **50. Non-Affiliated Shareholders [Not in the Can TO Reg]**

“Non-Affiliated Shareholders” means holders of Equity Securities of an Offeree Issuer, other than a holder who (a) is the Offeror, Offeree Issuer, any of their Affiliates, and any Person



Acting Jointly or in Concert with the Offeror or Offeree Issuer; (b) is a present or former officer, director, or, within the last 12 months, employee of the Offeror or Offeree Issuer, their Affiliates, or any Person Acting Jointly or in Concert with the Offeror or Offeree Issuer; and (c) owns, together with his or her Affiliates, 5% or more of the equity interest in the Offeror, Offeree Issuer, any of their Affiliates, or any Person Acting Jointly or in Concert with the Offeror or Offeree Issuer.

[**Comment:** For example, the Non-Affiliated Shareholders of an Offeree Issuer would not include (1) any officer, director or employee of the Offeree Issuer or Offeror, and (2) any shareholder of the Offeree Issuer or Offeror that owned more than 5% of the voting equity securities of such firm.]

### **51. Notice of Change**

“Notice of Change” has the meaning given in Section IV.B.4.a.

### **52. Notice of Variation**

“Notice of Variation” has the meaning given in Section IV.B.5.a.

### **53. Offer to Acquire**

"Offer to Acquire" means

- (a) an offer to purchase, or a solicitation of an offer to sell, securities,
- (b) an acceptance of an offer to sell securities, whether or not the offer has been solicited,
- or
- (c) any combination of the above.

### **54. Offeree Issuer and Reverse Acquisition Rule**

"Offeree Issuer" means Public Cross Listed Issuer whose securities or assets are the subject of a Takeover or Merger Transaction, provided, however, that if the Reverse Acquisition Rule in the definition of Offeror applies, the Offeree Issuer shall be considered the Offeror.

### **55. Offeror and Reverse Acquisition Rule**

#### **a) Basic Definition of Offeror**

"Offeror" means, except in Section IV.A of this Common Code (relating to Restrictions on Acquisitions or Sales), a Person that proposes to acquire an interest in, or the assets of, an Offeree Issuer in a Takeover or Merger Transaction. As indicated in the definition of Person, a group of Persons may constitute the Offeror.

#### **b) Two or More Offerors Acting Jointly**

If 2 or more Offerors acting Jointly or in Concert make one or more Offers to Acquire securities of a class, the securities subject to the offer or offers to acquire are deemed to be securities subject to the Offer to Acquire of each Offeror for the purpose of determining whether an Offeror is making a Takeover Bid.

### **c) Reverse Acquisition Rule [Not in the Can TO Reg]**

Notwithstanding paragraph (a), the Offeror in a Takeover or Merger Transaction shall be deemed the Offeree Issuer, and the Offeree Issuer shall be deemed the Offeror, if all of the following conditions are satisfied:

- (i) it is proposed that the Offeror issue its Equity Securities, and
- (ii) as a result of such issuance, upon completion of the transaction, the Offeror will have transferred to the shareholders of the Offeree Issuer (or to the Offeree Issuer or any of its designees) Equity Securities of the Offeror representing

- (A) the right to vote more than 50% of the Offeror's outstanding voting Equity Securities immediately after the transaction, and

- (B) the Beneficial Ownership of more than 50% of the value of the Offeror's Equity Securities immediately after the transaction.

### **d) Example of the Reverse Acquisition Rule.**

In a share for share exchange bid, an Offeror has offered to issue to the Offeree Issuer's shareholders ordinary shares of the Offeror that will have 75% of the vote and value of the Offeror's outstanding shares after the transaction. Consequently, after the transaction, the former shareholders of the Offeree Issuer will own 75% of the shares of the Offeror. Under the Reverse Acquisition Rule, the Offeror is treated as the Offeree Issuer for all purposes of the Common Code, and the Common Code applies if the Offeror (deemed Offeree Issuer) is a Public Cross Listed Issuer.

**[Comment:** As indicated in the definition of Person, a group can be an Offeror. Also, as indicated in the discussion of the concept of Acting Jointly or in Concert, a person who is not a member of a group constituting the Offeror may nevertheless be found to be Acting Jointly or in Concert with the Offeror.

For the reverse acquisition rule in paragraph (c) to operate, the Offeror would have to issue more than 50% of both the vote and value of its shares. In such case, the Offeror is in reality the Offeree Issuer. The U.K.'s Takeover Code has a similar provision, but the Can TO Reg does not.]

## **56. Offeror's Securities**

"Offeror's Securities" means securities of an Offeree Issuer beneficially owned, or over which Control or direction is exercised, on the date of an Offer to Acquire, by an Offeror or any Person Acting Jointly or in Concert with the Offeror.

## **57. Person and Counting of Persons**

### **a) Basic Definition of Person**

"Person" includes

- (a) an individual;
- (b) a corporation;
- (c) a partnership, limited liability company, trust fund and an association, syndicate, organization or other organized group of Persons, whether incorporated or not; and

(d) an individual or other Person acting in that Person's capacity as a trustee, executor, administrator or Personal or other legal representative.

### **b) Groups [Not in the Can TO Reg]**

When two or more Persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an Issuer, such syndicate or group shall be deemed a "Person" for the purposes of this Common Code. Persons who are not members of such a group may be found to be Acting Jointly or in Concert with another Person.

[**Comment:** The first sentence of paragraph (b) dealing with groups is based on Section 13(d)(3) under the U.S. Securities Exchange Act of 1934; the second sentence makes it clear, for example, that even if a Person is not part of a group that is the Offeror, such person may be Acting Jointly or in Concert with the Offeror.]

### **c) Counting of Persons**

For purposes of determining the number of Persons to whom an Offer to Acquire Equity Securities has been made, the following Persons shall be excluded:

- (i) any spouse, son or daughter, or parent of an offeree who has the same principal residence as the offeree;
- (ii) any trust or estate in which an offeree and any of the Persons related to him as specified in paragraph (i) of this definition collectively have more than 50 percent of the Beneficial Ownership interests (excluding contingent interests);
- (iii) any corporation or other organization of which a purchaser and any of the Persons related to him as specified in paragraph (i) of this definition collectively have Beneficial Ownership of more than 50 percent of the Equity Securities (excluding directors' qualifying shares) or equity interests.

[**Comment:** The provision regarding the number of Persons is adapted from Rule 501 under the SEC's Securities Act of 1934. The rules regarding counting of Persons is relevant, *inter alia*, to whether the ten person limits in the exemptions for bids in Section VI are applicable.]

### **58. Public Cross Listed Issuer [Not in the Can TO Reg]**

“Public Cross Listed Issuer” has the meaning given in Section II.A.

### **59. Published Market**

"Published Market" means, with respect to any class of Equity Securities, a market in the Cooperating Jurisdictions or outside of the Cooperating Jurisdictions on which the securities are traded, if the prices at which they have been traded on that market are regularly

- (a) disseminated electronically, or
- (b) published in a newspaper or business or financial publication of general and regular paid circulation.

### **60. Purchasing Non-Offeror**

“Purchasing Non-Offeror” has the meaning given in Section VII.A.3, relating to the early warning system and restrictions on acquisitions during bids.

[**Comment:** As indicated in Section VII.A.3, a Purchasing Non-Offeree is a Person, other than an Offeror, that purchases the securities of an Offeree Issuer.]

### **61. Purchasing Non-Offeree's Securities**

“Purchasing Non-Offeree's Securities” has the meaning given in Section VII.A.3, relating to the early warning system and restrictions on acquisitions during bids.

### **62. Purchasing Parties [Not in the Can TO Reg]**

“Purchasing Parties” is defined in various sections of this Common Code to mean, *inter alia*, “the Offeror, its Associates, and Persons Acting Jointly or in Concert with the Offeror.”

### **63. Put-Up or Shut-Up Rule [Not in the Can TO Reg]**

” Put-Up or Shut-Up Rule” has the meaning given in Section IV.B.11.

### **64. Recognized SA [Not in the Can TO Reg]**

“Recognized SA” has the meaning given in the Choice of Law Rules.

### **65. Related Transaction [Not in the Can TO Reg]**

“Related Transaction” means any transaction that is contingent upon, ancillary to, or in any other way related to a Takeover or Merger Transaction.

[**Comment:** The Common Code applies to Related Transactions. This makes it clear that, for example, the Investment Election in the Ansa McAl offer for BS&T (*see* Transactions Report) would be considered part of the Takeover or Merger Transaction.]

### **66. Relative [Not in the Can TO Reg]**

“Relative” in relation to an individual means: (a) a spouse (including a common law spouse and a domestic partner); (b) a child (including a child of full and half blood and a step child); (c) a parent, grandparent, brother, sister, or the spouse of such person; and (d) a son in law or a daughter in law.

[**Comment:** This definition is based on Section 3(1) of the Trinidad and Tobago Securities Industry Act, 1995, with modifications. *See* T&T SEC Comment No. 6.]

### **67. Sending Requirement [Not in the Can TO Reg]**

“Sending Requirement” has the meaning given in Section IV.B.3.a.

### **68. Service Provider**

“Service Provider” has the meaning given in Section IV.D.3.a.

### **69. Short Person [Not in the Can TO Reg]**

“Short Person” has the meaning given in Section VII.D.

### **70. Six Month Best Price Look-Back Rule [Not in the Can TO Reg]**

“Six Month Best Price Look-Back Rule” has the meaning given in Section IV.A.4.

## **71. Standard Trading Unit**

"Standard Trading Unit" means the Standard Trading Unit applicable to the exchange on which the securities are traded.

[**Comment:** The Canadian definition sets out the trading units.]

## **72. Starting Amount**

"Starting Amount" has the meaning given in Section III.A.4.a.

## **73. Subsequent Offering Period [Not in the Can TO Reg]**

"Subsequent Offering Period" has the meaning given in Section IV.E.6.

## **74. Subsidiary**

"Subsidiary" means an Issuer that is Controlled directly or indirectly by another Issuer and includes a Subsidiary of that Subsidiary.

[**Comment:** As indicated below in the discussion of Control, an Issuer is Controlled if a Person owns 10% or more of the voting rights of the Issuer. Therefore, if shareholder A owns 20% of the voting rights of an Issuer B, then A Controls B.]

## **75. Subsidiary Early Warning Shareholder [Not in the Can TO Reg]**

"Subsidiary Early Warning Shareholder" is defined in Section VII.B.1.a.

## **76. Summary Requirement**

"Summary Requirement" has the meaning given in Section IV.B.3.b.

## **77. Table Comparing TO Regs**

"Table Comparing TO Regs" is defined in Section I.A.1.

## **78. Takeover Bid**

"Takeover Bid" means a Takeover or Merger Transaction other than a Merger or Similar Transaction, an Issuer Bid, and any Related Transaction thereto, provided such bid is not exempt under Section VI.A.

[**Comment:** The concept of a Takeover Bid encompasses all forms of tender offers except for Issuer Bids. As a result of ten person limits in the normal course and private agreement exemptions in Sections VI.A.1 and 2, a Takeover Bid will, as a practical matter, be made to more than ten Persons. These ten person limits are based on a U.S. SEC proposed, but not adopted, definition of the term "tender offer."]

## **79. Takeover Bid Circular**

"Takeover Bid Circular" means a Takeover Bid Circular prepared in accordance with Section IV.B.2.

## **80. Takeover or Merger Transaction [Not in the Can TO Reg]**

“Takeover or Merger Transaction” means all of the following transactions: (a) a Voluntary Any and All Offer, (b) a Mini and Other Partial Bid, (c) a 30% Threshold Mandatory Bid, (d) a 30% Ownership and 2 Percentage Point Increase Mandatory Bid, (e) a 50% Ownership and 5 Percentage Point Increase Mandatory Bid, (f) a Merger or Similar Transaction, (g) an Issuer Bid, and (h) a Related Transaction. The term does not include an Offer to Acquire if the Offer to Acquire is a step in a Merger or Similar Transaction.

[**Comment:** Each of these forms of Takeover or Merger Transaction is defined separately.]

## **81. TO Regs**

“TO Regs” is defined in Section I.B.

## **82. Transactions Report**

“Transactions Report” is defined in Section I.A.1.

## **83. Twelve Month Best Price Look-Back Rule [Not in the Can TO Reg]**

“Twelve Month Best Price Look-Back Rule” has the meaning given in Section II.C.1.a.

## **84. U.K.’s Takeover Code**

“U.K.’s Takeover Code” is defined in Section I.B.

## **85. Ultimate Early Warning Shareholder [Not in the Can TO Reg]**

“Ultimate Early Warning Shareholder” is defined in Section VII.B.1.a.

## **86. Voluntary Any and All Offer [Not in the Can TO Reg]**

“Voluntary Any and All Offer” means an Any and All Offer made by an Offeror, its Associates, or any Person Acting Jointly or in Concert with the Offeror, that is not a Mandatory Offer or a Mini or Other Partial Offer. A Voluntary Any and All Offer may also constitute an Insider Takeover or Merger Transaction. A Voluntary Any and All Offer cannot Close unless the Majority of the Minority Tendering Condition is satisfied and the Offeror purchases such tendered shares.

[**Comment:** The requirement that the Majority of Minority Tendering Condition be satisfied guards against a deliberate low-ball Voluntary Any and All Offer. Thus, for example, assume that an Offeror that holds 5% of the shares of an Offeree Issuer and is, therefore, not an Insider (*i.e.*, does not hold more than 10% of the Offeree Issuer’s shares) makes a Voluntary Any and All Offer. All of the other shareholders are Non-Affiliated Shareholders. The Offeror cannot Close the bid unless more than half of the other shareholders (*i.e.*, more than 47.5% of such shareholders tender their shares. Thus, after the closing the Offeror would own at least 52.5% of the shares of the Offeree.

In the U.K the bid can Close as long as the Offeror has more than 50%; as a consequence it is possible to make a low-ball offer.]

## **B. Other Basic Concepts**

### **1. Control [See § 1.4 Can TO Reg]**

In this Common Code, a Person controls a second Person if

- (a) the first Person, directly or indirectly, beneficially owns or exercises control or direction over securities of the second Person carrying votes which, if exercised, would entitle the first Person to elect 10% of the directors of the second Person, unless the first Person holds the voting securities only to secure an obligation,
- (b) the second Person is a partnership, other than a limited partnership, and the first Person holds more than 10% of the interests of the partnership,
- (c) the second Person is a limited partnership and the general partner of the limited partnership is the first Person, or
- (d) the first Person otherwise possesses, directly or indirectly, the power to direct or cause the direction of the management and policies of the second Person, whether through the ownership of voting securities, by contract, or otherwise.

[**Comment:** Paragraph (d) is based on the definition of Control for purposes of the rules and regulations under the U.S. Securities Act of 1933. For corporations, Canada requires the election of a majority of directors, and for partnerships, Canada requires that the controller hold more than 50% of the interests.]

### **2. Computation of Time [See § 1.5 Can TO Reg]**

In this Common Code, a period of days is to be computed as beginning on the day following the event that began the period and ending at 11:59 p.m. on the last day of the period if that day is a Business Day or at 11:59 p.m. on the next Business Day if the last day of the period does not fall on a Business Day.

### **3. Expiry of Bid [See § 1.6 Can TO Reg]**

A Takeover Bid or an Issuer Bid expires at the later of

- (a) the end of the period, including any extension, during which securities may be deposited under the bid, and
- (b) the time at which the Offeror becomes obligated by the terms of the bid to take up or reject securities deposited under the bid.

### **4. Convertible Securities [See § 1.7 Can TO Reg]**

In this Common Code,

- (a) a security is deemed to be convertible into a security of another class if, whether or not on conditions, it is or may be convertible into or exchangeable for, or if it carries the right or obligation to acquire, a security of the other class, whether of the same or another Issuer, and
- (b) a security that is convertible into a security of another class is deemed to be convertible into a security or securities of each class into which the second-mentioned security may be converted, either directly or through securities of one or more other classes of securities that are themselves convertible.

## 5. Acting Jointly or in Concert [See § 1.9 Can TO Reg]

### a) Basic Concept of Acting Jointly or in Concert

In this Common Code, it is a question of fact as to whether a Person is acting Jointly or in Concert with an Offeror or another Person. Without limiting the generality of the foregoing the following are deemed to be acting Jointly or in Concert with an Offeror,

- (i) a Person that, as a result of any agreement, commitment or understanding with the Offeror, with any Associate of the Offeror, or with any other Person Acting Jointly or in Concert with the Offeror, acquires or offers to acquire securities of the same class as those subject to the Offer to Acquire; and
- (ii) a Person that, as a result of any agreement, commitment or understanding with the Offeror, with an Associate of the Offeror, or with any other Person Acting Jointly or in Concert with the Offeror (the Purchasing Parties), intends to exercise Jointly or in Concert with the Purchasing Parties any voting rights attaching to any securities of the Offeree Issuer.

If a Person (Corp A) is deemed to be part of a group that constitutes a Person, within the definition of the term Person, and the group is the Offeror, then Corp A is part of the Offeror and is not Acting Jointly or in Concert with the Offeror.

### b) Exception for Dealers

Paragraph (a) does not apply to a registered securities dealer, or similar Person, acting solely in an agency capacity for the Offeror in connection with a bid and not executing principal transactions in the Class of Equity Securities subject to the Offer to Acquire or performing services beyond the customary functions of a registered securities dealer.

### c) Treatment of Lock-ups

For the purposes of this definition, a Person is not acting Jointly or in Concert with an Offeror solely because there is an agreement, commitment or understanding pursuant to a lock-up or similar agreement that the Person will tender securities into a Takeover Bid or an Issuer Bid or vote its shares in support of a Merger or Similar Transaction. However, as indicated in the definition of Beneficial Ownership, the Offeror is deemed to have a Beneficial Ownership of any shares subject to a lock-up.

**[Comment:** As indicated, the basic concept of Acting Jointly or in Concert is based on Section 1.9 of the Can TO Reg. Although the Can TO Reg treats an Associate as Acting Jointly or in Concert with an Offeror, this concept is not needed in the Common Code because an Associate of an Offeror is treated as, in essence, a part of the Offeror. For example, in various places in this Common Code, the following parties are referred to as the “Purchasing Parties:” “the Offeror, its Associates, and Persons Acting Jointly or in Concert with the Offeror.”

The last sentence of paragraph (a), dealing with groups, is based on the relationship between the group concept within the definition of Person and the Acting Jointly or in Concert concept. The definition of the term Person makes it clear that the members of a partnership or other group that makes an offer are part of the Offeror. Therefore, the group members are not Acting Jointly or in Concert with the Offeror. However, other parties that are not part of a group constituting the Offeror may be Acting Jointly or in Concert with the Offeror.



As indicated in paragraph (c), a Person that grants to an Offeror a lock-up is not deemed to be Acting Jointly or in Concert with the Offeror solely by reason of the lockup. On the other hand, the Offeror is deemed to have Beneficial Ownership of the locked-up shares.]

## **6. Application to Direct and Indirect Offers [See § 1.10 Can TO Reg]**

In this Common Code, a reference to an Offer to Acquire or to the acquisition or ownership of securities or to Control or direction over securities includes a direct or indirect Offer to Acquire or the direct or indirect acquisition or ownership of securities, or the direct or indirect Control or direction over securities, as the case may be.

## **7. Determination of Market Price [See § 1.11 Can TO Reg]**

### **a) General Principles**

In this Common Code,

(i) the market price of a Class of Equity Securities for which there is a Published Market, at any date, is an amount equal to the simple average of the closing price of securities of that class for each of the Business Days on which there was a closing price in the 20 Business Days preceding that date,

(ii) if a Published Market does not provide a closing price, but provides only the highest and lowest prices of securities traded on a particular day, the market price of the securities, at any date, is an amount equal to the average of the simple averages of the highest and lowest prices for each of the Business Days on which there were highest and lowest prices in the 20 Business Days preceding that date, and

(iii) if there has been trading of securities in a Published Market for fewer than ten of the 20 Business Days preceding the date as of which the market price of the securities is being determined, the market price is the average of the following prices established for each day of the 20 Business Days preceding that date:

(A) the average of the closing bid and ask prices for each day on which there was no trading; and

(B) either the closing price of securities of the class for each day that there has been trading, if the Published Market provides a closing price, or the average of the highest and lowest prices of securities of that class for each day that there has been trading, if the Published Market provides only the highest and lowest prices of securities traded on a particular day.

### **b) More than One Published Market**

If there is more than one Published Market for a security, the market price in paragraphs (7)(a)(i), (ii), or (iii) must be determined solely by reference to the Published Market on which the greatest volume of trading in the particular Class of Equity Securities occurred during the 20 Business Days immediately preceding the date as of which the market price is being determined.

### **c) Acquisitions Pursuant to the Normal Course Purchase Exemption**

Despite paragraphs (a) and (b) for the purposes of Section VI.A.1 (the normal course purchase exemption), if an Offeror acquires securities on a Published Market, the market price for those securities is the price of the last Standard Trading Unit of securities of that class purchased, before the acquisition by the Offeror, by a Person who was not acting Jointly or in Concert with the Offeror.

### **8. Use of Terms such as Board, Directors, Shares, Shareholders, and Partners**

The use in this Common Code of such terms as board of directors, director, shareholder, partner, stock, and shares shall include similar bodies, persons serving in similar capacities, and similar ownership interests.

## **§ IV      General Rules Governing Takeover or Merger Transactions [See Part 2, Can TO Reg]**

[**Comment:** This Section IV sets out the substantive and procedural rules regarding all types of Takeover or Merger Transactions. Thus, these rules apply to (1) Takeover Bids, (2) Issuer Bids, and (3) where specifically made applicable, Mergers or Similar Transactions. Section IV.A sets out rules restricting certain acquisitions or sales of securities during a Takeover or Merger Transaction; Section IV.B contains certain basic rules governing these transactions; Section IV.C addresses the Offeree Issuer's obligations; Section IV.D deals with the Offeror's obligations; and Section IV.E covers bid mechanics. The rules specifically addressing Takeover Bids generally apply *mutatis mutandis* to a Merger or Similar Transaction. This structure follows, with modifications, the structure of the Can TO Reg.]

### ***A. Restrictions on Acquisitions or Sales in Bids and Mergers and Similar Transactions [See Part 2, Division 1 of Can TO Reg]***

[**Comment:** This section sets out various restrictions on the acquisition or sale by an Offeror of an Offeree Issuer's shares during a Takeover or Merger Transaction.

Section IV.A.2 generally prohibits an Offeror from acquiring the shares of the Offeree Issuer outside of a Takeover Bid or Merger or Similar Transaction. This rule operates from the date of Commencement of the bid, which under Section IV.B.1, begins with the first announcement of the bid or merger. In the U.S. there is an absolute prohibition against such acquisitions outside of a bid, but the prohibition does not extend to non-bid merger transactions. Section IV.A.3 applies similar restrictions to Issuer Bids.

Section IV.A.4 sets out a Six Month Best Price Look-Back Rule for determining the price the Offeror is required to pay in Takeover or Merger Transactions that are not Insider transactions. Pursuant to Section II.C.1.a, a Twelve Month Best Price Look-Back Rule applies in Insider transactions.

Section IV.A.5 sets out certain restrictions on acquisitions by an Offeror of securities of the Offeree Issuer after the transaction. Section IV.A.6 provides an exception to the Six Month Best Price Look-Back and the post-bid limitation for certain normal course purchases. Finally, Section IV.A.7 sets out certain restrictions on sales by an Offeror of securities of an Offeree Issuer during a bid.

As indicated in Section IV.A.1 below, it is important for the reader to remember that for purposes of the restrictions in Section IV.A, the term Offeror includes the Offeror, its Associates, and Persons Acting Jointly or in Concert with the Offeror. Thus, the restrictions in this Section IV apply to a broad concept of Offeror.]

## **1. Definition of "Offeror" for Purposes of Section IV.A [See § 2.1 of Can TO Reg]**

In Section IV.A, Offeror means the Offeror, its Associates, and Persons Acting Jointly or in Concert with the Offeror.

## **2. Restrictions on Acquisitions during a Takeover Bid or Merger Transactions Other than an Issuer Bid [ See §2.2 Can TO Reg]**

### **a) No Acquisitions by Offeror during a Bid**

An Offeror must not Offer to Acquire, or make or enter into an agreement, commitment or understanding to acquire Beneficial Ownership of any securities of the class that are subject to a Takeover Bid or securities convertible into securities of that class otherwise than under the bid on and from the Commencement of the bid (or the trigger event giving rise to an obligation for an Offeror to make a Mandatory Bid) until the expiry or Closing of the bid or the Subsequent Offering Period, set out in Section IV.E.6, if any. This prohibition applies, *mutatis mutandis*, to an agreement to vote securities pursuant to a Merger or Similar Transaction.

