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Canadian Securities Regulators Adopt Changes to Early Warning Rules

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The Canadian Securities Administrators (CSA) announced yesterday the adoption of amendments to the early warning rules. The CSA received extensive comments from market participants and industry groups in response to the original proposals, which had been published in March 2013. In response to those comments, the final rules have been scaled back in a number of important respects.

Key elements of the new rules are as follows:

- **10% Threshold to Remain.** The threshold for shareholders to report their ownership of shares will remain at 10% of the outstanding shares. The CSA had originally proposed lowering the threshold to 5%, consistent with the Rule 13d reporting threshold applicable under U.S. rules. However, the CSA was persuaded through the comment process that a 5% threshold would not be appropriate for the Canadian market.
- **Reporting Changes of Ownership.** Shareholders will be required to report both increases and decreases of 2% or more. In addition, they will be required to report when they have fallen below the 10% threshold. Under the prior rules, there was no clear obligation to file reports of decreases in shareholdings.
- **AMR Eligibility.** Institutional investors that rely on the Alternative Monthly Reporting (AMR) regime will now lose their eligibility to rely on the AMR system if they engage in proxy solicitation in opposition to management in connection with director elections or corporate transactions.
- **Treatment of Derivatives.** Contrary to the original proposal, shares underlying cash-settled derivatives, such as total return swaps, will not be included in determining whether a shareholder has crossed the 10% threshold. However, the CSA has published guidance reminding investors that they could be deemed to have beneficial ownership of securities held by a derivative counterparty if investors are able, formally or informally, to obtain those securities from the counterparty or to direct that counterparty with respect to the voting of those securities.
- **Reporting of Securities Borrowing Arrangements.** The rules have clarified the reporting obligations with respect to borrowed securities. The purpose of these changes is to provide greater transparency for borrowing arrangements and the potential use of borrowed securities to engage in “empty voting” – that is, the voting of shares by a holder that has no economic interest in the shares. The rules allow for exclusion of borrowed securities for the purpose of determining the early warning threshold trigger for specified securities lending arrangements, provided that the borrowed securities are disposed of within three business days and that the borrower does not in fact vote or intend to vote the borrowed securities.

- **Enhanced Disclosure.** The rules will now require more detailed disclosure in early warning reports by shareholders regarding their ownership of shares and their future intentions regarding the issuer. The new requirements are similar to the disclosure obligations applicable to filers of Schedule 13D under Rule 13d of the U.S. Securities and Exchange Commission.

The final rules are expected to come into force on May 9, 2016. In Ontario, the effective date will depend on the proclamation into force of amendments to the *Securities Act* (Ontario).

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