### **b) Prohibition Applies to Lock-up Agreements**

Paragraph (a) applies to an agreement between a security holder and the Offeror to the effect that the security holder will, in accordance with the terms and conditions of a Takeover Bid, deposit the security holder's securities under the bid. This prohibition applies, *mutatis mutandis*, to an agreement to vote securities pursuant to a Merger or Similar Transaction.

[**Comment:** The Can TO Reg permits these lock-ups.]

### **c) Exception for Certain Market Purchases**

Despite paragraph (a), an Offeror may purchase securities of the class that are subject to a Takeover Bid and securities convertible into securities of that class beginning on the 3rd Business Day following the Commencement of the bid until the expiry of the bid if all of the following conditions are satisfied:

(i) the intention of the Offeror,

(A) on the date of the Commencement of the bid, is to make purchases and that intention is stated in the Bid Circular, or

(B) to make purchases changes after the date of Commencement of the bid and that intention is stated in a news release issued and filed at least one Business Day prior to making such purchases;

(ii) the number of securities beneficially acquired under this paragraph does not exceed 5% of the outstanding securities of that class as at the Deemed Start Date (for purposes of this provision, the acquisition of Beneficial Ownership of securities that are convertible into securities of the class that is subject to the bid shall be deemed to be an acquisition of the securities as converted);

(iii) the purchases are made in the normal course on a Published Market;

(iv) the Offeror issues and files a news release immediately after the Close of business of the Published Market on each day on which securities have been purchased under this paragraph disclosing the following information:

- (A) the name of the Offeror and the purchaser, if not the Offeror;
  - (B) if the purchaser is not the Offeror, the relationship of the purchaser and the Offeror;
  - (C) the number of securities purchased on the day for which the news release is required;
  - (D) the highest price paid for the securities on the day for which the news release is required;
  - (E) the aggregate number of securities purchased on the Published Market during the currency of the bid;
  - (F) the average price paid for the securities that were purchased on the Published Market during the currency of the bid; and
  - (G) the total number of securities owned by the purchaser after giving effect to the purchases that are the subject of the news release;
- (v) no broker acting for the Offeror performs services beyond the customary broker's functions in regard to the purchases;
- (vi) no broker acting for the Offeror receives more than the usual fees or commissions charged for comparable services performed by the broker in the normal course;
- (vii) the Offeror does not solicit or arrange for the solicitation of offers to sell securities of the class subject to the bid, except for the solicitation by the Offeror or members of the soliciting dealer group under the bid; and
- (viii) the seller or any Person acting for the seller does not, to the knowledge of the Offeror, solicit or arrange for the solicitation of offers to buy securities of the class subject to the bid.

This exception applies, *mutatis mutandis*, to purchases made by an Offeror after the Commencement of a Merger or Similar Transaction.

[**Comment:** This is similar to an exception in the Can TO Reg.]

#### **d) Exception for Purchases Pursuant to Previously Existing Contracts and Ordinary Course Broker Transactions**

This restriction in paragraph (a) does not apply to:

- (i) purchases pursuant to a contractual obligation, provided (A) the contract was entered into prior to the Commencement of the bid and the contract was unrelated to the bid, (B) the contract is unconditional and binding on both parties, and (C) all Material matters relating to the contract are fully disclosed; and
- (ii) ordinary course purchases by a broker on behalf of its clients.

This restriction applies, *mutatis mutandis*, to a Merger or Similar Transaction.

[**Comment:** These exceptions are similar to exceptions in Rule 14e-5 of the U.S. tender offer rules.]

### **3. Restrictions on Acquisitions during Issuer Bid [See §2.3 Can TO Reg]**

#### **a) Prohibition**

An Offeror in an Issuer Bid must not Offer to Acquire, or make or enter into an agreement, commitment, or understanding to acquire, Beneficial Ownership of any securities of the class that are subject to an Issuer Bid, or securities that are convertible into securities of that class, otherwise than under the bid on and from the day of Commencement of the bid until the expiry of the bid.

#### **b) Exemption**

Paragraph (a) does not prevent the Offeree Issuer from purchasing, redeeming or otherwise acquiring any securities of the class subject to the bid in reliance on an exemption under Section VI.B.

### **4. Six Month Best Price Look-Back Rule Applicable to Certain Takeover or Merger Transactions [See §2.4 Can TO Reg]**

In the case of a Takeover or Merger Transaction that is not (a) an Insider Takeover or Merger Transaction (which transactions are subject to a Twelve Month Best Price Look-Back Rule in Section II.C.1.a), or (b) an Issuer Bid, if, within the period of 180 days immediately preceding such transaction, an Offeror acquired Beneficial Ownership of securities of the class subject to the bid in a transaction not generally available on identical terms to holders of that class of securities, the Offeror must offer

- (i) consideration for securities deposited under the bid at least equal to and in the same form as the highest consideration that was paid on a per security basis under any such prior transaction, and
- (ii) at least the cash equivalent of that consideration.

This is referred to as the Six Month Best Price Look-Back Rule.

[**Comment:** While a Twelve Month Best Price Look-Back Rule applies for purposes of an Insider Takeover or Merger Transaction, which includes all Mandatory Offers (*see* Sections II.C and D), a Six Month Best Price Look-Back Rule applies for Voluntary Any and All Offers, Mergers or Similar Transactions, and Mini and Other Partial Offers that are not also Insider Takeover or Merger Transactions. As discussed above, this difference in look-back periods should have the effect of encouraging Voluntary Offers.]

### **5. Restrictions on Acquisitions after Bid or an Abandoned Bid [See §2.5 Can TO Reg]**

#### **a) General Restriction**

In a situation in which a Takeover Bid or Issuer Bid Closes and shares are purchased pursuant thereto, during the period beginning with the date of the expiry of such bid (or the date of the expiry of a Subsequent Offering Period, if any, specified in Section IV.E.6) and ending at the end

of the 20th Business Day after such date, an Offeror must not acquire or Offer to Acquire Beneficial Ownership of securities of the class that was subject to the bid except by way of a transaction that is generally available to holders of that Class of Equity Securities on identical terms.

[**Comment:** In Canada this rule also applies to situations in which a Takeover Bid is abandoned. Under the rule here, in a Takeover Bid, the rule applies only when a bid Closes and the securities are taken up and paid for. Paragraph (b) below addresses the situation in which a Takeover Bid is abandoned.]

### **b) Abandoned Takeover Bids and Mergers or Similar Transactions**

In a situation in which a Takeover Bid or a Merger or Similar Transaction is abandoned before all conditions have been satisfied, except with the written permission of the Offeree Issuer, the Offeror must not acquire shares of the Offeree Issuer by way of Takeover or Merger Transaction or otherwise for a period of 12 months after the date of abandonment of the transaction.

[**Comment:** This rule is designed to prevent an Offeror in a Takeover Bid from harassing the Offeree Issuer with low ball bids. It is consistent with EU TO Dir Art 3(1)(f), which provides: “an offeree company must not be hindered in the conduct of its affairs for longer than is reasonable by a bid for its securities.”

Under Section IV.E.5, if all of the conditions have been satisfied and the Offeror does not Close the bid, the Offeror is prohibited from making a bid for any Issuer incorporated in the Cooperating Jurisdictions for a period of five years.]

### **6. Exception to the Six Month Best Price Look-Back and Post-Bid Limitation for Certain Normal Course Purchases [See §2.6 Can TO Reg]**

The Six Month Best Price Look-Back Rule in Section IV.A.4 and the post bid limitations in Section IV.A.5 do not apply to purchases made by an Offeror in the normal course on a Published Market if all of the following conditions are satisfied:

- (a) no broker acting for the Offeror performs services beyond the customary broker's functions in regard to the purchases;
- (b) no broker acting for the Offeror receives more than the usual fees or commissions charged for comparable services performed by the broker in the normal course;
- (c) the Offeror or any Person acting for the Offeror does not solicit or arrange for the solicitation of offers to sell securities of the class subject to the bid, except for the solicitation by the Offeror or members of the soliciting dealer group under the bid; and
- (d) the seller or any Person acting for the seller does not, to the knowledge of the Offeror, solicit or arrange for the solicitation of offers to buy securities of the class subject to the bid.

## **7. Restrictions on Sales during Bid [See §2.7 Can TO Reg]**

### **a) General Prohibition against Sales**

An Offeror must not sell, or make or enter into an agreement, commitment or understanding to sell, any securities of the class subject to a Takeover or Merger Transaction, or securities that are convertible into securities of that class, beginning on the day of Commencement of the transaction until the expiry of the bid or consummation of the Merger or Similar Transaction.

### **b) Exception Agreements to Make Post Bid Sales**

Despite paragraph (a), an Offeror may, before the expiry of a bid, make or enter into an agreement, commitment, or understanding to sell securities that may be taken up by the Offeror under the bid, after the expiry of the bid, if the intention to sell is disclosed in the Bid Circular.

### **c) Exception for Dividend Plans et cet**

Paragraph (a) does not apply to an Offeror under an Issuer Bid in respect of the issue of securities under a dividend plan, dividend reinvestment plan, employee purchase plan, or another similar plan.

## **8. Restrictions on Purchases by Offeror During an Offering of Its Securities [Not in Can TO Reg]**

An Offeror that offers its equity securities pursuant to a Takeover or Merger Transaction shall not, from the date that is 20 Business Days prior to the Commencement of the transaction to the expiry of the transaction, purchase such equity securities. This restriction does not apply to fully disclosed (a) ordinary course purchases of such securities from employees pursuant to a previously established plan or arrangement, and (b) purchases from a third party pursuant to a previously effective contractual obligation.

[**Comment:** A similar but less stringent restriction applies under Reg. M of the U.S. securities laws.]

## ***B. Making a Bid and Effectuating a Merger or Similar Transaction*** **[See Part 2, Division 2 Can TO Reg]**

[**Comment:** The rules in this section set out some of the procedural rules regarding the making of a bid or effectuating a Merger or Similar Transaction. Section IV.B.1 sets out rules regarding Commencement, which can be triggered by an announcement without mailing of the bid or other documents. The announcement will satisfy the Announcement Requirement. The date of Commencement is important, *inter alia*, because the prohibition in Section IV.A.2 against acquisitions by an Offeror of shares of an Offeree Issuer outside of a bid begins with the Commencement of the bid.

Section IV.B.2, requires that the Offeror's Circular be prepared within ten Business Days of Commencement, unless the Offeree Issuer agrees to a longer period. Section IV.B.3 sets out a Sending Requirement requiring that, within ten Business Days of Commencement (unless the Offeree Issuer agrees to a longer period), the Bid Circular be sent to all shareholders, pursuant to the Delivery Mechanics rules in Section IV.B.9. Section IV.B.3 also requires the publication of a summary of the Bid Circular. Sections IV.B.4 through Section IV.B.7 provide rules regarding



changes or variations in the bid, and Section IV.B.8 deals with the required consent of an expert for inclusion of the expert's report in a Bid Circular.

Section IV.B.9 sets out the Delivery Mechanics for delivering Bid and other documents. Section IV.B.9 also specifies a Deemed Start Date for various documents, which sets the starting date for purposes of determining certain time periods relating to the documents. The impact of the Deemed Start Date may be illustrated as follows:

Under Section IV.C.2, the directors of the Offeree Issuer must send a Directors' Circular on the transaction not later than ten Business Days after the Deemed Start Date of the Bid Circular, and under Section IV.E.1, an Offeror must allow securities to be deposited under a Takeover Bid or an Issuer Bid for at least 25 Business Days from the Deemed Start Date.

While the rules are structured to address bids, the above rules generally apply, *mutatis mutandis*, to a Merger or Similar Transaction, unless the applicable company or other law requires essentially comparable treatment.

To prevent the Offeree Issuer from being harassed indefinitely by an Offeror, Section IV.B.10 requires that a Takeover Bid Close prior to the Drop Dead Date, which is 50 Business days after the Deemed Start Date of the bid, and under the Put-Up or Shut-Up rules in Section IV.B.11, an Offeror that has proposed a transaction to an Offeree Issuer must Commence the Takeover Bid within 60 Business Days. If these rules are not complied with the Offeror cannot make a Takeover Bid for the Offeree Issuer for 12 months. Also, if a Takeover Bid is abandoned, then under Section IV.A.5.b, the Offeror generally cannot purchase shares of the Offeree Issuer for 12 months.

The following is a summary of the manner in which the rules apply in the context of an Offeror who decides to make a Takeover Bid:

### Illustration of Timing Rules Applicable to a Takeover Bid

Business Day	Description
Day 1, the Commencement Date	Offeror Commences Takeover Bid with an announcement of the bid pursuant to the Announcement Requirement in Section IV.B.1.a and makes a request for the shareholder list. Pursuant to Section IV.A.2, after Commencement and during a Takeover Bid, the Offeror generally may not acquire shares of the Offeree Issuer outside of the bid. Pursuant to Section II.D.1, a Mandatory Bid must Commence within 3 Business Days of the triggering event.
10 <sup>th</sup> Business Day after Day 1. This is the Deemed Start Date	Offeror must have prepared the Bid Circular as required by Section IV.B.2, and assuming the shareholder list has been received, the Offeror must send the Bid Circular to all of the shareholders pursuant to Sending Requirement of Section IV.B.3. Also, pursuant to Section IV.B.3, b, the Offeror must, pursuant to the Summary requirement, publish a summary of the Bid Circular. Under Section IV.B.9.b, in this situation, the Tenth Business Day after Day 1 is the Deemed Start Date.
10 <sup>th</sup> Business Day after the Deemed Start Date, the issuance of the Directors' Circular	Under Section IV.C.2, the directors of the Offeree Issuer must send a Directors' Circular on the transaction not later than ten Business Days after the Deemed Start Date of the Bid Circular.
25 <sup>th</sup> Business Day after the Deemed Start Date, the closing of the Takeover Bid	Under Section IV.E.1, an Offeror must allow securities to be deposited under a Takeover Bid for at least 25 Business Days after the Deemed Start Date. Thus, the day after this date, the Takeover Bid can Close. Pursuant to Section IV.E.6, the Offeror can purchase additional securities during a Subsequent Offering Period.
50 <sup>th</sup> Business Day after the Deemed Start Date, the Drop Dead Date	Section IV.B.10 requires that a Takeover Bid Close prior to the Drop Dead Date, which is 50 Business days after the Deemed Start Date of the bid.

If rather than making a Takeover Bid, the Offeror initiates negotiations with an Offeree Issuer, under the Put-Up or Shut-Up Rule of Section IV.B.11, the Offeror would have to Commence the Takeover Bid within 60 Business Days of the day it first initiated contact with the Offeror.]

## **1. Commencement of a Bid, Announcement Requirement; Request for Mailing List [See §2.9 Can TO Reg]**

### **a) Commencement and Announcement Requirement**

An Offeror must Commence a Takeover Bid or an Issuer Bid by publishing an advertisement containing a brief summary of the bid in at least one major daily newspaper of general and regular paid circulation in each jurisdiction in which an exchange on which the Issuer's shares are traded is located (hereinafter referred to as the Announcement Requirement). The Bid Circular required by Section IV.B.2 may, but need not, be published or mailed on the date of the first announcement.

[**Comment:** On the date of Commencement, the Announcement Requirement (*i.e.*, a brief summary of the bid) must be satisfied.]

### **b) Disclosure of Offeror's Stock Ownership in Offeree Issuer**

The summary required by paragraph (a) shall disclose any Beneficial Ownership the Offeror has in the securities of the Offeree Issuer, and any change in such Beneficial Ownership shall promptly be disclosed to the market place.

### **c) Request for List of Security Holders**

On the date a Takeover Bid Commences, the Offeror must request from the Offeree Issuer a list of security holders.

[**Comment:** The bid Commences with the announcement of the bid pursuant to the Announcement Requirement. The Bid Circular need not be mailed at the time of the announcement, but pursuant to Section IV.B.2, unless the Offeree Issuer agrees to a longer period, the Bid Circular must be prepared within ten Business Days of the announcement or if later within 2 Business Days of receipt of the list of security holders. Thus, there could be a gap of ten Business Days (and possibly more) between Commencement and mailing. Pursuant to Section IV.C.8, the Offeree Issuer is required to provide the shareholder list within 5 Business Days. The Canadian rule provides that Commencement begins by either an announcement or mailing.]

### **d) Merger or Similar Transaction**

Similar principles shall apply, *mutatis mutandis*, to a Merger or Similar Transaction, unless the applicable company or other law requires essentially comparable treatment.

## **2. Offeror's Circular [See §2.10 Can TO Reg]**

### **a) Preparation of the Circular**

Within ten Business Days (or within such longer period as the Offeree Issuer shall agree to in writing) of the Commencement of the bid pursuant to the Announcement Requirement in Section IV.B.1.a, an Offeror making a Takeover Bid or an Issuer Bid must, prepare a Takeover Bid Circular or an Issuer Bid Circular, as the case may be, in the following form:

- (i) Form 1, Takeover Bid Circular, for a Takeover Bid; or
- (ii) Form 2, Issuer Bid Circular, for an Issuer Bid.

[**Comment:** It can be expected that in a hostile bid, the Offeree Issuer will not agree to extend the ten Business Day requirement.]

### **b) Delivery and Filing of the Circular**

After preparation of the Bid Circular, the Offeror must in the case of a Takeover Bid Circular deliver the Bid Circular to the Offeree Issuer's principal office, and in the case of all Bid Circulars, file with the Applicable SA and any exchange on which the Offeree Issuers shares are traded, the Bid Circular and any summary or other advertisement related to the bid.

[**Comment:** There is no pre-clearance requirement for the Bid Circular or any other document.]

### **c) Merger or Similar Transaction**

Similar principles shall apply, *mutatis mutandis*, to a Merger or Similar Transaction, unless the applicable company or other law requires essentially comparable treatment. Consequently, similar disclosure requirements to those set forth in Form 1 shall apply, *mutatis mutandis*, to the proxy statement or other disclosure document for a Merger or Similar Transaction, unless the applicable company or other law requires essentially comparable disclosures.

[**Comment:** For example, the disclosures required in Form 1 for Insider Takeover Bids will also apply to the disclosure document for a Merger or Similar Transaction that is also an Insider Transaction.]

## **3. Duty to Make Bid to All Security Holders, Sending Requirement; and Summary of Circular; the Summary Requirement [See §2.8 Can TO Reg]**

### **a) Sending Requirement**

Within ten Business Days after the date the bid was first announced pursuant to the Announcement Requirement, or, if later, within two Business Days after receipt of the list of security holders referred to in Section IV.B.1.c (or within such longer period as the Offeree Issuer shall agree to in writing), the Offeror must make a Takeover Bid or an Issuer Bid to all holders of the Class of Equity Securities subject to the bid by sending, pursuant to the Delivery Mechanics in Section IV.B.9, the Bid Circular to

- (i) each holder of that Class of Equity Securities at the address shown on the books of the Offeree Issuer, and

(ii) each holder of securities that, before the expiry of the deposit period referred to in the bid, are convertible into securities of that class, at the address shown on the books of the Offeree Issuer.

This requirement is referred to as the Sending Requirement.

[**Comment:** The Sending Requirement is satisfied pursuant to the Delivery Mechanics in Section IV.B.9, which requires, inter alia, that the Bid Circular be mailed in accordance with rules specified by the Applicable SA. This Sending Requirement also applies to the Directors' Circular under Section IV.C.2.a and the individual Director's Circular under Section IV.C.5.]

### **b) Summary of the Bid Circular; Summary Requirement**

At the time of the mailing, a summary of the Bid Circular, containing the principal terms of the bid, must be published in at least one major daily newspaper of general and regular paid circulation in each jurisdiction in which an exchange on which the Issuer's shares are traded is located. The summary must prominently contain (1) the address, phone number, and email address of the Person from whom a copy of the Bid Circular may be requested, and (2) an undertaking by the Offeror to ensure that any request is promptly responded to in accordance with the Delivery Mechanics in Section IV.B.9. This is referred to as the Summary Requirement.

[**Comment:** Pursuant to Section IV.B.1, the bid can Commence prior to the mailing of the Bid Circular; however, unless extended by the Offeree Issuer, the Bid Circular must be mailed within ten Business Days after the date of the announcement of the bid pursuant to the Announcement Requirement. However, if the security holder list is not received by the Offeror until after such ten Business Days, the Circular must be mailed no later than two Business Days after receipt.

Pursuant to the Summary Requirement, the Offeror must publish a summary of the bid at the time of mailing.]

## **4. Change in Information [See §2.11 Can TO Reg]**

### **a) Notice of Change**

The document required by this section is referred to as a Notice of Change. If, before the expiry of a Takeover Bid or an Issuer Bid, a Material change occurs in the information contained in the Bid Circular or any previously issued Notice of Change or Notice of Variation, the Offeror must promptly

- (i) prepare a Notice of Change as provided in Section IV.B.4.c;
- (i) satisfy the Summary Requirement set out in Section IV.B.3.b with respect to such Notice of Change; and
- (ii) send, pursuant to the Delivery Mechanics in Section IV.B.9, the Notice of Change to every Person to whom the bid was required to be sent under Section IV.B.3.

### **b) Variation Not a Change**

In this section, a variation in the terms of a bid does not constitute a change in information.

### **c) Form 5**

A Notice of Change must be in the form of Form 5 Notice of Change or Notice of Variation.

### **d) Extension of Bid**

If there is a Material change in the terms of a Takeover Bid or an Issuer Bid within paragraph (a), the period during which securities may be deposited under the bid must not expire before ten Business Days after the date the Notice of Change is sent to security holders.

[**Comment:** As long as the Notice of Change is distributed prior to the 15<sup>th</sup> Business Day, this ten Business Day requirement would expire on or prior to the 25<sup>th</sup> Business Day, the earliest date on which a bid can close.]

### **e) Merger or Similar Transaction**

Similar principles shall apply, *mutatis mutandis*, to a Merger or Similar Transaction, unless the applicable company or other law requires essentially comparable treatment.

## **5. Variation of Terms [See §2.12 Can TO Reg]**

### **a) Notice of Variation**

The document required by this section is referred to as a Notice of Variation. If there is a Material variation in the terms of a Takeover Bid or an Issuer Bid, including any extension of the period during which securities may be deposited under the bid, and whether or not that variation results from the exercise of any right contained in the bid, the Offeror must promptly

- (i) prepare a Notice of Variation as provided in Section IV.B.5.b;
- (ii) satisfy the Summary Requirement set out in Section IV.B.3.b with respect to such Notice of Variation, and
- (iii) send, pursuant to the Delivery Mechanics in Section IV.B.9, a Notice of Variation to every Person to whom the bid was required to be sent under Section IV.B.3.

### **b) Form 5**

A Notice of Variation must be in the form of Form 5 Notice of Change or Notice of Variation.

### **c) Extension of Bid**

If there is a Material variation in the terms of a Takeover Bid or an Issuer Bid, the period during which securities may be deposited under the bid must not expire before ten Business Days after the date the Notice of Variation is sent to security holders.

[**Comment:** As long as the Notice of Variation is distributed prior to the 15<sup>th</sup> Business Day, this ten Business Day requirement would expire on or prior to the 25<sup>th</sup> Business Day, the earliest date on which a bid can close.]

### **d) Limitations**

Paragraphs (a) and (c) do not apply to a variation in the terms of a bid consisting solely of the waiver of a condition in the bid and any extension of the bid resulting from the waiver where the consideration offered for the securities consists solely of cash, but in that case the Offeror must promptly issue and file a news release announcing the waiver.

### **e) Merger or Similar Transaction**

Similar principles shall apply, *mutatis mutandis*, to a Merger or Similar Transaction, unless the applicable company or other law requires essentially comparable treatment.

## **6. Filing of Notice of Change or Notice of Variation [See §2.13 Can TO Reg]**

### **a) General Rule**

A Notice of Change or Notice of Variation in respect of a Takeover Bid or an Issuer Bid must be (i) filed with the Applicable SA and each exchange on which the Offeree Issuer's shares are traded, and (ii) in the case of a Takeover Bid, delivered to the Offeree Issuer's principal office, on the day the Notice of Change or Notice of Variation is sent to security holders of the Offeree Issuer, or as soon as practicable thereafter.

### **b) Merger or Similar Transaction**

Similar principles shall apply, *mutatis mutandis*, to a Merger or Similar Transaction, unless the applicable company or other law requires essentially comparable treatment.

## **7. Change or Variation in Advertised Takeover Bid [See §2.14 Can TO Reg]**

### **a) Change Prior to Mailing Circular**

If a change or variation occurs to a Takeover Bid that was Commenced, and if the Offeror has not yet sent the Bid Circular under Section IV.B.3, the Offeror must

(i) publish an advertisement that contains a brief summary of the change or variation in at least one major daily newspaper of general and regular paid circulation in each jurisdiction in which an exchange on which the Offeree Issuer's shares are traded is located,

(ii) concurrently with the date of first publication of the advertisement,

(A) file with the Applicable SA the advertisement, and

(B) file with the Applicable SA and deliver a Notice of Change or Notice of Variation to the Offeree Issuer's principal office, and

(iii) subsequently send, pursuant to the Delivery Mechanics in Section IV.B.9, the Bid Circular reflecting such Notice of Change or Notice of Variation (or accompanied by such Notice of Change or Notice of Variation) to the security holders of the Offeree Issuer before the expiration of the period set out in Section IV.B.3.

### **b) Merger or Similar Transaction**

Similar principles shall apply, *mutatis mutandis*, to a Merger or Similar Transaction, unless the applicable company or other law requires essentially comparable treatment.

## **8. Consent of Expert Bid Circular [See §2.15 Can TO Reg]**

### **a) Definition of Expert**

In this section and Section IV.C.6, an expert includes an attorney, auditor, accountant, engineer, geologist or appraiser or any other Person whose profession or business gives authority to a report, valuation, statement or opinion made by that Person.

### **b) Written Consent**

If a report, valuation, statement, or opinion of an expert is included in or accompanies a Bid Circular or any Notice of Change or Notice of Variation to the circular, the written consent of the expert to the use of the report, valuation, statement or opinion must be filed concurrently with the Bid Circular, Notice of Change or Notice of Variation.

### **c) Merger or Similar Transaction**

Similar principles shall apply, *mutatis mutandis*, to a Merger or Similar Transaction, unless the applicable company or other law requires essentially comparable treatment.

## **9. Delivery and Date of Bid Documents, Deemed Start Date [See §2.16 Can TO Reg]**

### **a) Delivery Mechanics**

A Takeover Bid Circular and an Issuer Bid Circular and every Notice of Change or Notice of Variation must be

- (i) mailed in accordance with rules specified by the Applicable SA to the intended recipient, or
- (ii) delivered to the intended recipient by Personal delivery, courier or other manner acceptable to the Applicable SA.

This is referred to as the Delivery Mechanics.

### **b) Deemed Start Date**

A Bid Circular, Notice of Change or Notice of Variation sent or other document sent in accordance with this section is deemed to be dated as of the later of (1) the first date of the satisfaction of the Summary Requirement with respect to such document, or (2) the date on which such document was mailed or delivered to all, or substantially all, of the shareholders entitled to receive it. On the day any such document is deemed to be dated, the Offeror shall issue a press release, in each jurisdiction in which the Offeree Issuer's shares are traded, announcing such date (hereafter referred to as the Deemed Start Date) and shall deliver on such date the press release to the principal office of the Offeree Issuer and each exchange on which the Offeree Issuer's shares are traded, and file such press release with the Applicable SA. Both the Offeror and the Offeree Issuer shall include the Deemed Start Date in a prominent location on their Web sites.

[**Comment:** The Deemed Start Date is important for several reasons, including the determination of how long the bid must remain open. *See* Section IV.E.1.]



### **c) Merger or Similar Transaction**

Similar principles shall apply, *mutatis mutandis*, to a Merger or Similar Transaction, unless the applicable company or other law requires essentially comparable treatment.

## **10. Drop Dead Date**

Any Takeover Bid must Close within 50 Business Days of the Deemed Start Date of the Takeover Bid. This is known as the Drop Dead Date. If a Drop Dead Date is reached, the Offeror, its Associates, and Persons Acting Jointly or in Concert with the Offeror may not make a bid for the Offeree Issuer (other than a Mandatory Bid or a bid supported by the board of the Offeree Issuer) for a period of 12 months after the Drop Dead Date.

[**Comment:** The Drop Dead Date can only be reached if a Takeover Bid has Commenced. If the Offeror has contacted the Offeree Issuer but not Commenced a Takeover Bid, then the Put-Up or Shut-Up rules in Section IV.B.11 apply. This provision together with the Put-Up or Shut-Up rule will prevent the Offeree Issuer from being harassed indefinitely by an Offeror.]

## **11. Put-Up or Shut-Up [Not in Can TO Reg]**

### **a) When Applicable**

This provision applies if (i) an Offeror has made a proposal for a Takeover or Merger Transaction to the board of the Offeree Issuer, and (ii) the Offeree Issuer has given notice of the receipt of such proposal to the Applicable SA and delivered to the Offeror a copy of such notice.

### **b) Put-Up or Shut-Up Requirement**

If within the succeeding 60 Business Days after the delivery of the notice to the Applicable SA (i) no agreement between the Offeror and Offeree Issuer is reached, and (ii) the Offeror does not Commence a Takeover Bid, then the Offeror, its Associates, and Persons Acting Jointly or in Concert with the Offeror may not make a bid for the Offeree Issuer (other than a Mandatory Bid or a bid supported by the board of the Offeree Issuer) for a period of 12 months after the expiry of such 60 Business Day period. This is known as the Put-Up or Shut-Up Rule.

[**Comment:** The clock on this provision does not begin to run until the Offeree Issuer gives the required notice to the Applicable SA. This provision is similar to the “put-up or shut-up” provisions of Rule 2.4(b) of the U.K. TO Reg. However, in the U.K, the Panel must issue a “put-up or shut-up” order, whereas under the above rule if the Offeror does not Commence a Voluntary Any and All hostile bid within 60 Business Days of the date the Offeree Issuer provides the Applicable SA with the notice of receipt of a proposal, the Offeror cannot make such a bid for a period of 12 months. Of course, during the 12 months the Offeror could negotiate a friendly Takeover or Merger Transaction with the Offeree Issuer’s board. If an Offeror Commences a Takeover Bid prior to the end of the 60 Business Day period, pursuant to the Drop Dead Date provisions of Section IV.B.10, the bid must Close within 50 Business Days. This provision, together with the Drop Dead Date provision, will prevent the Offeree Issuer from being harassed indefinitely by an Offeror.]

## **C. Offeree Issuer's Obligation [See Part 2, Division 3 Can TO Reg]**

[**Comment:** This section sets out the Offeree's obligations during a Takeover or Merger Transaction.]

### **1. General Duties of Board of Offeree Issuer, Including No Frustrating Actions and Limitation on Inducement Fees [Not in Can TO Reg]**

#### **a) Must Act for the Issuer as a Whole**

The board of an Offeree Issuer must act in the interests of the Offeree Issuer as a whole and must not deny the holders of securities the opportunity to decide on the merits of the Takeover or Merger Transaction.

[**Source:** EU Takeover Directive § 1(c)]

#### **b) Competent Advice and Independence**

(i) *Competent Advice.* The board of the Offeree Issuer must obtain competent independent advice on any Takeover or Merger Transaction, and the substance of such advice must be fully disclosed to the shareholders. In satisfying this obligation, the board could appoint an Independent Valuation Expert who would render a Formal Valuation.

(i) *Independence.* As indicated in Section II.C, in any Insider Takeover or Merger Transaction the board of the Offeree Issuer is required to act through an Independent Committee and to satisfy certain other requirements, including retaining an Independent Valuation Expert. On the other hand, in a transaction that is not an Insider Takeover or Merger Transaction, the board of the Offeree Issuer is not required to act through an Independent Committee. However, the most prudent course may be for the board to act through such a Committee. The appointment of an Independent Committee may make it clear that the board has satisfied its obligation under paragraph (i) to obtain competent advice.

[**Comment:** Paragraph (i) is in Rule 3.1 of the U.K's Takeover Code. Both competent advice and independence are specifically required in Insider Takeover or Merger Transactions. In most non-Insider Takeover or Merger Transactions, such as arm's-length transactions, most, if not all, of the members of the Offeree Issuer's board should be independent. Consequently, it should not be difficult for the Offeree Issuer to act through an Independent Committee.]

#### **c) Presumption Where Independent Committee Appointed at the Recommendation of the SA or Court**

Where an Independent Committee of the Board of Directors has been appointed in accordance with provisions of paragraph (c) of the definition of Independent Committee of Directors (relating to the recommendation of the Applicable SA or a court of members of the Committee), the board of the Offeree Issuer will be presumed to have satisfied its obligations under paragraphs (a) and (b) if such committee has received a Formal Valuation opinion regarding the fairness of the transaction from an Independent Valuation Expert, provided the substance of the decision of the Independent Committee and of the Formal Valuation are fully disclosed to the shareholders.

[**Comment:** The purpose of this provision is to encourage the board of an Offeree Issuer that is not party to an Insider Takeover or Merger Transaction to utilize the procedures set out in paragraph (c) of the definition of Independent Committee of Director. If such a Committee is acting in the transaction, the interest of all shareholders should be properly protected in the transaction.]

#### **d) No Frustrating Actions**

The board of the Offeree Issuer shall obtain the prior authorization of a general meeting of shareholders given for this purpose before taking any action, or relying on any provision of its charter or otherwise, other than seeking alternative bids, which may result in the frustration of a Takeover Bid. In particular, the board shall obtain such prior authorization before (i) issuing any shares which may result in a lasting impediment to an Offeror acquiring a Controlling interest in the Offeree Issuer, (ii) restricting the number or percentage of shares that any Offeror may own or control, or (iii) imposing any penalty or similar burden on an Offeror with respect to the Takeover Bid.

#### **e) Notice to Shareholders Regarding Shareholder Approved Frustrating Actions**

The notice of meeting containing the proposed resolution for the purposes of paragraph (d) shall contain, or be accompanied by, full particulars of the proposed action, the reasons for it, and the significance and effect of the resolution under this Common Code.

[**Comments:** Paragraphs (d) and (e) are consistent with the general thrust of Rule 21.1 of (1) the U.K.'s Takeover Code, (2) EU TO Dir Art 9(2), and (3) provisions of the takeover codes in Jamaica, Trinidad and Tobago, and Guyana. Paragraph (d) is broader than these other provisions because it applies at all times and not just from the time that a takeover is proposed.

This prohibition against frustrating actions is contrary to the general rule in virtually all states in the U.S., which permit, subject to certain restrictions, a target to employ a poison pill and other defensive measures. The rule is also contrary to the Canadian approach to defensive tactics reflected in Notice of National Policy 62-202, Take-Over Bids – Defensive Tactics. The Summary of the National Policy states:

The National Policy sets out the view of the Canadian securities regulatory authorities on take-over bid defensive tactics. The Canadian securities regulatory authorities are of the view that the take-over bid provisions of Canadian securities legislation should favour neither the offeror nor the management of the target company, and should leave the shareholders of the target company free to make a fully informed decision. The Canadian securities regulatory authorities are prepared to examine target company tactics in specific cases to determine whether they are abusive of shareholder rights and, if they become aware of defensive tactics that are likely to deny or limit severely the ability of shareholders to respond to a take-over bid or to a competing bid, they will take appropriate action. The National Policy also provides that prior shareholder approval of corporate action would, in appropriate cases, allay the concerns of the Canadian securities regulatory authorities.

The judgment behind the prohibition in paragraph (d) against defensive tactics adopted unilaterally by a board is that a board's decision to adopt defensive tactics almost always will involve a conflict of interest. Further, it is not worth the time of the Applicable SA to attempt to distinguish those rare situations when such tactics may be taken for legitimate reasons from those many situations in which the measures will be employed for reasons other than the promotion of the welfare of the Non-Affiliated Shareholders and the corporation.]

### **f) Inducement Fees**

In all cases in which an Offeree Issuer proposes to enter into an agreement to pay an inducement fee to the Offeror (such as a termination fee paid to an Offeror by the Offeree Issuer in the event the Offeror does not complete its proposed acquisition of the Offeree Issuer pursuant to a Merger or Similar Transaction), the following conditions must be satisfied:

- (i) An Independent Committee of Directors of the Offeree Issuer must determine on a reasoned basis that the inducement fee is in the best interest of the shareholders and in particular the Non-Affiliated Shareholders, and the basis of such determination must be filed with the Applicable SA and fully disclosed at the time of the first announcement of the agreement for the transaction;
- (ii) The inducement fee cannot exceed 1% of the value of the outstanding shares of the Offeree Issuer.

[**Comment:** The limitation on inducement fees is based on Rule 21.2 of the U.K.'s Takeover Code. To enter into an inducement fee the Offeree Issuer must act through an Independent Committee of Directors. Thus, without such an Independent Committee, there can be no inducement fee.]

Inducement fees can be a deterrent to an alternative offer. The Delaware courts apply a facts and circumstances analysis to inducement fees, but generally permit such fees as long as they are no higher than 3% to 4% of the purchase price.]

### **g) No Matching Rights.**

An Offeree Issuer may not grant to an Offeror a right to match any higher offer received by the Offeree Issuer.

[**Comment:** Delaware courts have permitted "matching rights" pursuant to which an Offeror has the right to match any alternative offer. Matching rights can dissuade a potential bidder from putting in a proposal, and for that reason are prohibited.]

## **2. Duty to Prepare and Send Directors' Circular [See §2.17 and TO Reg]**

### **a) Basic Rule**

If a Takeover Bid has been made, the board of directors of the Offeree Issuer must prepare and send, not later than ten Business Days after the Deemed Start Date (*see* Section IV.B.9) of the Bid Circular, a Directors' Circular to every Person to whom the bid was required to be sent under the Sending Requirement in Section IV.B.3.

## **b) Board's Evaluation of the Transaction**

The board of directors of the Offeree Issuer must evaluate the terms of the Takeover Bid and, in the Directors' Circular,

- (i) must recommend to security holders that they accept or reject the bid and state the reasons for the recommendation,
- (ii) must advise security holders that the board is unable to make, or is not making, a recommendation and state the reasons for being unable to make a recommendation or for not making a recommendation, or
- (iii) must advise security holders that the board is considering whether to make a recommendation to accept or reject the bid, must state the reasons for not making a recommendation in the Directors' Circular and may advise security holders that they should not deposit their securities under the bid until they receive further communication from the board of directors in accordance with paragraph (i) or (ii).

## **c) Follow-Up Communication**

If paragraph (b)(iii) applies, the board of directors must communicate to security holders a recommendation to accept or reject the bid or the decision that it is unable to make, or is not making, a recommendation, together with the reasons for the recommendation or decision, at least 5 Business Days before the scheduled expiry of the period during which securities may be deposited under the bid.

## **d) Form 3**

A Directors' Circular must be in the form of Form 3 Directors' Circular.

[**Comment:** A Directors' Circular is not needed in a Merger or Similar Transaction because the proxy statement will contain the Directors' views on the transaction.]

## **3. Notice of Change [See §2.18 Can TO Reg]**

### **a) Basic Rule**

If, before the expiry of a Takeover Bid, a Material change has occurred in the information contained in a Directors' Circular or in any Notice of Change to the Directors' Circular, the board of directors of the Offeree Issuer must promptly issue and file a news release relating to the change and send a Notice of Change to every Person to whom the Takeover Bid was required to be sent disclosing the nature and substance of the change.

### **b) Form 5**

A Notice of Change must be in the form of Form 5 Notice of Change or Notice of Variation.

## **4. Filing Directors' Circular or Notice of Change [See §2.19 Can TO Reg]**

In the case of a Takeover Bid, the board of directors of the Offeree Issuer must concurrently file with the Applicable SA the Directors' Circular or a Notice of Change in relation to it and deliver it to the principal office of the Offeree Issuer and to all exchanges on which the shares of the Offeree Issuer are traded, not later than the date on which it is sent to the security holders of the Offeree Issuer, or as soon as practicable after that date.

## **5. Individual Director's or Officer's Circular [See §2.20 Can TO Reg]**

### **a) Basic Rule**

An individual director or officer may recommend acceptance or rejection of a Takeover Bid if the director or officer sends with the recommendation a separate Director's or Officer's Circular to every Person to whom the Takeover Bid was required to be sent under the Sending Requirement in Section IV.B.3.

### **b) Notice of Change**

If, before the expiry of a Takeover Bid, a Material change has occurred in the information contained in a Director's or Officer's Circular or any Notice of Change in relation to it, other than a change that is not within the control of the director or officer, as the case may be, that director or officer must promptly send a Notice of Change to every Person to whom the Takeover Bid was required to be sent under Section IV.B.3.

### **c) Form 4**

A Director's or Officer's Circular must be in the form of Form 4 Director's or Officer's Circular.

### **d) Circular to Board of Offeree Issuer**

A director's or officer's obligation to send a circular under paragraph (a) or to send a Notice of Change under paragraph (b) may be satisfied by sending the circular or the Notice of Change, as the case may be, to the board of directors of the Offeree Issuer.

### **e) Offeree Issuer to Send Circular to Shareholders**

If a director or officer sends to the board of directors of the Offeree Issuer a circular under paragraph (a) or a Notice of Change under paragraph (b), the board, at the Offeree Issuer's expense, must promptly send a copy of the circular or notice to every Person to whom the Takeover Bid was required to be sent under Section IV.B.3.

### **f) Filing**

The board of directors of the Offeree Issuer or the individual director or officer, as the case may be, must concurrently file the Director's or Officer's Circular or a Notice of Change in relation to it and send it to the principal office of the Offeror and to all exchanges on which the shares of the Offeree Issuer are traded not later than the date on which it is sent to the security holders of the Offeree Issuer, or as soon as practicable after that.

### **g) Notice of Change on Form 5**

A Notice of Change in relation to a Director's or Officer's Circular must be in the form of Form 5 Notice of Change or Notice of Variation.

## **6. Consent of Expert — Directors' Circular/Individual Director's or Officer's Circular [See §2.21 Can TO Reg]**

If a report, valuation, statement, or opinion of an expert is included in or accompanies a Directors' Circular, an individual Director's or Officer's Circular or any Notice of Change to

either circular, the written consent of the expert to the use of the report, valuation, statement, or opinion must be filed concurrently with the circular or notice.

## **7. Delivery and Date of Offeree Issuer's Documents [See §2.22 Can TO Reg]**

### **a) Basic Rule**

A Directors' Circular, an individual Director's or Officer's Circular and every Notice of Change must be

- (i) mailed in accordance with rules specified by the Applicable SA to the intended recipient, or
- (ii) delivered to the intended recipient by Personal delivery, courier, or other manner acceptable to the Applicable SA.

### **b) Date of Document**

Any circular or notice sent in accordance with this section is deemed to be dated as of the date it was sent to all or substantially all of the Persons entitled to receive it.

## **8. Obligation to Provide Security Holder List [See §3.4 Can TO]**

If an Offeror makes or proposes to make a Takeover Bid for a Class of Equity Securities of an Offeree Issuer and the Offeree Issuer is not otherwise required by law to provide in a commonly used electronic format a list of its security holders to the Offeror, the Offeree Issuer must, within five Business Days of receipt of a request for a list of security holders from the Offeror, provide in a commonly used electronic format (a) the list of holders of the applicable Classes of Equity Securities, and (b) any known holder of an option or right to acquire securities of that class. The Offeror must use the list only in carrying out the bid in compliance with this Common Code and must return the list upon the completion or abandonment of the Takeover Bid.

## **9. Offeree Issuer Secrecy [Not in Can TO Reg]**

The Offeree Issuer, its Associates, officers and directors, and all Persons Acting Jointly or in Concert with the Offeree Issuer, must take steps to ensure that at all times confidential information relating to the Takeover or Merger Transaction is kept in the strictest confidence until and unless such information is made publicly available. Confidential information should be passed only to a person who has a bona fide need to know and who acknowledges this secrecy requirement. The Offeree Issuer shall promptly announce a potential Takeover or Merger Transaction if (a) the Offeree Issuer's board has received from a potential Offeror a firm intention to make a bona fide offer for a Takeover or Merger Transaction, or (2) the Offeree Issuer is aware of speculation in the stock of the Offeree Issuer or a potential Offeror as a result of the negotiation of a potential offer for a Takeover or Merger Transaction.

[**Comment:** This is based on Rules 2.1 and 2.2 of the U.K. TO Reg.]

## **D. Offeror's Obligations [See Part 2, Division 4 Can TO Reg]**

[**Comment:** This section sets out the Offeror's obligations during a Takeover or Merger Transaction.]

### **1. Consideration Including All Holders [See §2.23 Can TO Reg]**

#### **a) All Holders, Same Price, and Best Price**

In a Takeover or Merger Transaction, all holders of the same Class of Equity Securities must be offered identical consideration. *See also* the Six Month Best Price Look-Back Rule in Section IV.A.4 and the Twelve Month Best Price Look-Back Rule in Section II.C.1.a, applicable to Insider Takeover and Merger Transactions.

[**Comment:** This all holders, same and best price rule applies not just to Takeover Bids but also to Mergers or Similar Transactions.]

#### **b) Shareholder Choice of Consideration**

Paragraph (a) does not prohibit an Offeror from offering an identical choice of consideration to all holders of the same Class of Equity Securities.

#### **c) Cash Alternative Required if Illiquid Securities Offered**

If the consideration offered by the Offeror does not consist of liquid securities admitted to trading on a Published Market, it shall include a cash alternative.

[**Source:** EU TO Dir Art 5(5)]

#### **d) Merger or Similar Transaction**

Similar principles shall apply, *mutatis mutandis*, to a Merger or Similar Transaction, unless the applicable company or other law requires essentially comparable treatment.

### **2. Prohibition against Collateral Agreements [See §2.24 Can TO Reg]**

If an Offeror, its Associates, and Person Acting Jointly or in Concert with the Offeror (the Purchasing Parties) intend to engage in a Takeover or Merger Transaction, the Purchasing Parties must not enter into any collateral agreement, commitment, or understanding that has the effect, directly or indirectly, of providing a security holder of the Offeree Issuer with consideration of greater value than that offered to the other security holders of the same Class of Equity Securities.

### **3. Collateral Agreements — Exception [See §2.25 Can TO Reg]**

#### **a) General Exception**

Section IV.D.2 does not apply to an employment compensation arrangement, severance arrangement, or other employment benefit arrangement that provides:



(i) *Benefits Arising from Group Plans.* An enhancement of employee benefits resulting from participation by the security holder of the Offeree Issuer in a group plan available for a broad range of employees of the Offeror and its Subsidiaries if the benefits provided by the group plan are generally provided to employees of the Offeror and its Subsidiaries who hold positions of a similar nature to the position held by the security holder, or

(ii) *1% and 10% Limits or Equivalent Value Exception.* A benefit not described in paragraph (i) that is received solely in connection with the security holder's services as an employee, officer, director or Consultant of the Offeree Issuer, of an entity that is an Associate of the Offeree Issuer, or of a successor to (or acquirer of) the business of the Offeree Issuer (such security holder is hereinafter referred to as a Service Provider), if:

(A) *Less than 1% Stock Ownership.* At the time the bid is publicly announced, the Service Provider and (to the knowledge of the Service Provider after reasonable inquiry) its Associates, in the aggregate, Beneficially Own less than 1% of the outstanding securities of each Class of Equity Securities of the Offeree Issuer subject to the bid, or

(B) *Independent Committee.* An Independent Committee of Directors of the Offeree Issuer, acting in good faith, has determined that

(1) *Less than 10% of Amount Paid.* The value of the benefit, net of any offsetting costs to the Service Provider, is less than 10% of the aggregate amount paid to the Service Provider for the shares of the Offeree Issuer owned by such Service Provider, or

(2) *Equivalent Value.* The Service Provider is providing at least equivalent value in exchange for the benefit.

### **b) Conditions for Reliance on the 1%, 10%, and Equivalent Value Exceptions**

To rely on an exception under paragraph (3)(a)(ii)(A) (the 1% exception) and paragraph (3)(a)(ii)(B)(1) (the 10% exception) and paragraph 3(a)(ii)(B)(2) (the equivalent value exception), the following conditions must be satisfied:

- (i) the benefit is not conferred for the purpose, in whole or in part, of increasing the amount of the consideration paid to the security holder for securities deposited under the bid or providing an incentive to deposit under the bid or for voting in favor of or otherwise supporting a Merger or Similar Transaction;
- (ii) the conferring of the benefit is not, by its terms, conditional on the security holder supporting the Takeover or Merger Transaction in any manner; and
- (ii) full particulars of the benefit are disclosed in the Issuer Bid Circular or, in the case of a Takeover Bid, in the Takeover Bid Circular or Directors' Circular, or in the case of a Merger or Similar Transaction, in the applicable disclosure document.

### **c) Further Conditions for Reliance on the 10% Exception and the Equivalent Value Exception**

As additional requirements for reliance on the exception under paragraph (3)(a)(ii)(B)(1) (the 10% exception) and the exception under paragraph (3)(a)(ii)(B)(2) (the equivalent value exception), the following conditions must be satisfied:

(i) the Service Provider receiving the benefit has disclosed to the Independent Committee of Directors (A) the amount of consideration that the Service Provider expects he or she will be beneficially entitled to receive under the terms of Takeover or Merger Transaction in exchange for the securities beneficially owned by the Service Provider, and (B) the full amount of the employment benefit the Service Provider expects he or she will be beneficially entitled to receive under the terms of Takeover or Merger Transaction; and (ii) the determination of the Independent Committee of Directors under subparagraph (3)(a)(ii)(B) is disclosed in the Issuer Bid Circular or, in the case of a Takeover Bid, in the Takeover Bid Circular or Directors' Circular, or, in the case of a Merger or Similar Transaction, in the applicable disclosure document.

#### **d) Beneficial Ownership of Shares**

In this section, in determining the Beneficial Ownership of securities of a holder at a given date, any security or right or obligation permitting or requiring the security holder (or requiring his or her Associates, or any Person Acting Jointly or in Concert with the security holder) to acquire a security, including an unissued security, of a particular class within 50 Business Days by a single transaction or a series of linked transactions is deemed to be a security of a particular class.

[**Comment:** As indicated, this provision is similar to the exception in Section 2.25 of the Can TO Reg. The group plan provision does not have the exclusion for “incentive plans” found in the Can TO Reg. It has been explained by a Canadian takeover official that the purpose of the exclusion for incentive plans is to “prevent management from relying on the exemption if they receive equity or equity-like benefits, which are in effect a continuing interest in the target and should require minority approval.” This provision is rejected because, unlike the Canadian provision, under the group exception here, the benefit must be available to a “broad range of employees” of the Offeror.]

### **4. Proportionate Take Up and Payment [See §2.26 Can TO]**

#### **a) General Pro-Rata Take-up Requirement**

If in the case of a Mini or Other Partial Bid or an Issuer Bid a greater number of securities is deposited under the bid than the Offeror is bound or willing to acquire under the bid, the Offeror must take up and pay for the securities proportionately, disregarding fractions, according to the number of securities deposited by each security holder.

#### **b) Exception for Tendering of Less than 100 Shares**

Paragraph (a) does not prohibit the purchase of all tendered shares if the tendering shareholder certifies that he and his Associates (i) have tendered all shares such persons own, and (ii) the aggregate shares tendered constitute less than 100 shares. In such case, the Offeree Issuer may purchase all of such shares tendered.

#### **c) Special Rule for Issuer Bids and Purchase of Less than Standard Trading Unit.**

Paragraph (a) does not prohibit an Offeror from acquiring securities under the terms of an Issuer Bid that, if not acquired, would constitute less than a Standard Trading Unit for the security holder.

[**Comment:** The only permissible third party partial bids are Mini and Other Partial Bids, which include, for example, a bid that would result in the Offeror holding less than 30% of the Offeree Issuer's shares. In such case, the Offeror would not be required to make a Mandatory Bid. If the bid was for more than 30% of the shares, the 30% Threshold Mandatory Bid requirement would apply. The small shareholder exception in paragraph (b) is similar to an exception to the pro rata take up requirement in the U.S. tender offer rules.]

## **5. Financing Arrangements [See §2.27 Can TO]**

### **a) Certification that Cash Consideration is Available**

If a Takeover or Merger Transaction provides that the consideration for the securities of the Offeree Issuer is to be paid in cash or partly in cash, (i) the Offeror must make adequate arrangements before the bid (or, in the case of a Merger or Similar Transaction, before entering into the acquisition agreement) to ensure that the required funds are available to make full payment for the securities that the Offeror has offered to acquire, and (ii) at the Commencement of the Takeover or Merger Transaction, the financial advisor to the Offeror must provide a certification to the Applicable SA that the financing has been arranged and subject to normal and permitted conditions will be available at the closing.

### **b) Conditions**

The financing arrangements required to be made under paragraph (a) may be subject to conditions if, at the time the Commencement of the Takeover or Merger Transaction, the Offeror and the Offeror's financial advisor reasonably believe the possibility to be remote that such conditions will not be satisfied.

[**Comment:** The requirement that the Offeror's financial advisor certify that the financing is available, subject to normal and permitted conditions, is similar to Section 24.7 of the U.K. TO Reg.]

### **c) Non-Cash Consideration**

At the time the Commencement of the Takeover or Merger Transaction, the Offeror and the Offeror's financial advisor must be confident that any type of non-cash consideration will be available at the Closing, and the Offeror must take all reasonable measures to ensure that any such consideration will be available at the Closing.

## **6. Offeror Secrecy [Not in Can TO Reg]**

The Offeror, its Associates, and all Persons Acting Jointly or in Concert with the Offeror, must take steps to ensure that at all times confidential information relating to the Takeover or Merger Transaction is kept in the strictest confidence until and unless such information is made publicly available. Confidential information should be passed only to a person who has a bona fide need to know and who acknowledges this secrecy requirement. The Offeror shall promptly announce a Takeover or Merger Transaction or the potential for such a transaction, if (a) the Offeror becomes obligated to make a Mandatory Bid, or (b) the Offeror is aware of speculation in the stock of the Offeree Issuer or of the Offeror as a result of a planned offer by the Offeror.

[**Comment:** This is based on Rules 2.1 and 2.2 of the U.K. TO Reg.]

## ***E. Bid Mechanics [See Part 2, Division 5 Can TO Reg]***

### **1. Minimum Deposit Period [See §2.28 Can TO]**

An Offeror must allow securities to be deposited under a Takeover Bid or an Issuer Bid for at least 25 Business Days from the Deemed Start Date specified in Section IV.B.9.

### **2. Prohibition on Take Up [See §2.29 Can TO]**

An Offeror must not Close a Takeover Bid or Issuer Bid and take up securities deposited under the bid until after the expiration of 25 Business Days from the Deemed Start Date.

### **3. Withdrawal of Securities [See §2.30 Can TO]**

#### **a) Basic Withdrawal Right**

A security holder may withdraw securities deposited under a Takeover Bid or an Issuer Bid

- (i) at any time before the bid Closes, and
- (ii) at any time after the third Business Day after the bid Closes if the securities have not been taken up and paid for by the end of such third Business Day.

#### **b) Mechanics of Withdrawal**

The withdrawal of any securities under paragraph (a) is made by sending a written notice to the depository designated in the Bid Circular and becomes effective on its receipt by the depository.

#### **c) Prompt Return**

If notice is given in accordance with paragraph (b), the Offeror must promptly return the securities to the security holder.

[**Comment:** The withdrawal right is unlimited prior to the Closing of the bid.]

### **4. Effect of Market Purchases [See §2.31 Can TO]**

If an Offeror purchases securities as permitted by Section IV.A.2.c (permitting the acquisition of up to 5% of the securities of an Offeree Issuer during a Takeover Bid), those purchased securities must be counted in determining whether a condition as to the minimum number of securities to be deposited under a Takeover Bid has been fulfilled, but must not reduce the number of securities the Offeror is bound to take up under the bid.

[**Comment:** This provision is only applicable in a Mini or Other Partial Bid, which is a partial bid.]

### **5. Obligation to Close or Return Securities after Condition Satisfaction Date [See § 2.32 Can TO]**

#### **a) Prompt Payment**

If all the terms and conditions of a Takeover Bid or an Issuer Bid have been satisfied or waived (the date on which such satisfaction or waiver occurs is hereinafter referred to as the Condition Satisfaction Date), the Offeror must promptly, and in no case later than 3 Business Days after the

Condition Satisfaction Date, Close the bid by taking up and paying for securities deposited under the bid.

[**Comment:** The Offeror will generally Close the bid on the first Business Day after the Condition Satisfaction Date.]

### **b) Prompt Return of Securities if No Closing; Prohibition on Other Bids [See §2.33 Can TO]**

If the Offeror does not Close the bid and pay for the securities before the end of the third Business Day after the Condition Satisfaction Date, the Offeror shall promptly, and in no case later than 5 Business Days after the Condition Satisfaction Date, return all of the deposited securities to the depositing shareholders. As soon after the Condition Satisfaction Date as the Offeror knows that it will not Close the bid, the Offeror must promptly issue and file with the Applicable SA a news release to that effect. An Offeror that fails to Close after the Condition Satisfaction Date shall be prohibited from making a bid for any Issuer incorporated in the Cooperating Jurisdictions for a period of five years. The shareholders of the Offeree Issuer may pursue any remedies, including monetary damages, they may otherwise have against such an Offeror.

[**Comment:** The Can TO Reg does not have a prohibition on other bids. If the bid is abandoned before the Condition Satisfaction Date, then under Section IV.A.5.b, the Offeror is prohibited from making a bid for the Offeree Issuer for a period of 12 months. Thus, the penalty for abandoning a bid before the Condition Satisfaction Date is less onerous than the 5-year prohibition on making any bids if the bid is abandoned after the Condition Satisfaction Date.]

## **6. Subsequent Offering Period, Prompt Payment for Securities Deposited**

After a Takeover Bid has Closed, the Offeror may provide a Subsequent Offering Period of at least 5 and no more than 25 Business Days after the Closing during which it will accept additional tenders, provided the following conditions are satisfied:

- (a) The securities deposited in the initial bid have been promptly taken up and paid for;
- (b) The initial bid is an Any and All Bid, and if the Offeror is offering security holders a choice of different forms of consideration, there is no ceiling on any form of consideration offered;
- (c) The Offeror announces the results of the initial bid, including the approximate number and percentage of securities deposited to date, no later than 9:00 a.m. local time on the next Business Day after the Condition Satisfaction Date, and begins the Subsequent Offering Period immediately after the Closing;
- (d) The Offeror immediately accepts and promptly pays for all securities as they are tendered during the Subsequent Offering Period;
- (e) The Offeror offers the same form and amount of consideration to security holders in both the initial and the Subsequent Offering Period; and
- (f) The inclusion of a Subsequent Offering Period is a Material event, and consequently, the security holders of the Offeree Issuer must be apprised of the Subsequent Offering period at least ten Business Days prior to Closing of the bid.

[**Comment:** Once the initial bid has Closed, there is no reason to prevent the Offeror from buying, on the same terms as those applicable in the initial bid, additional shares that are tendered during a Subsequent Offering Period. This rule is based on Rule 14d-11 under the U.S. tender offer rules.]

### **7. News Release on Condition Satisfaction Date [See §2.33 Can TO]**

Promptly upon the occurrence of a Condition Satisfaction Date, the Offeror must issue and file with the Applicable SA a news release to that effect. The news release must disclose

- (a) the approximate number of securities deposited,
- (b) the approximate number that will be taken up, and
- (c) the expected date of the Closing.

### **8. Return of Deposited Securities after Termination of Bid [See §2.33 Can TO]**

If, before the Condition Satisfaction Date, a Takeover Bid or an Issuer Bid is terminated for any reason, the Offeror shall promptly (and in no case later than 2 Business Days after the termination) issue and file with the Applicable SA a news release to that effect and return the securities to the depositing security holders.

## **§ V Filings and Certifications [See Part 3, General, Can TO Reg]**

### ***A. Filing of Documents and Inclusion of Filed Documents on the Issuer's Web Site [See §3.2 Can TO]***

#### **1. Offeror's Documents**

In addition to the filing and delivery requirements with respect to an Offeror's Bid Circular set out in Section IV, an Offeror engaging in a Takeover or Merger Transaction must file with the Applicable SA copies of the following documents, and any amendments to those documents:

- (a) any agreement between the Offeror and a security holder of the Offeree Issuer relating to the Takeover or Merger Transaction, including any agreement to the effect that the security holder will deposit its securities in the Takeover Bid made by the Offeror or vote its securities in favor of a Merger or Similar Transaction proposed by the Offeror;
- (b) any agreement between the Offeror and directors or officers of an Offeree Issuer relating to the Takeover or Merger Transaction;
- (c) any agreement between the Offeror and an Offeree Issuer relating to the Takeover or Merger Transaction;
- (d) any other agreement of which the Offeror is aware that could affect Control of the Offeree Issuer, including any agreement with change of control provisions, any security holder agreement or any voting trust agreement, that the Offeror has access to and can reasonably be regarded as Material to a security holder;
- (e) all press releases and other public announcements relating in any way to the Takeover or Merger Transaction.

#### **2. Offeree Issuer's Documents**

In addition to the filing and delivery requirements with respect to the Directors' Circular and the individual Director's Circular set out in Section IV, an Offeree Issuer whose securities are the subject of a Takeover or Merger Transaction must file with the Applicable SA copies of the following documents:

- (a) any agreement of which the Offeree Issuer is aware that could affect Control of the Offeree Issuer, including an agreement with change of control provisions, a security holder agreement or a voting trust agreement, that the Offeree Issuer has access to and can reasonably be regarded as Material to a security holder; and
- (e) all press releases and other public announcements relating in any way to the Takeover or Merger Transaction.

#### **3. Date of Filing**

The documents required to be filed

- (a) under paragraph (1) must be filed on the earliest of (i) the day the Takeover Bid Circular (or Merger or Similar disclosure document) is filed under Section IV.B.3, or (ii) the day of the public release of that document, and
- (b) under paragraph (2) must be filed on the earliest of (i) the day that the Directors' Circular is filed under Section IV.C.4, or (ii) the day of the public release of that document.

#### **4. Post-Bid Documents**

If an agreement required to be filed under paragraph (1) or (2) is entered into after a Takeover Bid Circular (or Merger or Similar Transaction disclosure document) referred to in paragraph (1) or the Directors' Circular referred to in paragraph (2) is filed, the agreement must be filed promptly but not later than two Business Days from the date that the agreement was entered into.

#### **5. Web Site Disclosure**

The Offeree Issuer and Offeror must include in a prominent position on their Web sites copies of all announcements (including news releases) and documents (including Bid Circulars and Directors' Circulars) filed with the Applicable SA relating to the Takeover or Merger Transaction. Such documents must remain on the Web site for at least six months after the completion or abandonment of the transaction.

[**Comment:** The purpose of this provision is to enhance the accessibility of documents relating to a Takeover or Merger Transaction. This is important because none of the Cooperating Jurisdictions has an electronic retrieval system for filed documents like the EDGAR system the U.S. SEC employs.]

#### **6. All Disclosure Documents and News Releases Filed with Relevant Exchanges**

At the date of filing with the Applicable SA, the Offeror and Offeree Issuer shall file with every exchange within the Cooperating Jurisdictions on which their shares are traded a copy of all disclosure documents for a Takeover or Merger Transaction and all news releases relating to such a transaction.

#### **7. Confidentiality**

A provision in a document required to be filed under paragraph (1) or (2) may be omitted or marked so as to be unreadable if

- (a) the filer has reasonable grounds to believe that disclosure of the provision would be seriously prejudicial to the interests of the filer or would violate confidentiality provisions,
- (b) the provision does not contain information relating to the filer or its securities that would be necessary to understand the document, and
- (c) in the copy of the document filed by the filer, the filer includes a brief description of the information that has been omitted or marked so as to be unreadable immediately after the provision that has been omitted or marked.



## **B. Certification of Bid Circulars [See §3.3 Can TO]**

### **1. Offeror Certification Rule**

A Bid Circular or a Notice of Change or Notice of Variation in respect of the Bid Circular required under this Common Code must contain a certificate of the Offeror in the required form signed

(a) if the Offeror is a Person other than an individual, by each of the following:

- (i) the chief executive officer or, in the case of a Person that does not have a chief executive officer, the individual who performs similar functions to a chief executive officer,
- (ii) the chief financial officer or, in the case of a Person that does not have a chief financial officer, the individual who performs similar functions to a chief financial officer, and
- (iii) two directors, other than the chief executive officer and the chief financial officer, who are duly authorized by the board of directors of that Person to sign on behalf of the board of directors, or

(b) if the Offeror is an individual, by the individual.

For the purposes of paragraph (a), if the Offeror has fewer than four directors and officers, the certificate must be signed by all of the directors and officers. Similar principles shall apply, *mutatis mutandis*, to a Merger or Similar Transaction.

### **2. Certification of Directors' Circular**

A Directors' Circular or a Notice of Change in respect of a Directors' Circular required under this Common Code must contain a certificate of the board of directors of the Offeree Issuer in the required form signed by 2 directors who are duly authorized by the board of directors of that Person to sign on behalf of the board of directors.

### **3. Certification of Individual Director's or Officer's Circular**

Every Person that files and sends an individual Director's or Officer's Circular or a Notice of Change in respect of an individual Director's or Officer's Circular under this Common Code must ensure that the circular or notice contains a certificate in the required form and is signed by or on behalf of the director or officer sending the circular or notice.

### **4. Exception**

If the Applicable SA is satisfied that either or both of the chief executive officer or chief financial officer cannot sign a certificate required under this Common Code, the SA may accept a certificate signed by another officer or director.

## **§ VI Exemptions for Takeover Bids and Issuer Bids [See Part 4, Exemptions, Can TO Reg]**

### ***A. Exempt Takeover Bids [See Part 4, Division 1, Can TO Reg]***

#### **1. Normal Course Purchase Exemption [See § 4.1 Can TO Reg]**

##### **a) Basic Exemption, Not Affecting Obligation to Make a Mandatory Bid**

A Takeover Bid is exempt from Section IV if all of the following conditions are satisfied:

- (i) the bid is for not more than 5% of the outstanding securities of a Class of Equity Securities of the Offeree Issuer;
- (ii) the aggregate number of securities or, in the case of convertible debt securities, the aggregate principal amount of securities, acquired in reliance on this exemption by the Offeror, its Associates, or any Person Acting Jointly or in Concert with the Offeror (the Purchasing Parties) within any period of 12 months, when aggregated with acquisitions otherwise made by the Purchasing Parties within the same 12-month period, other than under a Takeover Bid subject to Section IV, does not exceed 5% of the securities of that class outstanding at the beginning of the 12-month period;
- (iii) the value of the consideration paid for any of the securities acquired is not in excess of the market price at the date of acquisition, as determined in accordance with Section III.B.7 (determination of market price), plus reasonable brokerage fees or commissions actually paid; and
- (iv) the Offer to Acquire is made to no more than ten Persons.

Purchases pursuant to this exemption will not prevent the transaction from triggering the obligation to make a Mandatory Bid.

**[Comment:** Under this exemption, an Offeror that has not previously owned securities of an Offeree Issuer would be exempt if it (1) made a bid for no more than 5% of the shares of the Offeree Issuer, (2) made the bid to no more than ten security holders of the Offeree Issuer, and (2) paid no more than market price.

As indicated in the definition of Person, in determining the number of Persons, certain related parties are not counted. This exemption will cover purchases that are not in substance made pursuant to public bids. Thus, the exemption does not extend to “mini-tender offers,” which are widely disseminated bids for a small percentage of the target’s shares. Mini bids are subject to regulation in the U.S., Canada, and the U.K. (through its Tender Offer Rules in Appendix 5 of the U.K. Takeover Code). There can be abuses with these transactions, such as uninformed shareholders tendering into offers that are deliberately made at a price below the trading value of the shares. For example, the exemption would not apply, if an Offeror made an offer to more than ten shareholders of the Offeree Issuer to purchase shares which amounted to 1% of the Offeree Issuer’s shares. Also, there is no *de minimis* exemption as set out in Section 4.5 of the Can TO Reg; with a ten Person limit there is no need for a *de minimis* exemption. Note: Section

4.1 of the Can TO Reg does not refer to convertible debt but Section 4.8, the analogous exemption for Issuer Bids, does. It seems that the provision should address convertible securities, and for that reason this section addresses them. As a result of the ten Person limit, as a practical matter, this exemption will rarely be available.

Even if this exemption is applicable, if, for example, as a result of purchases pursuant to this exemption, the acquirer holds more than 30% of the Equity Securities of the Offeree Issuer, the acquirer will be obligated to make a Mandatory Bid under the 30% Threshold Mandatory Bid.]

### **b) Anti-Abuse Rule**

For purposes of paragraph (a), if an Offeror makes an Offer to Acquire securities from a Person and the Offeror knows or ought to know after reasonable inquiry that

- (i) the Person acquired the securities in order that the Offeror might make use of the exemption under paragraph (a), then each Person from whom those securities were acquired must be included in the determination of the number of Persons to whom an Offer to Acquire has been made, or
- (ii) the Person from whom the acquisition is being made is acting as a nominee, agent, trustee, executor, administrator, or other legal representative for one or more other Persons having Beneficial Ownership of those securities, then each of those other Persons must be included in the determination of the number of Persons to whom an Offer to Acquire has been made.

[**Comment:** This anti-abuse rule comes from Section 4.2 Can TO Reg.]

### **c) Reporting**

An Offeror making a bid under paragraph (a) must issue and file with the Applicable SA, at least 5 Business Days before the Commencement of the bid, a news release containing the following information:

- (i) the class and number of Equity Securities;
- (ii) the dates, if known, on which the Takeover Bid will Commence and expire;
- (iii) the value, in the currency of the country of each exchange on which the applicable securities are traded, of the consideration offered per security;
- (iv) the manner in which the securities will be acquired; and
- (v) the reasons for the Takeover Bid.

## **2. Private Agreement Exemption [See § 4.2 Can TO Reg]**

### **a) Basic Exemption, Not Affecting Obligation to Make a Mandatory Bid**

A Takeover Bid is exempt from Section IV if all of the following conditions are satisfied:

- (i) purchases are made from not more than ten Persons in the aggregate pursuant to separately negotiated purchase agreements;
- (ii) the offer is not made generally to security holders of the Class of Equity Securities that is the subject of a Takeover Bid; and

(iii) the value of the consideration paid for any of the securities, including brokerage fees or commissions, is not greater than 1.05% of the market price of the securities as determined in accordance with Section III.B.7.

Purchases pursuant to this exemption will not prevent the transaction from triggering the obligation to make a Mandatory Bid.

[**Comment:** Canada sets the limit in paragraph (i) at five Persons; however, many bona fide privately negotiated purchases could be from more than five Persons, and for this reason the limit is set at ten Persons. Canada set the price limit in paragraph (iii) at 115% of the market price of the securities. This seems too high and for that reason the price limit is set at 1.05%, because the underlying principle of the Common Code is that any control premium should be shared by all of the shareholders.

As with the normal course exemption in Section VI.A.1, even if this exemption is applicable, if, for example, as a result of purchases pursuant to this exemption, the acquirer holds more than 30% of the Equity Securities of the Offeree Issuer, the acquirer will be obligated to make a Mandatory Bid under the 30% Threshold Mandatory Bid.]

### **b) Anti-Abuse Rule**

For purposes of paragraph (a), if an Offeror makes an Offer to Acquire securities from a Person and the Offeror knows or ought to know after reasonable inquiry that

- (i) the Person acquired the securities in order that the Offeror might make use of the exemption under paragraph (a), then each Person from whom those securities were acquired must be included in the determination of the number of Persons to whom an Offer to Acquire has been made, or
- (ii) the Person from whom the acquisition is being made is acting as a nominee, agent, trustee, executor, administrator, or other legal representative for one or more other Persons having Beneficial Ownership of those securities, then each of those other Persons must be included in the determination of the number of Persons to whom an Offer to Acquire has been made.

## ***B. Exempt Issuer Bids [See Part 4, Division 2, Can TO Reg]***

### **1. Issuer Acquisition or Redemption Exemption [See § 4.6 Can TO Reg]**

An Issuer Bid for a Class of Equity Securities is exempt from Section IV if any of the following conditions are satisfied:

- (a) the securities are purchased, redeemed, or otherwise acquired in accordance with the terms and conditions attaching to the Class of Equity Securities that permit the purchase, redemption, or acquisition of the securities by the Issuer without the prior agreement of the owners of the securities;
- (b) the purchase, redemption or other acquisition is required by the terms and conditions attaching to the Class of Equity Securities or by the statute under which the Issuer was incorporated, organized or continued; or

(c) the terms and conditions attaching to the Class of Equity Securities contain a right of the owner to require the Issuer of the securities to redeem, repurchase, or otherwise acquire the securities, and the securities are acquired under the exercise of the right.

## **2. Employee, Executive Officer, Director and Consultant Exemption [See § 4.7 Can TO Reg]**

An Issuer Bid is exempt from Section IV if the securities are acquired from a current or former employee, executive officer, director, or Consultant of the Issuer or of an Associate of the Issuer, and

(a) the value of the consideration paid for any of the securities acquired is not greater than the market price of the securities at the date of the acquisition, determined in accordance with Section III.B.7, and

(b) the aggregate number of securities or, in the case of convertible debt securities, the aggregate principal amount of securities acquired by the Issuer within any period of 12 months in reliance on the exemption provided by this paragraph does not exceed 5% of the securities of that class outstanding at the beginning of the 12-month period.

## **3. Normal Course Issuer Bid Exemption [See § 4.8 Can TO Reg]**

### **a) Basic Exemption**

An Issuer Bid is exempt from Section IV if all of the following conditions are satisfied:

(i) the bid is for not more than 5% of the outstanding securities of a Class of Equity Securities of the Issuer;

(ii) the aggregate number of securities or, in the case of convertible debt securities, the aggregate principal amount of securities acquired in reliance on this exemption by the Issuer, its Associates, and any Person Acting Jointly or in Concert with the Issuer (the Purchasing Parties) within any 12-month period does not exceed 5% of the securities of that class outstanding at the beginning of the 12-month period;

(iii) the value of the consideration paid for any of the securities acquired is not in excess of the market price at the date of acquisition as determined in accordance with Section III.B.7, plus reasonable brokerage fees or commissions actually paid; and

(iv) the Offer to Acquire is made to no more than ten Persons.

**[Comment:** This exemption is essentially the same as the normal course exemption to Takeover Bids. Because of the ten Person limit, there is no need for a *de minimis* exemption.]

### **b) Anti-Abuse Rule**

For purposes of paragraph (a), if in an Issuer Bid, the Issuer makes an Offer to Acquire securities from a Person and the Issuer knows or ought to know after reasonable inquiry that

(i) the Person acquired the securities in order that the Issuer might make use of the exemption under paragraph (a), then each Person from whom those securities were acquired must be included in the determination of the number of Persons to whom an Offer to Acquire has been made, or

(ii) the Person from whom the acquisition is being made is acting as a nominee, agent, trustee, executor, administrator or other legal representative for one or more other Persons having Beneficial Ownership of those securities, then each of those other Persons must be included in the determination of the number of Persons to whom an Offer to Acquire has been made.

### **c) Filing**

An Issuer making a bid under paragraph (a) must issue and file with the Applicable SA, at least 5 Business Days before the Commencement of the bid, a news release containing the following information:

- (i) the class and number of Equity Securities;
- (ii) the dates, if known, on which the Issuer Bid will Commence and expire;
- (iii) the value, in the currency of the country of each exchange on which the applicable securities are traded, of the consideration offered per security;
- (iv) the manner in which the securities will be acquired; and
- (v) the reasons for the Issuer Bid.

## **§ VII Reports and Announcements of Acquisitions and Short Positions by Persons who are Not Offerors or Offeree Issuers [See Part 5 Can TO Reg]**

### ***A. Purpose, Presumption and Definitions***

#### **1. Purpose and Presumption**

The purpose of this Section VII is to facilitate market transparency by ensuring that the market place is aware of:

- (a) a Person's 5% or more stock ownership in a Public Cross Listed Company prior to the Commencement of (and without respect to whether there ever will be) a Takeover or Merger Transaction (the Early Warning system in Section VII.B);
- (b) a Person's 1% or more stock ownership in an Offeree Issuer or Offeror after the Commencement of a Takeover or Merger Transaction (Section VII.C);
- (c) a Person's 1% or more Net Short Positions in an Offeree Issuer or Offeror after the Commencement of a Takeover or Merger Transaction; (Section VII.D);
- (d) a Public Cross Listed Issuer's change of control and similar provisions (Section VII.G); and
- (e) officers' and directors' stock ownership in a Public Cross Listed Issuer (Section VII.H).

Each of these disclosure items could be important in planning or implementing a Takeover or Merger Transaction. These provisions do not apply if the disclosures are otherwise reported in accordance with a comparable rule.

#### **2. Presumption**

Given the market transparency purpose of the provisions in Section VII, any doubt concerning the application of these provisions will be resolved in favor of the interpretation that results in the most comprehensive disclosure.

#### **3. Definition of Purchasing Non-Offeror and Purchasing Non-Offeror's Securities [See § 5.1 Can TO Reg]**

For purposes of Section VII.B and C,

- (a) "Purchasing Non-Offeror" means a Person who acquires or otherwise becomes the owner of a security of an Issuer, other than by way of a Takeover Bid or an Issuer Bid made in compliance with Section IV, and
- (b) "Purchasing Non-Offeror's Securities" means securities of an Offeree Issuer Beneficially Owned on the date of an Offer to Acquire, by the Purchasing Non-Offeror.

[**Comment:** In the Can TO Reg, these terms are referred to as Acquiror and Acquiror's Securities. These definitions have significance for the early warning system in Section VII.B and in the reports of acquisitions by non-Offerors during bids in Section VII.C. Thus, these

Purchasing Non-Offerors are parties, other than the Offeror, that purchase, or otherwise realize an increase in ownership of the shares of the Offeree Issuer.]

## ***B. Early Warning Applicable to Early Warning Shareholders [See § 5.2 Can TO Reg]***

### **1. Reporting Required by Early Warning Shareholders at the 5% Threshold: News Release and Form 6**

#### **a) Application and Definitions of Early Warning Shareholder, Ultimate Early Warning Shareholder, and Subsidiary Early Warning Shareholder**

Unless otherwise reported in accordance with a comparable rule, this Section VII.B applies to a Purchasing Non-Offeror who directly or indirectly (including through any contract, arrangement, understanding, relationship, or formation of a group) acquires (or otherwise realizes an increase in) Beneficial Ownership of voting or Equity Securities of any class of securities of a Public Cross Listed Issuer (or securities convertible into voting or Equity Securities of any class of securities of a Public Cross Listed Issuer) constituting 5% or more of the outstanding securities of that class (such Purchasing Non-Offerors being hereafter referred to as an Early Warning Shareholder). An Early Warning Shareholder with the highest level of Beneficial Ownership is referred to here as the Ultimate Early Warning Shareholder, and an Early Warning Shareholder who is not an Ultimate Early Warning Shareholder is referred to here as a Subsidiary Early Warning Shareholder.

**[Comment:** A person can become an Early Warning Shareholder by purchasing 5% or more of the shares of an Offeree Issuer or, for example, (1) by having its interest increased to 5% or more as a result of the receipt of shares by gift or inheritance, or (2) by an increase in its percentage interest as a result of a redemption by a Public Cross Listed Issuer of its shares. For example, assume that a shareholder (S) owns 4% of the stock of corporation (C), C engages in an Issuer Bid in which it purchases 10% of its outstanding stock, and S does not have any of her shares purchased in the bid. After the bid, S owns more than 5% of the outstanding stock of C and, therefore, is an Early Warning Shareholder.

If several shareholders with less than 5% of the shares of a Public Cross Listed Issuer form a group for purposes of dealing with such shares, then on formation the group becomes an Early Warning Shareholder. Such groups fall within the definition of Person.

The concepts of the Ultimate Early Warning Shareholder and the Subsidiary Early Warning Shareholder, which are important for reporting purposes, are illustrated in the following examples. Assume that P, a publicly held corporation without a controlling shareholder, owns all of the stock of S. S purchases 7% of the stock of PCLI, a Public Cross Listed Issuer. Both P and S are Early Warning Shareholders because they both have Beneficial Ownership of more than 5% of the stock of PCLI. P is an Ultimate Early Warning Shareholder, and S is a Subsidiary Early Warning Shareholder. On the other hand, if P purchased 4% of the stock of PCLI and S purchased 3%, P would be both an Early Warning Shareholder and an Ultimate Early Warning Shareholder because it has Beneficial Ownership of 5% or more of the shares of PCLI, but S would not be an Early Warning Shareholder because S does not have Beneficial Ownership of 5% or more of the stock of PCLI.



The Can TO Reg sets the threshold at 10%. In the U.S., the threshold under Section 13(d) is 5%; in the U.K., the threshold is 3%.

The disclosures required by this rule apply prior to the Commencement of a Takeover or Merger Transaction (hence the name Early Warning). Under Section VII.C, a 1% threshold applies after the Commencement of a Takeover or Merger Transaction.]

### **b) Making the 5% Determination from Public Records**

In determining if the 5% threshold is satisfied, a Purchasing Non-Offeror may rely on the number of securities outstanding as contained in the most recently available public filing by the Public Cross Listed Issuer, unless such Purchasing Non-Offeror has reason to believe such information is not current.

### **c) News Release Requirement for the Ultimate Early Warning Shareholders**

An Ultimate Early Warning Shareholder shall on the day it became such a shareholder, promptly (i) issue to the general public a news release specifying the information set out in paragraph (4), (ii) file the news release with the Applicable SA, and (iii) satisfy the delivery requirements in Section VII.F.

### **d) Form 6 Filing Requirement for the Ultimate Early Warning Shareholder and Any Subsidiary Early Warning Shareholder**

An Ultimate Early Warning Shareholder and each Subsidiary Early Warning Shareholder shall either jointly or separately, in accordance with the instructions to Form 6, within 2 Business Days of the day on which it became an Early Warning Shareholder, (i) file with the Applicable SA a report containing the information required by Form 6, Reports by Early Warning Shareholders, and (ii) satisfy the delivery requirements in Section VII.F.

## **2. Revised News Release and Form 6 When 1% or Material Change**

An Ultimate Early Warning Shareholder must issue to the general public an additional news release and both the Ultimate Early Warning Shareholder and any Subsidiary Early Warning Shareholder must file a report in accordance with paragraph (1)(d) each time any of the following events occur:

(a) such Early Warning Shareholder acquires, or disposes of, Beneficial Ownership of, or control or direction over,

(i) at least 1% or more of the outstanding securities of the class of Equity Securities that was the subject of the most recent report required to be filed by the Early Warning Shareholder under this section, or

(ii) securities convertible into at least 1% or more of the outstanding securities referred to in subparagraph (i); or

(b) there is a change in a Material fact (including dropping below the 5% ownership level) contained in the report required under paragraph (1)(d).

[**Comment:** The revised filing is required if the Early Warning Shareholder either increases or decreases its ownership of the Offeree Issuer's shares by 1% or more or otherwise drops below the 5% ownership level. This is the same as the rule in the U.S. under Section 13(d). The Can TO Reg only applies to increases of 1%. All other Material changes are required to be reported in a revised filing.]

### **3. No Additional Sales or Purchases for One Business Day after Report**

During the period beginning on the occurrence of an event in respect of which a report or further report is required to be filed under this section and ending on the expiry of one Business Day after the date that the report or further report is filed, the Early Warning Shareholder must not acquire or Offer to Acquire Beneficial Ownership of (a) any securities of the class in respect of which the report or further report is required to be filed, or (b) any securities convertible into securities of that class.

### **4. Scope of News Release**

A news release or further news release required under paragraph (1) or (2) must set out

- (a) the name, address, phone number, and email address of the Ultimate Early Warning Shareholder and if the Ultimate Early Warning Shareholder is a group, the name of the group and the name of each member of the group,
- (b) the number of securities of the Offeree Issuer that the Early Warning Shareholder acquired direct or indirect Beneficial Ownership of in the transaction that gave rise to the requirement under paragraph (1) or (2) to issue the news release,
- (c) the number of securities and the percentage of outstanding securities of the Offeree Issuer that the Early Warning Shareholder has direct or indirect Beneficial Ownership of immediately after the acquisition described in paragraph (b),
- (d) the name of the market in which the acquisition described in paragraph (b) took place, and
- (e) the purpose of the Early Warning Shareholder in making the acquisition described in paragraph (b), including any intention of the Early Warning Shareholder to increase its Beneficial Ownership of any of the securities of the Offeree Issuer.

[**Comment:** Section VII.F requires wide distribution of the news release and report.]

## ***C. Reports by 1% Purchasing Non-Offeror during a Takeover or Merger Transaction [See § 5.3 Can TO Reg]***

### **1. Application at the 1% Threshold in the Offeree Issuer or Offeror**

Unless otherwise reported in accordance with a comparable rule, after the Commencement of a Takeover or Merger Transaction under Section IV, this Section VII.C applies to a Purchasing Non-Offeror who directly or indirectly (including through any contract, arrangement, understanding, relationship, or formation of a group) acquires (or otherwise realizes an increase

in) Beneficial Ownership of voting or Equity Securities of any class of securities of either the Offeree Issuer or the Offeror (or securities convertible into voting or Equity Securities of any class of securities of such Offeree Issuer or Offeror) constituting 1% or more of the outstanding securities of that class (such Purchasing Non-Offeror is hereafter referred to as a 1% Purchasing Non-Offeror).

## **2. News Release**

A 1% Purchasing Non-Offeror must, before the opening of trading on the next Business Day after becoming a 1% Purchasing Non-Offeror, (a) issue to the general public, (b) file with the Applicable SA a news release containing the information required by paragraph (4), and (c) satisfy the delivery requirements in Section VII.F.

[**Comment:** This 1% threshold for disclosure by non-Offerors that acquire shares of the Offeree Issuer or the Offeror only applies after the Commencement of a Takeover or Merger Transaction. The Can TO Reg sets the threshold at 5% and only applies to disclosure regarding the Offeree Issuer. Rule 8 of the U.K.'s Takeover Code sets the threshold at 1% and applies to both the Offeree Issuer and Offeror. However, it does not apply to the Offeror if the offer is for all cash. In the U.S., the standard 5% threshold under Section 13(d) applies only with respect to the Offeree Issuer. Section VII.F requires wide distribution of the news release.]

## **3. Revised News Release When 1% Change**

A 1% Purchasing Non-Offeror must issue to the general public and file with the Applicable SA an additional news release in accordance with paragraph (4) before the opening of trading on the next Business Day each time the 1% Purchasing Non-Offeror, acquires, or disposes of, Beneficial Ownership of, in aggregate, at least 1% or more (or drops below the 1% ownership level) of the outstanding securities of the Class of Equity Securities that was the subject of the most recent news release required to be filed by the 1% Purchasing Non-Offeror under this section.

[**Comment:** The Can TO Reg sets the threshold at 1%, but only deals with acquisitions, not dispositions.]

## **4. Scope of News Release**

A news release or further news release required under paragraph (2) or (3) must set out

- (a) the name, address, phone number, and email address of the 1% Purchasing Non-Offeror,
- (b) the number of securities of the Offeree Issuer or Offeror that the 1% Purchasing Non-Offeror, directly or indirectly, acquired Beneficial Ownership of in the transaction that gave rise to the requirement under paragraph (2) or (3) to issue the news release,
- (c) the number of securities and the percentage of outstanding securities of the Offeree Issuer and Offeror that the 1% Purchasing Non-Offeror has, directly or indirectly, Beneficial Ownership of immediately after the acquisition described in paragraph (b),
- (d) the number of securities of the Offeree Issuer and Offeror that the 1% Purchasing Non-Offeror has acquired Beneficial Ownership of since the Commencement of the Takeover or Merger Transaction,
- (e) the name of the market in which the acquisition described in paragraph (b) took place, and

(f) the purpose of the 1% Purchasing Non-Offeror in making the acquisition described in paragraph (b), including any intention of the 1% Purchasing Non-Offeror to increase its Beneficial Ownership of the securities of the Offeree Issuer or Offeror.

[**Comment:** Section VII.F requires wide distribution of the news release.]

## ***D. Reporting of Significant Short Position in the Equity Securities of an Offeree Issuer and Offeror [Not in Can TO Reg]***

### **1. Reporting Required**

Unless otherwise reported in accordance with a comparable rule, if, after the Commencement of a Takeover or Merger Transaction under Section IV, a Person, its Associates, and Persons Acting Jointly or in Concert with such Person (the Short Person) have, in the aggregate, a Net Short Position in at least 1% of the outstanding voting or Equity Securities, or securities convertible into voting or Equity Securities, of the Offeree Issuer or the Offeror, such Short Person must before the opening of trading on the next Business Day after establishing such position (or after the Commencement of the Takeover or Merger Transaction) (a) issue to the general public and file with the Applicable SA a news release specifying the information set out in paragraph (3), and (b) satisfy the delivery requirements in Section VII.F.

[**Comment:** Information on significant short positions in an Offeree Issuer or Offeror could be very important to the market place, and this provision requires such disclosure if the short position exceeds 1%. This is similar to the requirements of Rule 8 of the U.K.'s Takeover Code; however, under Rule 8, disclosure is not required with respect to an Offeror that makes an all cash offer.]

### **2. Revised News Release When 1% Change**

A Short Person must issue to the general public and file with the Applicable SA an additional news release in accordance with paragraph (3) before the opening of trading on the next Business Day each time the aggregate net short position of the Short Person changes by at least 1% or more (or drops below the 1% net short position level) of the outstanding securities of the Class of Equity Securities that was the subject of the most recent news release required to be filed by the Short Person under this section.

### **3. Scope of News Release**

A news release or further news release required under paragraph (1) or (2) must set out

- (a) the name, address, phone number, and email address of each of the Persons constituting the Short Person; and
- (b) the number and percentage of the outstanding Equity Securities of the Offeree Issuer or Offeror in which the Short Person has a short position.

[**Comment:** Section VII.F requires wide distribution of the news release.]

## ***E. Duplicate News Release Not Required [See § 5.4 Can TO Reg]***

If the facts in respect of which a news release is required to be filed under Sections VII.B and C are identical, a news release is required only under the provision requiring the earlier news release.

### ***F. Copies of News Release and Report [See § 5.5 Can TO Reg]***

A Purchasing Non-Offeree and a Short Person that issues a news release or files a report under Sections VII.B, C, or D, must promptly send a copy of each news release and report to the Public Cross Listed Issuer, and each exchange on which the securities of the Public Cross Listed Issuer are listed. Also, the news release must be distributed in each jurisdiction in which the securities of the Public Cross Listed Issuer are traded on an exchange.

### ***G. Reporting by Public Cross Listed Issuers of Change of Control and Similar Provisions [Not in Can TO Reg]***

Unless otherwise reported in accordance with a comparable rule, each Public Cross Listed Issuer shall, within 30 Business Days of the effective date of this Common Code, prominently disclose on its Web site and file with the Appropriate SA and with each exchange on which its shares are traded, a current description (which must be kept current) of any agreement that could have a material impact in any Takeover or Merger Transaction in which the Issuer becomes an Offeree Issuer. Such agreements shall include any Material agreement with a change of control provision and any shareholder voting agreement. Upon request of the Applicable SA, an exchange, or a bona fide potential Offeror, the Public Cross Listed Issuer shall promptly deliver to the Person making the request a copy of any such agreement.

[**Comment:** The purpose of this provision is to ensure that a potential Offeror will have access to key information needed in structuring a Takeover or Merger Transaction. If the Public Cross Listed Issuer is required to disclose this information in its regular reports, then this provision falls away.]

### ***H. Reporting by Officers and Directors of Public Cross Listed Issuers [Not in Can TO Reg]***

Unless otherwise reported in accordance with a comparable rule, every Person who is a director or an officer of a Public Cross Listed Issuer shall, within 30 Business Days of the effective date of this Common Code, file with the Appropriate SA and deliver to the Public Cross Listed Issuer, a statement setting out the amount of all Equity Securities of such Issuer of which he or she, and, to his or her knowledge after reasonable investigation, his or her Associates, are the Beneficial Owner. Within 2 Business Days after there has been a change in such ownership, the officer or director shall file with the Appropriate SA, and deliver to the Public Cross Listed Issuer, a statement reflecting such change. The Public Cross Listed Issuer shall promptly file any such reports with each exchange on which its shares are traded.

[**Comment:** The purpose of this provision, which is based on Section 16(a) of the U.S. Securities Exchange Act of 1934, is to ensure that a potential Offeror will be informed concerning the share ownership by officers and directors of a Public Cross Listed Issuer. Although Section 16(a) requires only monthly reporting, this provision requires reporting 2 Business Days after any change in ownership. If officers and directors are otherwise required to provide this information, then this provision falls away. Although Section 16(a) also requires reports by more than 10% shareholders, such reports are required under Section VII.B of the Common Code by 5% shareholders.]

## **§ VIII Other Matters [Not in Can TO Reg]**

### ***A. No False Markets [Not in Can TO Reg]***

No Person shall engage in any transaction that creates false markets with respect to the securities of the Offeree Issuer, the Offeror, or any other company concerned by the Takeover or Merger Transaction in such a way that the rise or fall of the prices of the securities becomes artificial and the normal functioning of the markets is distorted. Enforcement of matters addressed in this section may, at the election of the Applicable SA, be under the applicable laws of the jurisdiction in which the Applicable SA is located.

[Source: EU TO Art § 3(1)(d)]

### ***B. Sell-Out Right [Not in Can TO Reg But in Can Corp Law]***

#### **1. Basic Right**

Unless a provision similar to this section is contained in the company law applicable to the Offeree Issuer, where in connection with a Takeover Bid, 90% or more of a class of Equity Securities of the Offeree Issuer held by Non-Affiliated Shareholders is acquired by an Offeror, its Associates, or any Person Acting Jointly or in Concert with the Offeror, then any Non-Affiliated Shareholder who after the Takeover Bid continues to hold securities of that class shall be entitled in accordance with this section to require the Offeror to acquire such shareholder's securities of that class.

[**Comment:** This sell-out right would arise if, for example, an Offeror (1) made a Voluntary Any and All offer for the shares of the Offeree Issuer, which had all Non-Affiliated Shareholders; (2) acquired 95% of the shares in the bid; and (3) did not exercise its squeeze-out right. In such case the 5% non-tendering shareholders could exercise this sell-out right.

This sell-out right is the mirror image of the squeeze-out right present in the company laws in all of the Cooperating Jurisdictions. Under a squeeze-out right, an Offeror has the ability to squeeze-out minority shareholders of the Offeree Issuer after the Offeror has acquired 90% of the Offeree Issuer's shares in a Takeover Bid. Under the Company Law Savings rule, these laws continue to apply, and any squeeze-out occurring after a Takeover Bid would be governed by the squeeze-out provisions of the applicable companies act. The squeeze-out right is contained in EU TO Dir Art 15 and in the company law in both the U.K. and Canada.

Article 16 of the EU TO Dir and company law in both the U.K. and Canada also provide for a sell-out right similar to the provision in this section. Within the Cooperating Jurisdictions, only the company law of St. Kitts contains a sell-out right. Under paragraph (1), if an Offeree Issuer is incorporated in St. Kitts, the squeeze-out provision of St. Kitt's company law would apply. On the other hand, if an Offeree Issuer is incorporated in any other Cooperating Jurisdiction, then the sell-out provision in this section would apply.

This provision is based on Section 26 of the Trinidad and Tobago TO Reg. However, rather than having fair value determined by a court as is the case with Section 26, pursuant to Section VII.B.8, fair value is determined by an Independent Valuation Expert appointed by the

Applicable SA. Consideration could be given to having a court in the jurisdiction of the Applicable SA appoint the Independent Valuation Expert; however, as an expert in takeovers, it will likely be more efficient for the Applicable SA to make the appointment. As a routine matter, SAs could familiarize themselves with professional valuation firms that could serve this function.]

## **2. Notice**

Every Offeror, within 25 Business Days after it becomes aware that Non-Affiliated Shareholders are entitled to require it to acquire their securities under paragraph (1), shall send a written notice to all such shareholders advising each of them that they may within 50 Business Days after the date of such notice, require the Offeror to acquire their securities.

## **3. Content of Notice**

The notice sent by the Offeror under paragraph (2) shall:

- (a) set out a price that the Offeror is willing to pay for the securities, which shall be no less than, and in the same form as, the consideration offered by the Offeror in the transaction giving rise to the obligation under this section;
- (b) give the basis for arriving at the price;
- (c) state the location where any supporting material used for arriving at the price may be examined and extracts taken therefrom by the shareholder or a duly authorized agent; and
- (d) state that if the shareholder is not satisfied with the price offered by the Offeror in the notice, the shareholder is entitled to have the fair value of such securities fixed by an Independent Valuation Expert (determined without regard to paragraph (c) of the definition of such term, relating to the appointment by an Independent Committee of Directors) appointed by the Applicable SA.

## **4. Exercise of Sellout Right**

Where a Non-Affiliated Shareholder receives a notice under paragraph (2) and wishes the Offeror to acquire the applicable securities, the shareholder may, within 50 Business Days after the date of the notice:

- (a) elect to accept the price offered by the Offeror by giving notice of acceptance to the Offeror and by forthwith sending the certificates for the applicable securities to the Offeror; or
- (b) notify the Offeror that the shareholder wishes to have the fair value of the applicable securities determined by the Independent Valuation Expert.

## **5. Application to Applicable SA**

Where a Non-Affiliated Shareholder has given notice of a desire to have the fair value of the applicable securities determined by an Independent Valuation Expert, the Offeror shall make an application to the Applicable SA within 75 Business Days after the date of the notice under paragraph (2) for the appointment of an Independent Valuation Expert.

## **6. Failure of Offeror to Send Notice**

If an Offeror fails to send a notice under paragraph (2), a Non-Affiliated Shareholder, after giving the Offeror 25 Business Days notice of intention so to do, may apply to the Applicable SA

to have the fair value of the applicable securities determined by an Independent Valuation Expert.

### **7. Failure of Offeror to Make an Application**

If an Offeror fails to make an application to the Applicable SA as required under paragraph (5), a Non-Affiliated Shareholder may make the application.

### **8. Appointment of Independent Valuation Expert**

Upon an application to the Applicable SA under paragraph (5), (6) or (7):

- (a) the Applicable SA shall within 30 Business Days appoint an Independent Valuation Expert;
- (b) the Independent Valuation Expert shall notify each Non-Affiliated Shareholder covered by paragraphs (5), (6), or (7) that such shareholder has a right to appear and be heard in person or by attorney-at-law by such Independent Valuation Expert at a specified time and place;
- (c) the Independent Valuation Expert shall render a decision specifying the fair value of the shares within 6 months of the date of appointment by the Applicable SA;
- (d) all Non-Affiliated Shareholders covered by paragraphs (5), (6), or (7) are bound by the decision of the Independent Valuation Expert; and
- (b) unless the Applicable SA determines that equity requires that all or a portion of the fees and expenses of the Independent Valuation Expert be allocated to one or more of the Non-Affiliated Shareholders, such fees and expenses shall be the full responsibility of the Offeror.

### **9. Prompt Payment and Interest**

Promptly, and in no case later than 5 Business Days, after the rendering by the Independent Valuation Expert of the decision regarding fair value of the shares, the Offeror shall pay to the shareholders exercising the sell-out right such fair value plus interest compounded and computed on a monthly basis at the prime rate in the jurisdiction where the Applicable SA is located plus 2 percentage points from the date of the Closing of the Takeover Bid to the date of payment.

### **10. Appeals**

The decision of the Independent Valuation Expert shall be final and non-appealable, except for claims of fraud.



## **§ IX General Exemptive Authority of Applicable SA [See § 6.1 Can TO Reg]**

With the consent of a majority of the SAs, pursuant to the Cooperation, Periodic Review, and Amendment Rules of Section XIII of the Choice of Law Rules, the Applicable SA may grant an exemption to this Common Code.

[**Comment:** The consultation requirement will (1) guard against any real or asserted favoritism by an SA, (2) keep the number of requests for exemptions to a minimum, and (3) eliminate the concern an SA may have that by granting an exemption it has not acted in the public interest.]

# **§ X Form 1, Takeover Bid Circular [See Can TO Reg, Form 62-104F1]**

## **A. Part 1 — General Provisions**

### **1. Applicability to Mergers or Similar Transactions**

Similar disclosure principles shall apply, *mutatis mutandis*, to the proxy statement or other disclosure document for a Merger or Similar Transaction, unless the applicable company or other law requires essentially comparable disclosures.

[**Comment:** For example, the disclosures required below for Insider Takeover Bids will also apply to the disclosure document for a Merger or Similar Transaction.]

### **2. Defined Terms**

If a term is used but not defined in this Form, refer to Section III of the Common Takeover Code.

### **3. Plain Language**

Write the Takeover Bid Circular so that readers are able to understand it and make informed investment decisions. Offerors should apply plain language principles when they prepare a Takeover Bid Circular including:

- using short sentences;
- using definite everyday language;
- using the active voice;
- avoiding superfluous words;
- organizing the document into clear, concise sections, paragraphs and sentences;
- avoiding jargon;
- using personal pronouns to speak directly to the reader;
- avoiding reliance on glossaries and defined terms unless it facilitates understanding of the disclosure;
- avoiding vague boilerplate wording;
- avoiding abstract terms by using more concrete terms or examples;
- avoiding multiple negatives;
- using technical terms only when necessary and explaining those terms;
- using charts, tables and examples where it makes disclosure easier to understand.

If you use technical terms, explain them in a clear and concise manner.

### **4. Numbering and Headings**

The numbering, headings and ordering of items included in this Form are guidelines only. You do not need to include the heading or numbering or follow the order of items in this Form. You do not need to refer to inapplicable items and, unless otherwise required in this Form, you may omit negative answers to items. Disclosure provided in response to any item need not be repeated elsewhere in the circular.

## **B. Part 2 — Contents of Takeover Bid Circular**

### **1. Item 1. Summary Term Sheet of Bid Circular**

Provide security holders with a summary term sheet that is written in plain language. The summary term sheet must briefly describe in bullet point format the most Material terms of the Takeover Bid. The summary term sheet must provide security holders with sufficient information to understand the essential features and significance of the Takeover Bid. The bullet points must cross-reference a more detailed discussion contained in the Bid Circular.

#### **Instructions:**

- a. The summary term sheet must not recite all information contained in the Bid Circular. The summary term sheet is intended to serve as an overview of all Material matters that are presented in the Bid Circular.
- b. The summary term sheet must begin on the first or second page of the Bid Circular.
- c. The summary term sheet may be supplemented by or include questions and answers concerning the Takeover Bid.

[**Comment:** This requirement is based on the U.S tender offer rules. See Reg. MA, Rule 1001,]

### **2. Item 2. Name and Description of Offeror and Offeree Issuer**

(a) State the corporate name, address, phone number, and email address of the Offeror or, if the Offeror is an unincorporated entity, the full name, address, phone number, and email address under which it exists and carries on business, and give a brief description of its activities. Also provide such information with respect to each Person, including Associates of the Offeror, who is acting Jointly or in Concert with the Offeror in making the Offer to Acquire.

(b) State the corporate name, address, phone number, and email address of the Offeree Issuer or, if the Offeree Issuer is an unincorporated entity, the full name, address, phone number, and email address under which it exists and carries on business, and give a brief description of its activities.

### **3. Item 3. Securities Subject to the Bid**

State the class and number of outstanding securities that are the subject of the Takeover Bid and a description of the rights of the holders of any other Class of Equity Securities that have a right to participate in the offer. This information may be based on public filings by the Offeree Issuer.

### **4. Item 4. Time Periods**

State (a) the date the Takeover Bid Commenced or is expected to Commence (*see* Section IV.B.1), (b) the expected Deemed Start Date (*see* Section IV.B.9), and (c) the date the bid is expected to Close (*see* Section IV.E.5).

### **5. Item 5. Consideration**

State the consideration to be offered. If the consideration includes securities, state the particulars of the designation, rights, privileges, restrictions and conditions attaching to those securities.

### **6. Item 6. Ownership of Securities of Offeree Issuer**

State the number, designation and percentage of the outstanding securities of any Class of Equity Securities of the Offeree Issuer Beneficially Owned:

- (a) by the Offeror;
- (b) by each director and officer of the Offeror; and
- (c) if known after reasonable enquiry, by
  - (i) an Insider of the Offeror, other than a director or officer of the Offeror,
  - (ii) each Associate of the Offeror and of an Insider of the Offeror, and
  - (iii) any Person Acting Jointly or in Concert with the Offeror.

In each case where no securities are owned, directly or indirectly, state this fact.

### **7. Item 7. Trading in Securities of Offeree Issuer**

State, if known after reasonable enquiry, the following information about any securities of the Offeree Issuer purchased or sold by the Persons referred to in item 6 during the 6-month period (and in the case of an Insider Takeover or Merger Transaction, the 12-month period) preceding the date of the Commencement of the Takeover Bid:

- (a) the description of the security;
- (b) the number of securities purchased or sold;
- (c) the purchase or sale price of the security;
- (d) the date of the transaction.

If no such securities were purchased or sold, state this fact.

### **8. Item 8. Commitments to Acquire Securities of Offeree Issuer**

Disclose all agreements, commitments or understandings made by the Offeror, and, if known after reasonable enquiry, by the Persons referred to in item 6, to acquire securities of the Offeree Issuer, and the terms and conditions of those agreements, commitments or understandings.

### **9. Item 9. Terms and Conditions of the Bid**

State the Material terms of the Takeover Bid. If the obligation of the Offeror to take up and pay for securities under the Takeover Bid is conditional, state the particulars of each condition. Such information shall include:

- (a) The total number and class of securities sought in the offer;
- (b) The type and amount of consideration offered to security holders;
- (c) The scheduled expiry date;
- (d) Whether a Subsequent Offering Period will be available;
- (e) Whether the offer may be extended, and if so, how it could be extended;
- (f) The withdrawal rights with respect to securities tendered in the offer;
- (g) The procedures for tendering securities;
- (h) The manner in which securities will be accepted for payment;
- (i) An explanation of any Material differences in the rights of security holders as a result of the transaction;
- (j) A discussion of the regulatory requirements that must be satisfied prior to the Closing of the bid;
- (k) A brief statement as to the accounting treatment of the transaction;

- (l) A brief statement of the income tax treatment of the bid to the security holders of the Offeree Issuer in each jurisdiction in which such securities are traded on an exchange.

### **10. Item 10. Payment for Deposited Securities**

State the particulars of the method and time of payment of the consideration.

### **11. Item 11. Right to Withdraw Deposited Securities**

Describe the withdrawal rights specified in Section IV.E.3 of the Common Code of the security holders of the Offeree Issuer under the Takeover Bid. State that the withdrawal is made by sending a written notice to the designated depository and becomes effective on its receipt by the depository.

### **12. Item 12. Source of Funds**

State the source of any funds to be used for payment of deposited securities. If the funds are to be borrowed, state

- (a) the name of the lender,
- (b) the terms and financing conditions of the loan,
- (c) the circumstances under which the loan must be repaid, and
- (d) the proposed method of repayment.

### **13. Item 13. Trading in Securities to be Acquired**

Provide a summary showing:

- (a) the name of each principal market on which the securities sought are traded,
- (b) any change in a principal market that is planned following the Takeover Bid, including but not limited to listing or de-listing on an exchange,
- (c) where reasonably ascertainable, in reasonable detail, the volume of trading and price range of the class of the securities in the 6-month period preceding the date of the Commencement (*see* Section IV.B.1) of the Takeover Bid, or, in the case of debt securities, the prices quoted on each principal market, and
- (d) the date that the Takeover Bid to which the circular relates Commenced and the market price of the securities immediately before the Commencement.

### **14. Item 14. Arrangements Between the Offeror and the Directors and Officers of Offeree Issuer**

Disclose the particulars (including values involved) of any Material agreement, commitment or understanding made or proposed to be made between the Offeror and (to its knowledge after reasonable investigation) its Associates, and Persons Acting Jointly or in Concert with the Offeror (the Purchasing Parties) and the Offeree Issuer and its Associates, including particulars of any payment or other benefit proposed to be made or given by way of compensation for loss of office or for remaining in or retiring from office if the Takeover Bid is successful.

### **15. Item 15. Arrangements between the Offeror and Security Holders of Offeree Issuer**

- (a) Disclose the particulars (including values involved) of any Material agreement, commitment or understanding made or proposed to be made between the Offeror and (to its knowledge after reasonable investigation) its Associates, and Persons Acting Jointly or in Concert with the

Offeror (the Purchasing Parties) and a security holder of the Offeree Issuer entered into within the past two years or relating to the bid, including a description of its purpose, its date, the identity of the parties, and its terms and conditions. Disclosure with respect to each agreement, commitment or understanding, other than an agreement that a security holder will tender securities to a Takeover Bid made by the Offeror, must include:

- (i) a detailed explanation as to how the Offeror determined that entering into it was not prohibited by Section IV.D.2 of the Common Code, or
- (ii) disclosure of the exception, set out in Section IV.D.3, to the prohibition against collateral agreements relied on by the Offeror and the facts supporting that reliance.

(b) If the Offeror is relying on an exception to the prohibition against collateral agreements under paragraph (a)(ii) of Section IV.D.3, and if the information is available to the Offeror, disclose the review process undertaken by the Independent Committee of Directors of the Offer Issuer and the basis on which the Independent Committee of Directors made its determination under clause (a)(ii)(A) or (B) of Section IV.D.3.

## **16. Item 16. Arrangements with or Relating to the Offeree Issuer**

Disclose the particulars (including values involved) of

- (a) any Material agreement, commitment or understanding made between the Offeror and (to its knowledge after reasonable investigation) its Associates, and Persons Acting Jointly or in Concert with the Offeror (the Purchasing Parties) and the Offeree Issuer and its Associates (i) entered into within the past two years, or (ii) relating to the Takeover Bid, and
- (b) any other agreement, commitment or understanding of which the Purchasing Parties are aware that could affect Control of the Offeree Issuer, including an agreement with change of control provisions, a security holder agreement or a voting trust agreement that the Purchasing Parties have access to.

## **17. Item 17. Purpose of the Bid**

State the purpose of the Takeover Bid. Disclose the particulars of any plans or proposals for

- (a) subsequent transactions involving the Offeree Issuer such as a going private transaction, including a planned Exempt Second-Step Merger, or
- (b) Material changes in the affairs of the Offeree Issuer, including, for example, any proposal to liquidate the Offeree Issuer, to sell, lease, or exchange all or a substantial part of its assets, to amalgamate it with any other business organization or to make any Material changes in its business, corporate structure (debt or equity), management or personnel.

## **18. Item 18. Insider Bids—Valuation, Independent Committee of Directors, and Majority of Minority—and Conflicts of Interest**

### **a) Insider Takeover Bids**

If the Takeover Bid is an Insider Takeover Bid, include the disclosures required by Section II.B, including those regarding (i) the Formal Valuation and any other valuations or fairness opinions received within 24 months of the initiation of the Insider Takeover Bid; (ii) the decision of the Independent Committee of Directors, including a discussion of any Materially contrary view or abstention by a director and any Material disagreement between the board and the Independent Committee of Directors; (iii) the effect of the Majority of the Minority Tendering Condition, including the Offeror's identification, after reasonable investigation, of the shareholders of the Offeree Issuer that are not Non-Affiliated Shareholders; and (iv) any bona fide prior offer that relates to the Offeree Issuer or its securities or is otherwise relevant to the Insider Takeover Bid, which offer was received by the board of the Offeree Issuer during the 24 months before the Insider Takeover Bid.

### **b) Conflicts of Interest**

If Material, describe any actual or potential conflict of interest faced by any Associate of the Offeree Issuer.

## **19. Item 19. Securities of an Offeror or Other Issuer to be Exchanged for Securities of Offeree Issuer**

### **a) Prospectus Disclosure Rule**

If a Takeover Bid provides that the consideration for the securities of the Offeree Issuer is to be, in whole or in part, securities of the Offeror or other Issuer, include the financial statements and other information required in a prospectus that would be applicable to the Offeror or other Issuer if it were issuing comparable securities in a normal capital raising transaction in the jurisdiction of the Applicable SA.

[**Comment:** This provision makes it clear that the prospectus requirements of the jurisdiction of the Applicable SA apply if the consideration offered in the transaction consist in whole or in part of securities of the Offeror or another Issuer. These transactions are often referred to as exchange offers. This provision would require prospectus type disclosure with regard to the Investment Election in the Ansa McAl offer for BS&T (see Transactions Report). As noted in the comments to the definition of Related Transaction, the Investment Transaction would be considered a Related Transaction and, therefore, within the concept of a Takeover or Merger Transaction.]

### **b) Financial Statements**

Unless the Offeror is issuing securities that are less than 20% of its outstanding voting securities prior to the completion of the Takeover Bid, for the purposes of paragraph (a), provide the pro forma financial statements that would be required in a prospectus assuming that

- (i) the likelihood of the Offeror completing the acquisition of the Offeree Issuer is high, and

(i) the acquisition is a significant acquisition for the Offeror.

However, in all events, include in the Bid Circular:

- (i) a pro forma balance sheet and income statement of the Offeror giving effect to the exchange of securities as at the date of the most recent balance sheet of the Offeror that is included in the Bid Circular based on the information in the most recent audited financial statements of the Offeree Issuer;
- (ii) a description of the basis of preparation of the pro forma financial statements; and
- (ii) the basic and fully diluted earnings per share based on the pro forma financial statements.

(c) State the particulars of any information known to the Offeror reflecting any Material change in the affairs of the Offeror or Offeree Issuer since the date of the last published interim or annual financial statements of the Offeror or Offeree Issuer.

(d) Where interim financial statements are included, include a report of the chief financial officer of the Offeree Issuer, stating whether in the opinion of the chief financial officer, the financial statements present fairly the financial position of the Offeree Issuer and the results of its operations for the period under review.

## **20. Item 20. Right of Appraisal and Acquisition**

State any rights of appraisal the security holders of the Offeree Issuer have under the laws or organizational documents governing, or contracts binding, the Offeree Issuer and state whether or not the Offeror intends to exercise any squeeze-out right it may have.

## **21. Item 21. Partial Offers**

### **a) General Rule**

In a Mini or Other Partial Bid, the Offeror must state that it will take up tendered securities as nearly as may be proportionately, disregarding fractions, according to the number or principal amount of the securities deposited.

### **b) Exceptions**

If the Offeror in such a bid intends to rely on an exception from the proportionate take up and payment requirements found in paragraph (b) or (c) of Section IV.D.4 (relating to tendering less than 100 shares and Standard Trading Units), describe the mechanism under which securities would be deposited and taken up without proration.

## **22. Item 22. Market Purchases of Securities**

State whether or not the Offeror intends to purchase, pursuant to Section IV.A.2.c, in the market securities that are the subject of the Takeover Bid.



### **23. Item 23. Tax Consequences**

For each of the jurisdictions where the Offeree Issuer's shares are listed, provide a general description of the income tax consequences of the bid on (a) the Offeree Issuer, and (b) the security holders of any class affected by the bid.

### **24. Item 24. Judicial Developments**

Discuss any judicial developments relating to the Takeover Bid, and if the transaction is an Insider Bid discuss recent legal developments, if any, relating to the such transactions.

### **25. Item 25. Approval of Takeover Bid Circular**

If true, state that the Takeover Bid Circular has been approved and its sending has been authorized by the directors of the Offeror.

### **26. Item 26. Other Material Facts, Including Financial Statements**

Describe or include any Material fact (including where appropriate financial statements) concerning the Offeror, the Offeree Issuer, or the Takeover Bid that has not been disclosed pursuant to another item of this form or previously been generally disclosed.

[**Comment:** In a cash offer, financial statements of the Offeror generally will not be required, because they are not generally relevant to the shareholder's decision to accept or reject the bid.]

### **27. Item 27. Solicitations**

Disclose any Person retained by or on behalf of the Offeror, its Associates, and Persons Acting Jointly or in Concert with the Offeror (the Purchasing Parties) to make solicitations in respect of the Takeover Bid and the particulars of the compensation arrangements. Also disclose any Persons working directly or indirectly for the Purchasing Parties who will be spending more than 10% of their work day making such solicitations.

### **28. Item 28. Statement of Rights**

Include the following statement of rights provided under the securities legislation of the jurisdiction of the Applicable SA relating to this circular:

Securities and related legislation and regulations in the [insert the name of the SA with the exclusive jurisdiction of the Takeover or Merger Transaction] provides security holders of the Offeree Issuer with, in addition to any other rights they may have at law, one or more rights of rescission, price revision or to damages, if there is a misrepresentation in a circular or notice that is required to be delivered to those security holders. However, such rights must be exercised within prescribed time limits. Security holders should refer to the applicable provisions of the securities legislation or regulations for particulars of those rights or consult a lawyer.

### **29. Item 29. No Untrue Material Fact Certificate**

A Takeover Bid Circular certificate form must state:

The foregoing contains no untrue statement of a Material fact and does not omit to state a Material fact that is required to be stated or that is necessary to make a statement not misleading in the light of the circumstances in which it was made.

**30. Item 30. Date of Takeover Bid Circular**

Specify the date of the Takeover Bid Circular.

**31. Item 31. Certification**

Provide the certification required by Section V.B.1.

## **§ XI Form 2, Issuer Bid Circular [See Can TO Reg, Form 62-104F2]**

### ***A. Part 1 — General Provisions***

#### **1. Defined Terms**

If a term is used but not defined in this Form, refer to the Common Takeover Code.

#### **2. Plain Language**

Write the Issuer Bid Circular so that readers are able to understand it and make informed investment decisions. Issuers should apply plain language principles when they prepare an Issuer Bid Circular including:

- using short sentences;
- using definite everyday language;
- using the active voice;
- avoiding superfluous words;
- organizing the document into clear, concise sections, paragraphs and sentences;
- avoiding jargon;
- using Personal pronouns to speak directly to the reader;
- avoiding reliance on glossaries and defined terms unless it facilitates understanding of the disclosure;
- avoiding vague boilerplate wording;
- avoiding abstract terms by using more concrete terms or examples;
- avoiding multiple negatives;
- using technical terms only when necessary and explaining those terms;
- using charts, tables and examples where it makes disclosure easier to understand.

If you use technical terms, explain them in a clear and concise manner.

#### **3. Numbering and Headings**

The numbering, headings and ordering of items included in this Form are guidelines only. You do not need to include the heading or numbering or follow the order of items in this Form. You do not need to refer to inapplicable items and, unless otherwise required in this Form, you may omit negative answers to items. Disclosure provided in response to any item need not be repeated elsewhere in the circular.

### ***B. Part 2 — Contents of Issuer Bid Circular***

#### **1. Item 1. Summary Term Sheet of Bid Circular**

Provide security holders with a summary term sheet that is written in plain language. The summary term sheet must briefly describe in bullet point format the most Material terms of the Issuer Bid. The summary term sheet must provide security holders with sufficient information to understand the essential features and significance of the Issuer Bid. The bullet points must cross-reference a more detailed discussion contained in the Bid Circular.

**Instructions:**

- a. The summary term sheet must not recite all information contained in the Bid Circular. The summary term sheet is intended to serve as an overview of all Material matters that are presented in the Bid Circular.
- b. The summary term sheet must begin on the first or second page of the Bid Circular.
- c. The summary term sheet may be supplemented by or include questions and answers concerning the Issuer Bid.

[**Comment:** This requirement is based on the U.S tender offer rules. *See* Reg. MA, Rule 1001,]

**2. Item 2. Name of Issuer and Securities Subject to the Bid**

(a) State the corporate name, address, phone number, and email address of the Issuer or, if the Issuer is an unincorporated entity, the full name, address, phone number, and email address under which it exists and carries on business.

(b) State the class and number of outstanding securities that are the subject of the Issuer Bid and a description of the rights of the holders of any other Class of Equity Securities that have a right to participate in the offer.

**3. Item 3. Time Period**

State (a) the date the Issuer Bid Commenced or is expected to Commence (*see* Section IV.B.1), (b) the expected Deemed Start Date (*see* Section IV.B.9), and (c) the date the bid is expected to Close (*see* Section IV.E.5).

**4. Item 4. Consideration**

State the consideration to be offered. If the consideration includes securities, state the particulars of the designation, rights, privileges, restrictions and conditions attaching to those securities.

**5. Item 5. Method of Acquisition.**

State the method by which the securities will be acquired and time of payment of the consideration.

**6. Item 6. Right to Withdraw Deposited Securities**

Describe the right to withdraw securities deposited under the Issuer Bid. State that the withdrawal is made by sending a written notice to the designated depository and becomes effective on its receipt by the depository.

**7. Item 7. Source of Funds**

State the source of any funds to be used for payment of deposited securities. If the funds are to be borrowed, state

- (a) the name of the lender,
- (b) the terms and financing conditions of the loan,
- (c) the circumstances under which the loan must be repaid, and
- (d) the proposed method of repayment.

## **8. Item 8. Partial Offers**

### **a) General Rule**

State that if a greater number or principal amount of the securities are deposited than the Issuer is bound or willing to take up and pay for, the Issuer will take up as nearly as may be proportionately, disregarding fractions, according to the number or principal amount of the securities deposited.

### **b) Exceptions**

If the Issuer intends to rely on an exception from the proportionate take up and payment requirements found in paragraph (b) or (c) of Section IV.D.4 (relating to tendering less than 100 shares and Standard Trading Units), describe the mechanism under which securities would be deposited and taken up without proration.

## **9. Item 9. Purpose of the Bid**

State the purpose for the Issuer Bid, and if it is anticipated that the Issuer Bid will be followed by a going private transaction or other transaction such as a business combination, describe the proposed transaction.

## **10. Item 10. Trading in Securities to be Acquired**

Provide a summary showing

- (a) the name of each principal market on which the securities sought are traded,
- (b) any change in a principal market that is planned following the Issuer Bid,
- (c) where reasonably ascertainable, in reasonable detail, the volume of trading and price range of the class of the securities in the 6-month period preceding Commencement of the Issuer Bid, or, in the case of debt securities, the prices quoted on each principal market, and
- (d) the date that the Issuer Bid to which the circular relates was Commenced and the market price of the securities of the Issuer immediately before the Commencement.

## **11. Item 11. Ownership of Securities of Issuer**

State the number, designation, and percentage of the outstanding securities of any Class of Equity Securities of the Issuer Beneficially Owned:

- (a) by each director and officer of the Issuer, and
- (b) if known after reasonable enquiry, by
  - (i) each Associate of an Insider of the Issuer,
  - (ii) each Associate of the Issuer,
  - (iii) an Insider of the Issuer, other than a director or officer of the Issuer, and
  - (iv) each Person Acting Jointly or in Concert with the Issuer.

In each case where no securities are owned, directed or indirectly, state this fact.

## **12. Item 12. Commitments to Acquire Securities of Issuer**

Disclose all agreements, commitments or understandings made by the Issuer and, if known after reasonable enquiry, by the Persons referred to in item 11, to acquire securities of the Issuer, and the terms and conditions of those agreements, commitments or understandings.

## **13. Item 13. Acceptance of Issuer Bid**

If known after reasonable enquiry, state the name of every Person named in item 11 who has accepted or intends to accept the Issuer Bid and the number of securities in respect of which the Person has accepted or intends to accept the Issuer Bid.

## **14. Item 14. Benefits from the Bid**

State the direct or indirect benefits to any of the Persons named in item 11 of accepting or refusing the Issuer Bid.

## **15. Item 15. Material Changes in the Affairs of Issuer**

Disclose the particulars of any plans or proposals for Material changes in the affairs of the Issuer, including, for example, any contract or agreement under negotiation, any proposal to liquidate the Issuer, to sell, lease or exchange all or a substantial part of its assets, to amalgamate it or to make any Material changes in its business, corporate structure (debt or equity), management or Personnel.

## **16. Item 16. Other Benefits**

If any Material changes or subsequent transactions are contemplated, as described in item 9 or 15, state any specific benefit, direct or indirect, as a result of such changes or transactions to any of the Persons named in item 11.

## **17. Item 17. Arrangements between the Issuer and Security Holders**

(a) Disclose the particulars of any agreement, commitment or understanding made or proposed to be made between the Issuer and a security holder of the Issuer relating to the bid, including a description of its purpose, its date, the identity of the parties, and its terms and conditions. Disclosure with respect to each agreement, commitment or understanding, other than an agreement that a security holder will tender securities to an Issuer Bid, must include

- (i) a detailed explanation as to how the Issuer determined that entering into it was not prohibited by Section IV.D.2 of the Common Code, or
- (i) disclosure of the exception, pursuant to Section IV.D.3, to the prohibition against collateral agreements relied on by the Issuer and the facts supporting that reliance.

(b) If the Issuer is relying on an exception to the prohibition against collateral agreements under subparagraph (a)(ii) of Section IV.D.3, disclose the review process undertaken by the Independent Committee of Directors of the Issuer and the basis on which the Independent Committee made its determination under clause (a)(ii)(A) or (B) of Section IV.D.3.

## **18. Item 18. Previous Purchases and Sales**

State the following information about any securities of the Issuer purchased or sold by the Issuer during the twelve months preceding the date of the Issuer Bid, excluding securities purchased or sold pursuant to the exercise of employee stock options, warrants and conversion rights:

- (a) the description of the security,
- (b) the number of securities purchased or sold,
- (c) the purchase or sale price of the security, and
- (d) the date and purpose of each transaction.

If no securities were purchased or sold, state this fact.

## **19. Item 19. Financial Statements**

(a) If the most recently available final or interim financial statements have not been delivered to security holders of the Issuer, include such financial statements.

(a) Where interim financial statements are included, include a report of the chief financial officer of the Issuer, stating whether in the opinion of the chief financial officer, the financial statements present fairly the financial position of the Issuer and the results of its operations for the period under review.

## **20. Item 20. Valuation and Bona Fide Offers**

### **a) Valuations**

For each valuation or fairness opinion received by the Issuer within the 24 months preceding the Commencement of the bid, and for each Formal Valuation that the Issuer has access to, or is in the possession or control of the Issuer:

- (a) include a summary of the valuation, disclosing the basis of computation, scope of review, relevant factors and their values, and the key assumptions on which the valuation is based; and
- (b) advise where copies of the valuation are available for inspection and state that a copy of the valuation will be sent to any registered security holder upon payment of a nominal charge sufficient to cover copying and postage.

### **b) Bona Fide Offers**

Discuss any bona fide offer that relates to the Issuer or its securities or is otherwise relevant to the bid, which offer was received by the board of the Issuer during the 24 months preceding the Commencement of the bid.

## **21. Item 21. Securities of Issuer to be Exchanged for Others**

If an Issuer Bid provides that the consideration for the securities of the Issuer is to be, in whole or in part, different securities of the Issuer, include the financial and other information required in a prospectus issued by the Issuer for an offering in the jurisdiction of the Applicable SA.

## **22. Item 22. Approval of Issuer Bid Circular**

(a) State that the Issuer Bid Circular has been approved by the Issuer's directors, disclosing the name of any individual director of the Issuer who has informed the directors in writing of their opposition to the Issuer Bid and that the delivery of the Issuer Bid Circular to the security holders of the Issuer has been authorized by the Issuer's directors.

(b) Include a discussion of any Materially contrary view or abstention by a director and any Material disagreement between the board and any director or directors concerning the board's approval of the Issuer Bid.

(c) If the Issuer Bid is part of a transaction or to be followed by a transaction required to be approved by security holders, state the nature of the approval required.

### **23. Item 23. Previous Distribution**

If the securities of the class subject to the Issuer Bid were distributed during the 5 years preceding the Issuer Bid, state the distribution price per share and the aggregate proceeds received by the Issuer or selling security holder.

### **24. Item 24. Dividend Policy**

State the frequency and amount of dividends with respect to shares of the Issuer during the 2 years preceding the date of the Issuer Bid, any restrictions on the Issuer's ability to pay dividends and any plan or intention to declare a dividend or to alter the dividend policy of the Issuer.

### **25. Item 25. Tax Consequences**

For each of the jurisdictions where the Issuer's shares are listed, provide a general description of the income tax consequences of the Issuer Bid on (1) the Issuer, and (2) the security holders of any class affected by the bid.

### **26. Item 26. Expenses of Bid**

Provide a statement of the expenses incurred or to be incurred in connection with the Issuer Bid.

### **27. Item 27. Right of Appraisal and Acquisition**

State any rights of appraisal the security holders of the Issuer have under the laws or organizational documents governing, or contracts binding, the Issuer and state whether or not the Issuer intends to exercise any squeeze-out right it may have.

### **28. Item 28. Issuer Bids that are Insider Takeover or Merger Transactions—Valuation, Independent Committee of Directors, and Majority of Minority—and Conflicts of Interest**

#### **a) General Rule for Issuer Bids that are Insider Takeover Bids**

If the Issuer Bid is an Insider Takeover or Merger Transactions as provided for within the definition of such Insider transaction, include the disclosures required by Section II.B, including those regarding (i) the Formal Valuation and any other valuations or fairness opinions received within 24 months of the initiation of such Issuer Bid; (ii) the decision of the Independent Committee of Directors, including a discussion of any Materially contrary view or abstention by a director and any Material disagreement between the board and the Independent Committee of Directors; (iii) the effect of the Majority of the Minority Tendering Condition, including the Issuer's identification, after reasonable investigation, of the shareholders of the Issuer that are not Non-Affiliated Shareholders; and (iv) any bona fide prior offer that relates to the Issuer or its securities or is otherwise relevant to the bid, which offer was received by the board of the Issuer during the 24 months before the bid.



## **b) Conflicts of Interest**

If Material, describe any actual or potential conflict of interest faced by any Associate of the Issuer.

### **29. Item 29. Judicial Developments**

Discuss any judicial developments relating to the Issuer Bid, and if the transaction is an Insider Bid discuss recent legal developments, if any, relating to the such transactions.

### **30. Item 30. Statement of Rights**

Include the following statement of rights provided under the securities legislation of the jurisdictions relating to this circular:

Securities and related legislation and regulations in the [insert the name of the SA with the exclusive jurisdiction of the Takeover or Merger Transaction] provides security holders of the Issuer with, in addition to any other rights they may have at law, one or more rights of rescission, price revision or to damages, if there is a misrepresentation in a circular or notice that is required to be delivered to those security holders. However, such rights must be exercised within prescribed time limits. Security holders should refer to the applicable provisions of the securities legislation or regulations for particulars of those rights or consult a lawyer.

### **31. Item 31. Other Material Facts**

Describe:

- (a) any Material facts concerning the securities of the Issuer, and
- (b) any other Material matter that has not previously been generally disclosed.

### **32. Item 32. Solicitations**

Disclose any Person retained by or on behalf of the Issuer, its Associates, and Persons Acting Jointly or in Concert with the Issuer (the Purchasing Parties) to make solicitations in respect of the Issuer Bid and the particulars of the compensation arrangements. Also, disclose any Persons working directly or indirectly for the Purchasing Parties who will be spending more than 10% of their work day making such solicitations.

### **33. Item 33. No Untrue Material Fact Certificate**

An Issuer Bid Circular certificate form must state:

The foregoing contains no untrue statement of a Material fact and does not omit to state a Material fact that is required to be stated or that is necessary to make a statement not misleading in the light of the circumstances in which it was made.

### **34. Item 34. Date of Issuer Bid Circular**

Specify the date of the Issuer Bid Circular.

### **35. Item 35. Certification**

Provide the certification required by Section V.B.1.

## **§ XII Form 3, The Directors' Circular [See Can TO Reg, Form 62-104F3]**

### ***A. Part 1 — General Provisions***

#### **1. Defined Terms**

If a term is used but not defined in this Form, refer to the Common Takeover Code.

#### **2. Plain Language**

Write the Directors' Circular so that readers are able to understand it and make informed investment decisions. Directors should apply plain language principles when they prepare a Directors' Circular including:

- using short sentences;
- using definite everyday language;
- using the active voice;
- avoiding superfluous words;
- organizing the document into clear, concise sections, paragraphs and sentences;
- avoiding jargon;
- using Personal pronouns to speak directly to the reader;
- avoiding reliance on glossaries and defined terms unless it facilitates understanding of the disclosure;
- avoiding vague boilerplate wording;
- avoiding abstract terms by using more concrete terms or examples;
- avoiding multiple negatives;
- using technical terms only when necessary and explaining those terms;
- using charts, tables and examples where it makes disclosure easier to understand.

If you use technical terms, explain them in a clear and concise manner.

#### **3. Numbering and Headings**

The numbering, headings and ordering of items included in this Form are guidelines only. You do not need to include the heading or numbering or follow the order of items in this Form. You do not need to refer to inapplicable items and, unless otherwise required in this Form, you may omit negative answers to items. Disclosure provided in response to any item need not be repeated elsewhere in the circular.

### ***B. Part 2 — Contents of Directors' Circular***

#### **1. Item 1. Summary of Directors' Circular**

Provide security holders with a summary of the Directors' Circular that is written in plain language. The summary must briefly describe in bullet point format the most Material information contained in the Directors' Circular. The summary must provide security holders with sufficient information to understand the essential significance of the information in the

Directors' Circular. The bullet points must cross-reference a more detailed discussion contained in the Directors' Circular.

**Instructions:**

- a. The summary must not recite all information contained in the Directors' Circular. The summary is intended to serve as an overview of all Material matters that are presented in the Directors' Circular.
- b. The summary must begin on the first or second page of the Directors' Circular.
- c. The summary may be supplemented by or include questions and answers concerning the bid.

[**Comment:** This requirement is based on the U.S tender offer rules; however, the summary obligation does not go beyond the bid documents. *See* Reg. MA, Rule 1001,]

**2. Item 2. Name of Offeror and Offeree Issuer**

(a) State the corporate name, address, phone number, and email address of the Offeror or, if the Offeror is an unincorporated entity, the full name, address, phone number, and email address under which it exists and carries on business.

(b) State the corporate name, address, phone number, and email address of the Offeree Issuer or, if the Offeree Issuer is an unincorporated entity, the full name, address, phone number, and email address under which it exists and carries on business.

**3. Item 3. Names of Directors of the Offeree Issuer**

State the name of each director of the Offeree Issuer.

**4. Item 4. Ownership of Securities of Offeree Issuer**

State the number, designation and the percentage of the outstanding securities of any Class of Equity Securities of the Offeree Issuer Beneficially Owned:

- (a) by each director and officer of the Offeree Issuer, and
- (b) if known after reasonable enquiry, by
  - (i) each Associate of an Insider of the Offeree Issuer,
  - (ii) each Associate of the Offeree Issuer,
  - (iii) an Insider of the Offeree Issuer, other than a director or officer of the Offeree Issuer, and
  - (iv) each Person Acting Jointly or in Concert with the Offeree Issuer.

In each case where no securities are owned, directed or indirectly, state this fact.

**5. Item 5. Acceptance of Takeover Bid**

If known after reasonable enquiry, state the name of every Person named in item 4 who has accepted or intends to accept the offer and the number of securities in respect of which such Person has accepted or intends to accept the offer.

## **6. Item 6. Ownership of Securities of Offeror**

If a Takeover Bid is made by or on behalf of an Offeror that is an issuer, state the number, designation and percentage of the outstanding securities of any Class of Equity Securities of the Offeror Beneficially Owned:

- (a) by the Offeree Issuer,
- (b) by each director and officer of the Offeree Issuer, and
- (c) if known after reasonable enquiry, by
  - (i) each Associate of an Insider of the Offeree Issuer,
  - (ii) each Associate of the Offeree Issuer, and
  - (iii) an Insider of the Offeree Issuer, other than a director or officer of the Offeree Issuer, and
  - (iv) each Person Acting Jointly or in Concert with the Offeree Issuer.

In each case where no securities are so owned, directed or Controlled, state this fact.

## **7. Item 7. Relationship Between the Offeror and the Directors and Officers of the Offeree Issuer**

To the extent not otherwise disclosed, disclose the particulars of any agreement, commitment or understanding made or proposed to be made between the Offeror and any of the directors or officers of the Offeree Issuer, including particulars of any payment or other benefit proposed to be made or given by way of compensation for loss of office or their remaining in or retiring from office if the Takeover Bid is successful. State also whether any directors or officers of the Offeree Issuer are also directors or officers of the Offeror or (to the knowledge of the filing Person after reasonable inquiry) any Associate of the Offeror and identify those Persons.

## **8. Item 8. Arrangements Between Offeree Issuer and Officers and Directors**

To the extent not otherwise disclosed, disclose the particulars of any agreement, commitment or understanding made or proposed to be made between (a) the Offeree Issuer and any of its Associates and Persons Acting Jointly or in Concert with the Offeree Issuer (the Purchasing Parties), and (b) any of the directors or officers of the Offeree Issuer, including particulars of any payment or other benefit proposed to be made or given by way of compensation for loss of office or their remaining in or retiring from office if the Takeover Bid is successful.

## **9. Item 9. Arrangements Between the Offeror and Security Holders of Offeree Issuer**

(a) If not already disclosed in the Takeover Bid Circular, disclose the particulars of any agreement, commitment or understanding made or proposed to be made between the Offeror and a security holder of the Offeree Issuer relating to the bid, including a description of its purpose, its date, the identity of the parties, and its terms and conditions. Disclosure with respect to each agreement, commitment or understanding, other than an agreement that a security holder will tender securities to a Takeover Bid made by the Offeror, must include

- (i) a detailed explanation as to how the Offeror determined that entering into it was not prohibited by Section IV.D.2 of the Common Code, or

(ii) disclosure of the exception to the prohibition against collateral agreements relied on by the Offeror and the facts supporting that reliance.

(b) If the Offeror is relying on an exception to the prohibition against collateral agreements under paragraph (a)(ii) of Section IV.D.3 of the Common Code, and if not already disclosed in the Takeover Bid Circular, disclose the review process undertaken by the Independent Committee of Directors of the issuer and the basis on which the Independent Committee of Directors made its determination under clause (a)(ii)(A) or (B) of Section IV.D.3 of the Common Code.

## **10. Item 10. Interests of Directors and Officers of the Offeree Issuer in Material Transactions with Offeror**

State whether any of the following Persons has any interest in any Material transaction to which the Offeror or any of its Associates is a party: (a) any director or officer of the Offeree Issuer or any of its Associates, and (b) if known to such director or officer after reasonable enquiry, any Person who owns more than 10% of any class of the outstanding Equity Securities of the Offeree Issuer. If so, state the particulars of the nature and extent of such interest.

## **11. Item 11. Trading by Directors, Officers and Other Insiders**

(a) State the number of securities of the Offeree Issuer traded, the purchase or sale price and the date of each transaction during the 6-month period preceding the date of the Directors' Circular by the Offeree Issuer and each director, officer or other Insider of the Offeree Issuer, and, if known after reasonable enquiry, by

- (i) each Associate of an Insider of the Offeree Issuer,
- (ii) each Associate of the Offeree Issuer, and
- (iii) each Person Acting Jointly or in Concert with the Offeree Issuer.

(b) Disclose the number and price of securities of the Offeree Issuer of the Class of Equity Securities subject to the bid or convertible into securities of that class that have been issued to the directors, officers and other Insiders of the Offeree Issuer during the 2-year period preceding the date of the circular.

## **12. Item 12. Valuation and Bona Fide Offers**

### **a) Valuation**

For each valuation or fairness opinion received by the Offeree Issuer within the 24 months preceding the date of the Commencement of the bid, and for each Formal Valuation that the Offeree Issuer has access to, or is in the possession or control of the Offeree Issuer, to the extent such valuations are not disclosed in a Takeover Bid Circular:

- (i) include a summary of the valuation, disclosing the basis of computation, scope of review, relevant factors and their values, and the key assumptions on which the valuation is based; and
- (ii) advise where copies of the valuation are available for inspection and state that a copy of the valuation will be sent to any registered security holder upon payment of a nominal charge sufficient to cover copying and postage.

## **b) Bona Fide Offers**

Unless disclosed in the Takeover Bid Circular, discuss any bona fide offer that relates to the Offeree Issuer or its securities or is otherwise relevant to the bid, which offer was received by the board of the Offeree Issuer during the 24 months preceding the Commencement of the bid.

### **13. Item 13. Financial Statements**

Where unaudited financial statements of the Offeree Issuer are included in a Directors' Circular, include a report of the chief financial officer of the Offeree Issuer, stating whether in the opinion of the chief financial officer the financial statements present fairly the financial position of the Offeree Issuer and the results of its operations for the period under review.

### **14. Item 14. Additional Information**

If any information required to be disclosed by the Takeover Bid Circular prepared by the Offeror has been presented incorrectly or is misleading, supply any additional information which will make the information in the circular correct or not misleading.

### **15. Item 15. Material Changes in the Affairs of Offeree Issuer**

State the particulars of any information known to any of the directors or officers of the Offeree Issuer that indicates any Material change in the affairs of the Offeree Issuer since the date of the last published interim or annual financial statement of the Offeree Issuer.

### **16. Item 16. Other Material Information**

State the particulars of any other Material information known to the directors but not already disclosed in the Directors' Circular.

### **17. Item 17. Recommending Acceptance or Rejection of the Bid**

(a) Pursuant to the requirements of Section IV.C.2, relating to the Director's Circular, include either

- (i) a recommendation to (A) accept, or (B) reject the Takeover Bid and the reasons for such recommendation, including the extent to which the board of directors relied on any Formal Valuation or prior valuation, or
- (ii) a statement that the board of directors is unable to make or is not making a recommendation and the reasons for not making a recommendation.

(b) Include a discussion of any Materially contrary view or abstention by a director and any Material disagreement between the board and any director or directors concerning the board's recommendation or non-recommendation.

(c) Where a board of directors of an Offeree Issuer is considering recommending acceptance or rejection of a Takeover Bid at the time of sending a Directors' Circular, state that fact and, if desired, advise the security holders of the Offeree Issuer not to tender their securities until a further communication is received from the directors.

## **18. Item 18. Response of Offeree Issuer**

To the extent not otherwise disclosed, describe any transaction, directors' resolution, agreement in principle or signed contract of the Offeree Issuer entered into in response to the bid. Disclose whether there are any negotiations underway in response to the bid, which relate to or would result in

- (a) an extraordinary transaction such as a merger or reorganization involving the Offeree Issuer or a Subsidiary,
- (b) the purchase, sale or transfer of a Material amount of assets by the Offeree Issuer or a Subsidiary,
- (c) a competing Takeover Bid,
- (d) a bid by the Offeree Issuer for its own securities or for those of another issuer, or
- (e) any Material change in the present capitalization or dividend policy of the Offeree Issuer.

If there is an agreement in principle, give full particulars.

## **19. Item 19. Insider Bids—Valuation, Independent Committee of Directors, and Majority of Minority—and Conflicts of Interest**

### **a) Insider Takeover Bids**

If the Takeover Bid is an Insider Takeover Bid, unless the disclosures are provided in the Takeover Bid Circular, include the disclosures required by Section II.B, including those regarding (i) the Formal Valuation and any other valuations or fairness opinions received within 24 months of the initiation of the Insider Takeover Bid; (ii) the decision of the Independent Committee of Directors, including a discussion of any Materially contrary view or abstention by a director and any Material disagreement between the board and the Independent Committee of Directors; (iii) the effect of the Majority of the Minority Tendering Condition, including the Offeree Issuer's identification, after reasonable investigation, of the shareholders of the Offeree Issuer who are not Non-Affiliated Shareholders; and (iv) any bona fide prior offer that relates to the Offeree Issuer or its securities or is otherwise relevant to the Insider Takeover Bid, which offer was received by the board of the Offeree Issuer during the 24 months before the Insider Takeover Bid.

### **b) Conflicts of Interest**

Unless the disclosures are provided in the Takeover Bid Circular, if Material, describe any actual or potential conflict of interest faced by any Associate of the Offeree Issuer.

## **20. Item 20. Approval of Directors' Circular**

State that the Directors' Circular has been approved and its sending has been authorized by the directors of the Offeree Issuer, and provide full disclosure of any directors or officers who have not concurred in the approval of the Directors' Circular.

## **21. Item 21. Statement of Rights**

Include the following statement of rights provided under the securities legislation of the jurisdictions relating to this circular:

Securities and related legislation and regulations in the [insert the name of the SA with the exclusive jurisdiction of the Takeover or Merger Transaction] provides security holders of the Offeree Issuer with, in addition to any other rights they may have at law, one or more rights of rescission, price revision or to damages, if there is a misrepresentation in a circular or notice that is required to be delivered to those security holders. However, such rights must be exercised within prescribed time limits. Security holders should refer to the applicable provisions of the securities legislation or regulations for particulars of those rights or consult a lawyer.

## **22. Item 22. No Untrue Material Fact Certificate**

A Directors' Circular certificate form must state:

The foregoing contains no untrue statement of a Material fact and does not omit to state a Material fact that is required to be stated or that is necessary to make a statement not misleading in the light of the circumstances in which it was made.

## **23. Item 23. Date of Directors' Circular**

Specify the date of the Directors' Circular.

## **24. Item 24. Certification**

Provide the certification required by Section V.B.2.



## **§ XIII Form 4, Individual Director's or Officer's Circular [See Can TO Reg, Form 62-104F4]**

### ***A. Part 1 — General Provisions***

#### **1. Defined Terms**

If a term is used but not defined in this Form, refer to the Common Takeover Code.

#### **2. Plain Language**

Write the Director's or Officer's Circular so that readers are able to understand it and make informed investment decisions. Directors and officers should apply plain language principles when they prepare a Director's or Officer's Circular including:

- using short sentences;
- using definite everyday language;
- using the active voice;
- avoiding superfluous words;
- organizing the document into clear, concise sections, paragraphs and sentences;
- avoiding jargon;
- using Personal pronouns to speak directly to the reader;
- avoiding reliance on glossaries and defined terms unless it facilitates understanding of the disclosure;
- avoiding vague boilerplate wording;
- avoiding abstract terms by using more concrete terms or examples;
- avoiding multiple negatives;
- using technical terms only when necessary and explaining those terms;
- using charts, tables and examples where it makes disclosure easier to understand.

If you use technical terms, explain them in a clear and concise manner.

#### **3. Numbering and Headings**

The numbering, headings and ordering of items included in this Form are guidelines only. You do not need to include the heading or numbering or follow the order of items in this Form. You do not need to refer to inapplicable items and, unless otherwise required in this Form, you may omit negative answers to items. Disclosure provided in response to any item need not be repeated elsewhere in the circular.

### ***B. Part 2 — Contents of Director's or Officer's Circular***

#### **1. Item 1. Summary of Director's or Officer's Circular**

Provide security holders with a summary of the Director's or Officer's Circular that is written in plain language. The summary must briefly describe in bullet point format the most Material

information contained in the Director's or Officer's Circular. The summary must provide security holders with sufficient information to understand the essential significance of the information in the Director's or Officer's Circular. The bullet points must cross-reference a more detailed discussion contained in the Director's or Officer's Circular.

**Instructions:**

- a. The summary must not recite all information contained in the Director's or Officer's Circular. The summary is intended to serve as an overview of all Material matters that are presented in the Director's or Officer's Circular.
- b. The summary must begin on the first or second page of the Director's or Officer's Circular.
- c. The summary may be supplemented by or include questions and answers concerning the bid.

[**Comment:** This requirement is based on the U.S tender offer rules; however, the summary obligation does not go beyond the bid documents. *See* Reg. MA, Rule 1001,]

**2. Item 2. Name of Offeror and Offeree Issuer**

(a) State the corporate name, address, phone number, and email address of the Offeror or, if the Offeror is an unincorporated entity, the full name under which it exists and carries on business.

(b) State the corporate name, address, phone number, and email address of the Offeree Issuer or, if the Offeree Issuer is an unincorporated entity, the full name under which it exists and carries on business.

**3. Item 3. Name of Director or Officer of Offeree Issuer**

State the name of each director or officer delivering the circular.

**4. Item 4. Ownership of Securities of Offeree Issuer**

State the number, designation and percentage of the outstanding securities of any Class of Equity Securities of the Offeree Issuer beneficially owned or over which Control or direction is exercised

- (a) by the director or officer, and
  - (b) if known after reasonable enquiry, by the Associates of the director or officer.
- In each case where no securities are so owned, directly or indirectly, state this fact.

**5. Item 5. Acceptance of Bid**

State whether the director or officer of the Offeree Issuer and, if known after reasonable enquiry whether any Associate of such director or officer, has accepted or intends to accept the offer and state the number of securities in respect of which the director or officer, or any Associate, has accepted or intends to accept the offer.

**6. Item 6. Ownership of Securities of Offeror**

If a Takeover Bid is made by or on behalf of an issuer, state the number, designation and percentage of the outstanding securities of any Class of Equity Securities of the Offeror beneficially owned or over which control or direction is exercised

- (a) by the director or officer, or
- (b) if known after reasonable enquiry, by the Associates of the director or officer.

In each case where no securities are so owned, directly or indirectly, state this fact.

### **7. Item 7. Arrangements between Offeror and Director or Officer**

Disclose the particulars of any agreement, commitment or understanding made or proposed to be made between the Offeror and the director or officer, including particulars of any payment or other benefit proposed to be made or given by way of compensation for loss of office or the director or officer remaining in or retiring from office if the Takeover Bid is successful. State whether the director or officer is also a director or officer of the Offeror or any Subsidiary of the Offeror.

### **8. Item 8. Arrangements between Offeree Issuer and Director or Officer**

Disclose the particulars of any agreement, commitment or understanding made or proposed to be made between the Offeree Issuer and the director or officer, including particulars of any payment or other benefit proposed to be made or given by way of compensation for loss of office or his or her remaining in or retiring from office if the Takeover Bid is successful.

### **9. Item 9. Interests of Director or Officer in Material Transactions with Offeror**

State whether the director or officer or the Associates of the director or officer have any interest in any Material transaction to which the Offeror is a party, and if so, state the particulars of the nature and extent of such interest.

### **10. Item 10. Valuation and Bona Fide Offers**

#### **a) Valuation**

For each valuation or fairness opinion received by the board of the Offeree Issuer within the 24 months preceding the Commencement of the Takeover Bid, and for each Formal Valuation that the director or officer has access to, or is in the possession or control of the director or officer, to the extent such valuations are not disclosed in the Takeover Bid Circular or Directors' Circular:

- (i) include a summary of the valuation, disclosing the basis of computation, scope of review, relevant factors and their values, and the key assumptions on which the valuation is based; and
- (ii) advise where copies of the valuation are available for inspection and state that a copy of the valuation will be sent to a registered security holder upon payment of a nominal charge sufficient to cover copying and postage.

#### **b) Bona Fide Offers**

Unless otherwise previously disclosed, discuss any bona fide offer that relates to the Offeree Issuer or its securities or is otherwise relevant to the bid, which offer was received by the board of the Offeree Issuer during the 24 months preceding the Commencement of the bid.

## **11. Item 11. Additional Information**

If any information required to be disclosed by the Takeover Bid Circular prepared by the Offeror or the Directors' Circular prepared by the directors has been presented incorrectly or is misleading, supply any additional information within the knowledge of the director or officer which would make the information in the Takeover Bid Circular or Directors' Circular correct or not misleading.

## **12. Item 19. Insider Bids—Valuation, Independent Committee of Directors, and Majority of Minority—and Conflicts of Interest**

### **a) Insider Takeover Bids**

If the Takeover Bid is an Insider Takeover Bid, unless the disclosures are otherwise provided, include the disclosures required by Section II.B, including those regarding (i) the Formal Valuation and any other valuations or fairness opinions received within 24 months of the initiation of the Insider Takeover Bid; (ii) the decision of the Independent Committee of Directors, including a discussion of any Materially contrary view or abstention by a director and any Material disagreement between the board and the Independent Committee of Directors; (iii) the effect of the Majority of the Minority Tendering Condition, including the Offeree Issuer's identification, after reasonable investigation, of the shareholders of the Offeree Issuer who are not Non-Affiliated Shareholders; and (iv) any bona fide prior offer that relates to the Offeree Issuer or its securities or is otherwise relevant to the Insider Takeover Bid, which offer was received by the board of the Offeree Issuer during the 24 months before the Insider Takeover Bid.

### **b) Conflicts of Interest**

Unless the disclosures are provided in the Takeover Bid Circular, if Material, describe any actual or potential conflict of interest faced by any Associate of the Offeree Issuer.

## **13. Item 12. Material Changes in the Affairs of Offeree Issuer**

State the particulars of any information known to the director or officer that indicates any Material change in the affairs of the Offeree Issuer since the date of the last published interim or annual financial statement of the Offeree Issuer and not generally disclosed or in the opinion of the director or officer not adequately disclosed in the Takeover Bid Circular or Directors' Circular.

## **14. Item 13. Other Material Information**

State the particulars of any other information known to the director or officer but not already disclosed in the Director's or Officer's Circular that would reasonably be expected to affect the decision of the security holders of the Offeree Issuer to accept or reject the offer.

## **15. Item 14. Recommendation**

(a) State the recommendation of the director or officer and the reasons for the recommendation, including the extent to which the director or officer relied on any Formal Valuation or prior valuation.

(b) Include a discussion of any Materially contrary view or abstention by the filing party and any Material disagreement between the board and the filing party concerning the board's recommendation or non-recommendation.

### **16. Item 15. Statement of Rights**

Include the following statement of rights provided under the securities legislation of the jurisdictions relating to this circular:

Securities and related legislation and regulations in the [insert the name of the SA with the exclusive jurisdiction of the Takeover or Merger Transaction] provides security holders of the Offeree Issuer with, in addition to any other rights they may have at law, one or more rights of rescission, price revision or to damages, if there is a misrepresentation in a circular or notice that is required to be delivered to those security holders. However, such rights must be exercised within prescribed time limits. Security holders should refer to the applicable provisions of the securities legislation or regulations for particulars of those rights or consult a lawyer.

### **17. Item 16. No Untrue Material Fact Certificate**

Include a certificate in the following form signed by or on behalf of each director or officer delivering the circular:

The foregoing contains no untrue statement of a Material fact and does not omit to state a Material fact that is required to be stated or that is necessary to make a statement not misleading in the light of the circumstances in which it was made.

### **18. Item 17. Date of Director's or Officer's Circular**

Specify the date of the director's or officer's circular.

### **19. Item 32. Certification**

Provide the certification required by Section V.B.3.

## **§ XIV Form 5, Notice of Change or Notice of Variation [See Can TO Reg, Form 62-104F5]**

### ***A. Part 1 — General Provisions***

#### **1. Defined Terms**

If a term is used but not defined in this Form, refer to the Common Takeover Code.

#### **2. Plain Language**

Write the Notice of Change or Notice of Variation so that readers are able to understand it and make informed investment decisions. Plain language principles should be applied when preparing a Notice of Change or Notice of Variation including:

- using short sentences;
- using definite everyday language;
- using the active voice;
- avoiding superfluous words;
- organizing the document into clear, concise sections, paragraphs and sentences;
- avoiding jargon;
- using Personal pronouns to speak directly to the reader;
- avoiding reliance on glossaries and defined terms unless it facilitates understanding of the disclosure;
- avoiding vague boilerplate wording;
- avoiding abstract terms by using more concrete terms or examples;
- avoiding multiple negatives;
- using technical terms only when necessary and explaining those terms;
- using charts, tables and examples where it makes disclosure easier to understand.

If you use technical terms, explain them in a clear and concise manner.

#### **3. Numbering and Headings**

The numbering, headings and ordering of items included in this Form are guidelines only. You do not need to include the heading or numbering or follow the order of items in this Form. You do not need to refer to inapplicable items and, unless otherwise required in this Form, you may omit negative answers to items. Disclosure provided in response to any item need not be repeated elsewhere in the circular.

### ***B. Part 2 — Contents of Notice of Change or Notice of Variation***

#### **1. Item 1. Summary of Notice of Change or Notice of Variation**

Provide security holders with a summary that is written in plain language. The summary must briefly describe (where appropriate) in bullet point format the most Material terms of the Notice of Change or Notice of Variation . The summary must provide security holders with sufficient information to understand the essential features and significance of the Notice of Change or

Notice of Variation. The bullet points must cross-reference a more detailed discussion contained in the Notice of Change or Notice of Variation .

**Instructions:**

- a. The summary must not recite all information contained in the Notice of Change or Notice of Variation . The summary is intended to serve as an overview of all Material matters that are presented in the Notice of Change or Notice of Variation.
- b. The summary must begin on the first or second page of the Notice of Change or Notice of Variation.
- c. The summary may be supplemented by or include questions and answers concerning the bid.

[**Comment:** This requirement is based on the U.S tender offer rules; however, the summary obligation does not go beyond the bid documents. *See* Reg. MA, Rule 1001.]

**2. Item 2. Name of Offeror and Offeree Issuer**

(a) State the corporate name, address, phone number, and email address of the Offeror or, if the Offeror is an unincorporated entity, the full name, address, phone number, and email address under which it exists and carries on business.

(b) State the corporate name, address, phone number, and email address of the Offeree Issuer or, if the Offeree Issuer is an unincorporated entity, the full name under which it exists and carries on business.

**3. Item 3. Particulars of Notice of Change or Notice of Variation**

(a) A Notice of Change required under Section IV.B.4 of the Common Code must contain

(i) a description of the change in the information contained in

- (A) the Takeover Bid Circular or Issuer Bid Circular, and
- (B) any Notice of Change previously delivered under Section IV.B.4,

(ii) the date of the change,

(iii) the date up to which securities may be deposited,

(iv) the date by which securities deposited must be taken up by the Offeror, and

(v) a description of the rights of withdrawal that are available to security holders.

(b) A Notice of Variation required under Section IV.B.5 of the Common Code must contain

(i) a description of the variation in the terms of the Takeover Bid or Issuer Bid,

(ii) the date of the variation,

(iii) the date up to which securities may be deposited,

(iv) the date by which securities deposited must be taken up by the Offeror,

(v) if the date referred to in paragraph (d) is not known, a description of the legal requirements regarding the timing of take up of securities deposited under the bid,

(vi) a description of when payment will be made for deposited securities in relation to the time in which they are taken up by the Offeror, and

(vii) a description of the rights of withdrawal that are available to security holders.

(c) A Notice of Change required under Section IV.C.3 or Section IV.C.5.b of the Common Code must contain, as applicable, a description of the change in the information contained in

- (i) the Directors' Circular,
- (ii) any Notice of Change previously delivered under Section IV.C.3,
- (iii) the director's or officer's circular, or
- (iv) any Notice of Change previously delivered under of Section IV.C.5.b.

#### **4. Item 4. Statement of Rights**

Include the following statement of rights provided under the securities legislation of the jurisdictions relating to this notice:

Securities and related legislation and regulations in the [insert the name of the SA with the exclusive jurisdiction of the Takeover or Merger Transaction] provides security holders of the Offeree Issuer with, in addition to any other rights they may have at law, one or more rights of rescission, price revision or to damages, if there is a misrepresentation in a circular or notice that is required to be delivered to those security holders. However, such rights must be exercised within prescribed time limits. Security holders should refer to the applicable provisions of the securities legislation or regulations for particulars of those rights or consult a lawyer.

#### **5. Item 16. No Untrue Material Fact Certificate**

Include a certificate in the following form signed by or on behalf of each the Person or Persons delivering the circular:

The foregoing contains no untrue statement of a Material fact and does not omit to state a Material fact that is required to be stated or that is necessary to make a statement not misleading in the light of the circumstances in which it was made.

#### **6. Item 6. Date of Notice of Change or Notice of Variation**

Specify the date of the Notice of Change or Notice of Variation.

#### **7. Item 5. Certificate**

Include the signed certificate required in Section V.B for the Bid Circular, Directors' Circular or Director's or Officer's circular, amended to refer to the initial circular and to all subsequent notices of change or notices of variation.



## **§ XV Form 6, Report of Early Warning Shareholder [Not in Can TO Reg]**

### ***A. The Filing Obligation of an Early Warning Shareholder***

#### **1. Basic Obligation**

Pursuant to the requirements of Section VII.B.1.d and VII.B.2, this Form 6 must be filed by an Ultimate Early Warning Shareholder and each Subsidiary Early Warning Shareholder. However, with the written consent of a Subsidiary Early Warning Subsidiary, which consent is filed with the Form 6, the Ultimate Early Warning Shareholder may file Form 6 jointly for it and the Subsidiary Early Warning Shareholder.

[**Comment:** The basic requirement can be illustrated as follows. Assume that P, a publicly held corporation without a controlling shareholder, owns all of the stock of S. S purchases 7% of the stock of PCLI, a Public Cross Listed Issuer. Pursuant to Section VII.B, both P and S are Early Warning Shareholders because they both have Beneficial Ownership of more than 5% of the stock of PCLI. S has direct Beneficial Ownership and P has indirect Beneficial Ownership. P is an Ultimate Early Warning Shareholder, and S is a Subsidiary Early Warning Shareholder. With S's consent, P may file Form 6 jointly for it and S.]

#### **2. Groups**

If the Ultimate Early Warning Shareholder or Subsidiary Early Warning Shareholder is a group as included in the definition of Person, Form 6 may, with the consent of all of the members of the group, which consent is filed with Form 6, be filed by the group. Otherwise each member of the group must file separately.

[**Comment:** The group rule can be illustrated as follows. Three corporations (Corps. A, B, and C) acting as a group each acquire 2% of the stock of PCLI. The group is an Ultimate Early Warning Shareholder because it has Beneficial Ownership of 6% of the stock of PCLI. With the consent of Corps A, B, and C, the group can file Form 6. Otherwise, each corporation must file a separate Form 6.]

### ***B. Background Information***

#### **1. Name of the Issuer**

Set out the name and address of the Public Cross Listed Issuer.

## **2. The Names and Addresses of the Ultimate Early Warning Shareholder and Each Subsidiary Early Warning Shareholder**

Give the names, addresses, phone numbers, and email addresses of the Ultimate Early Warning Shareholder and each Subsidiary Early Warning Subsidiary for which this Form 6 is being filed.

## **3. Date of Event Which Requires Filing of This Statement**

Specify the date of the event giving rise to the reporting requirement.

## **4. Instruction re Substantive Reporting by the Early Warning Shareholder and Certain Entities**

The information called for by Items 2-6 of Section XV.C of this Form, inclusive, shall be given with respect to (a) the Ultimate Early Warning Shareholder, (b) each Subsidiary Early Warning Shareholder included in this Form, and (c) to the extent available to the filing Person after reasonable investigation:

(i) each director, executive officer, general partner, and Person serving in a similar capacity of (A) the Ultimate Early Warning Shareholder, (B) each Subsidiary Early Warning Shareholder, (C) each member of a group that is an Ultimate Early Warning Shareholder or Subsidiary Early Warning Shareholder, and (D) an entity that is not a Subsidiary Early Warning Shareholder that holds securities in the Offeree Issuer that are indirectly Beneficially Owned by the Ultimate Early Warning Shareholder;

(ii) each shareholder or other owner of 10% or more of the voting equity interests of (A) the Ultimate Early Warning Shareholder, (B) each Subsidiary Early Warning Shareholder, (C) each member of a group that is an Ultimate Early Warning Shareholder or Subsidiary Early Warning Shareholder, and (D) an entity that is not a Subsidiary Early Warning Shareholder that holds securities in the Offeree Issuer that are indirectly Beneficially Owned by the Ultimate Early Warning Shareholder; and

(iii) each director, executive officer, general partner, and Person serving in a similar capacity of each 10% shareholder specified in paragraph (ii).

**[Comment:** This requirement can be illustrated as follows. Assume that P, a publicly held corporation without any shareholder owning 10% or more of its shares, owns all of the stock of S1 and 80% of the stock of S2. Corporation A owns the other 20% of the stock of S2. S1 purchases 7% of the stock of PCLI, a Public Cross Listed Issuer, and S2 purchases 2% of the stock of PCLI. Pursuant to Section VII.B, both P and S1 are Early Warning Shareholders because they both have Beneficial Ownership of more than 5% of the stock of PCLI. S1 has direct beneficial ownership and P has indirect Beneficial Ownership. However, S2 is not an Early Warning Shareholder because it does not have Beneficial Ownership of 5% or more of the shares of PCLI. S2 has Beneficial Ownership of just 2% of the stock of PCLI. As indicated above, P is an Ultimate Early Warning Shareholder, and S1 is a Subsidiary Early Warning Shareholder. With S1's consent, P files Form 6 jointly for it and S1.

The information called for by Items 2-6 of Section XV.C of this Form, inclusive, would be given with respect to (1) P, the Ultimate Early Warning Shareholder, (2) S1, a Subsidiary Early Warning Shareholder, and (3) to the extent available to P after reasonable investigation: S2, the

non-Subsidiary Early Warning Shareholder that acquired 2% of the stock of PCLI; A, a 10% shareholder of S2; and each director, executive officer, general partner, and Person serving in a similar capacity of P, S1, S2, and A.]

## **5. Disclosures of Items**

The item numbers and captions of the items in Section XV.C shall be included, but the text of the items is to be omitted. The answers to the items shall be so prepared as to indicate clearly the coverage of the items without referring to the text of the items. Answer every item. If an item is inapplicable or the answer is in the negative, so state.

## **6. Incorporation by Reference**

Information contained in exhibits to the statement may be incorporated by reference in answer or partial answer to any item or sub-item of the statement unless it would render such answer misleading, incomplete, unclear, or confusing. Material incorporated by reference shall be clearly identified in the reference by page, paragraph, caption, or otherwise. An express statement that the specified matter is incorporated by reference shall be made at the particular place in the statement where the information is required. A copy of any information or a copy of the pertinent pages of a document containing such information which is incorporated by reference shall be submitted with this statement as an exhibit.

## **7. Duplication of Disclosures**

If there is any duplication in the disclosures required in this Form, only one disclosure is required and the duplication may be eliminated by referring to the applicable disclosure.

### ***C. Substantive Disclosure***

#### **1. Item 1. Security and Issuer**

State the title of the class of equity securities to which this statement relates and the name and address of the principal executive offices of the issuer of such securities.

#### **2. Item 2. Identity and Background**

If any Person with respect to which information is provided is a corporation, general partnership, limited partnership, syndicate, or other group of Persons, state its name, the country or other place of its organization, its principal business, the address of its principal office, and the information required by (d) and (e) of this Item. If the Person filing this statement is a natural Person, provide the information specified in (a) through (f) of this Item with respect to such Person(s).

(a) Name;

(b) Residence or business address;

(c) Present principal occupation or employment and the name, principal business, and address of any corporation or other organization in which such employment is conducted;

(d) Whether or not, during the last five years, such Person has been convicted in a criminal proceeding (excluding traffic violations or similar misdemeanors) and, if so, give the dates, nature of conviction, name and location of court, any penalty imposed, or other disposition of the case;

(e) Whether or not, during the last five years, such Person was a party to a civil proceeding of a judicial or administrative body of competent jurisdiction and, as a result of such proceeding, was or is subject to a judgment, decree, or final order enjoining future violations of, or prohibiting or mandating activities subject to, the securities laws of any jurisdiction or finding any violation with respect to such laws; and, if so, identify and describe such proceedings and summarize the terms of such judgment, decree or final order; and

(f) Citizenship.

### **3. Item 3. Source and Amount of Funds or Other Consideration**

State the source and the amount of funds or other consideration used or to be used in making the purchases, and if any part of the purchase price is or will be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, trading, or voting the securities, a description of the transaction and the names of the parties thereto. Where Material, such information should also be provided with respect to prior acquisitions not previously reported pursuant to this Form. If the source of all or any part of the funds is a loan made in the ordinary course of business by a bank or financial institution, the name of the bank or financial institution shall not be made available to the public if the Person at the time of filing the statement so requests in writing and files such request, naming such bank or financial institution, with the Applicable SA. If the securities were acquired other than by purchase, describe the method of acquisition.

### **4. Item 4. Purpose of Transaction**

State the purpose or purposes of the acquisition of securities of the Issuer. Describe any plans or proposals which the reporting Persons may have which relate to or would result in:

- (a) The acquisition by any Person of additional securities of the Issuer, or the disposition of securities of the Issuer;
- (b) An extraordinary corporate transaction, such as a Takeover or Merger Transaction or liquidation, involving the Issuer or any of its subsidiaries;
- (c) A sale or transfer of a Material amount of assets of the Issuer or any of its subsidiaries;
- (d) Any change in the present board of directors or management of the Issuer, including any plans or proposals to change the number or term of directors or to fill any existing vacancies on the board;
- (e) Any Material change in the present capitalization or dividend policy of the Issuer;
- (f) Any other Material change in the Issuer's business or corporate structure;
- (g) Changes in the issuer's charter, bylaws, or instruments corresponding thereto or other actions which may impede the acquisition of Control of the issuer by any Person;
- (h) Causing a class of securities of the Issuer to be delisted from a securities exchange; or
- (i) Any action similar to any of those enumerated above.

### **5. Item 5. Interest in Securities of the Issuer**

(a) State the aggregate number and percentage of the class of securities identified pursuant to Item 1 (which may be based on the number of securities outstanding as contained in the most recently available public filing by the Issuer unless the filing Person has reason to believe such information is not current) Beneficially Owned (identifying those shares for which there is a

right to acquire) by each Person named in Item 2. The above mentioned information should also be furnished with respect to Persons who, together with any of the Persons named in Item 2, comprise a group within the meaning of the definition of Person.

(b) For each Person named in response to paragraph (a), indicate the number of shares as to which there is sole power to vote or to direct the vote, sole power to dispose or to direct the disposition, or shared power to dispose or to direct the disposition. Provide the applicable information required by Item 2 with respect to each Person with whom the power to vote or to direct the vote or to dispose or direct the disposition is shared;

(c) Describe any transactions in the class of securities reported on that were effected during the past 50 Business Days or since the most recent filing of this Form, whichever is less, by the Persons named in response to paragraph (a).

*Instruction.* The description of a transaction required by Item 5(c) shall include, but not necessarily be limited to: (i) The identity of the Person covered by Item 5(c) who effected the transaction; (ii) the date of transaction; (iii) the amount of securities involved; (iv) the price per share or unit; and (v) where and how the transaction was effected.

(d) If any other Person is known to have the right to receive or the power to direct the receipt of dividends from, or the proceeds from the sale of, such securities, a statement to that effect should be included in response to this item and, if such interest relates to more than five percent of the class, such Person should be identified.

(e) If applicable, state the date on which the reporting Person ceased to be the Beneficial Owner of more than 5% of the class of securities.

## **6. Item 6. Contracts, Arrangements, Understandings or Relationships with Respect to Securities of the Issuer.**

Describe any contracts, arrangements, understandings, or relationships (legal or otherwise) among the Persons named in Item 2 and between such Persons and any Person with respect to any securities of the issuer, including but not limited to transfer or voting of any of the securities, finder's fees, joint ventures, loan or option arrangements, puts or calls, guarantees of profits, division of profits or loss, or the giving or withholding of proxies, naming the Persons with whom such contracts, arrangements, understandings, or relationships have been entered into. Include such information for any of the securities that are pledged or otherwise subject to a contingency, the occurrence of which would give another Person voting power or investment power over such securities except that disclosure of standard default and similar provisions contained in loan agreements need not be included.

## **7. Item 7. Material to be Filed as Exhibits**

The following shall be filed as exhibits: Copies of all written agreements, contracts, arrangements, understanding, plans or proposals relating to: (a) The borrowing of funds to finance the acquisition as disclosed in Item 3; (b) the acquisition of Issuer Control, liquidation, sale of assets, merger, or change in business or corporate structure, or any other matter as described in Item 4; and (c) the transfer or voting of the securities, finder's fees, joint ventures, options, puts, calls, guarantees of loans, guarantees against loss or of profit, or the giving or withholding of any proxy as disclosed in Item 6.

**D. Signature**

After reasonable inquiry and to the best of my knowledge and belief, I certify that the information set forth in this statement is true, complete and correct.

Date

Signature

Name/Title

The original statement shall be signed by each Person on whose behalf the statement is filed or his authorized representative. If the statement is signed on behalf of a Person by his authorized representative (other than an executive officer or general partner of the filing Person), evidence of the representative's authority to sign on behalf of such Person shall be filed with the statement: Provided, however, That a power of attorney for this purpose which is already on file with the Applicable SA may be incorporated by reference. The name and any title of each Person who signs the statement shall be typed or printed beneath his signature.

**[Comment:** This form is based on the disclosures required by Schedule 13D, the disclosure document under the U.S. early warning system under Section 13(d) of the Securities Exchange Act of 1934. However, the Filing Obligation in Section XV.A, was developed to reflect the definition of Early Warning Shareholder in Section VII.B.]