



CHANGES TO EXISTING CANADIAN TAKE-OVER BID REGIME

Effective February 1, 2008, regulatory initiatives proposed by the Canadian securities regulators governing take-over bids and issuer bids in Canada have come into force.

As a result of these initiatives, the following measures have been adopted:

- Multilateral Instrument 62-104 – *Take-over Bids and Issuer Bids* will govern the conduct of take-over bids and issuer bids in all provinces and territories in Canada, except Ontario;
- Part XX - Take-Over Bids and Issuer Bids of the *Securities Act* (Ontario) and Ontario Securities Commission (“OSC”) Rule 62-504 – *Take-over Bids and Issuer Bids* which governs the conduct of take-over bids and issuer bids in Ontario only;
- Multilateral Instrument 61-101 – *Protection of Minority Security Holders in Special Transactions* which replaces OSC Rule 61-501 and governs the conduct of insider bids, issuer bids, business combinations and related party transactions in Ontario.
- National Policy 62-203 – *Take-over Bids and Issuer Bids*, (the “Policy”) adopted in all provinces and territories, including Ontario, which provides interpretive guidance with regard to certain provisions of the bid regime (which includes the preceding rules and amendments) and the conduct of parties involved in a bid.

Concurrent with the adoption of the Policy, the Canadian Securities Administrators (“CSA”) have revoked National Policy 62-201 *Bids Made Only in Certain Jurisdictions*, and withdrew CSA Staff Notice 62-303 *Identifying the Offeror in a Take-over Bid*, the substance of which is largely found in the Policy.

Purpose

The amendments to the take-over bid regime form part of the recent initiative by the Canadian Securities Administrators designed to harmonize, consolidate and streamline securities laws in Canada. In particular, the Policy seeks to codify existing practice while granting reprieve from certain aspects of the take-over bid regime from which applicants routinely seek exemptive relief. Although the amendments are largely a reflection of the harmonization objectives of the new regime, there are

certain substantive changes which are summarized below.

Summary of the Policy

The bulk of the changes are contained in the Policy, which provides guidance concerning the following matters: (i) interpretation of the prohibition against collateral agreements; (ii) independent committees for the purposes of the collateral agreement exceptions; (iii) independent committees’ determination of equivalent value; (iv) redacting or omitting filed information; and (v) varying terms after a bid has been commenced.

Definitions of Issuer Bid and Take-over Bid

The new regime modifies the definition of an issuer bid such that the offer by an issuer to acquire or redeem securities of an issuer seeking to complete an amalgamation, merger, reorganization or arrangement that requires the approval of security holders will no longer require an application to the applicable regulator for exemptive relief.

Offers by an issuer to acquire or redeem securities of an issuer for which no valuable consideration is offered or paid by the issuer are also excluded from the application of the regime. These amendments have also been reflected in the definition of take-over bids.

Acting Jointly or in Concert

In seeking to determine whether early warning thresholds have been triggered, the determination as to whether a person is “acting jointly or in concert” with an offeror continues to be a question of fact. However, the new regime more clearly defines the classes of persons who are considered to be joint actors, providing that every person or company who, as a result of any agreement, commitment or understanding, whether formal or informal, with the offeror or with any other person or company acting jointly or in concert with the offeror, acquires or offers to acquire securities of the issuer of the same class as those subject to the offer to acquire shall be *deemed* to be acting jointly or in concert with the offeror. Previously, such persons or companies were subject to a rebuttable presumption which continues to apply to associates of the offeror as well as those persons or companies agreeing to vote their shares with the offeror who are presumed to be joint actors with the offeror.

Collateral Benefits Exemptions

The collateral benefit prohibition prevents any person or company acting jointly or in concert with an offeror from entering 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 securities. As a result, bidders are typically required to seek exemptive relief from this restriction in connection with certain post-bid employment compensation matters.

The new regime has codified the following three exemptions in connection with employment-related agreements such that bidders will no longer be required to seek exemptive relief from the collateral benefits rule in those circumstances where:

- (i) there is a compensation arrangement between the offeror and the target company's employee where the employee holds less than 1% of the class of securities subject to the offer; or
- (ii) an independent committee of the target company, acting in good faith, determines that: (A) the value of the benefit, net of any offsetting costs to the related party, is less than 5% of the value of the consideration paid to the security holder; or (B) the security holder (employee) is providing at least "equivalent value" for the benefits received.

Filing of Agreements

The new regime increases the disclosure required through the public filing of documents such that any agreement between the offeror and any security holder, director or officer of the offeree as well as any other agreement of which the offeror is aware that could affect control of the offeree issuer, as well as any amendments thereto, must be filed at the time that the take-over bid circular or directors' circular is filed, by both the offeror and the target company, as applicable.

The new regime also grants these parties the ability to redact these documents in circumstances where the filer has reasonable grounds to believe that:

- (i) disclosure of the redacted provision would be seriously prejudicial to the interests of the filer or would violate confidentiality provisions;
- (ii) the redacted provision does not contain information relating to the filer or its securities that would be necessary to understand the document; and
- (iii) in the copy of the redacted 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.

New "Foreign Target" Exemption

In order to facilitate compliance with the take-over bid regime by foreign bidders and target companies, the new regime has introduced a new exemption from the formal take-over bid regime requirements in circumstances where the following conditions are satisfied:

- (i) security holders whose last address as shown on the books of the offeree issuer is in Canada hold less than 10% of the outstanding securities of the class subject to the bid at the commencement of the bid;
- (ii) the offeror reasonably believes that security holders in Canada beneficially own less than 10% of the outstanding securities of the class subject to the bid at the commencement of the bid;
- (iii) the published market on which the greatest dollar volume of trading in securities of that class occurred during the 12 months immediately preceding the commencement of the bid was not in Canada; and
- (iv) security holders in Canada are entitled to participate in the bid on terms at least as favourable as the terms that apply to the general body of security holders of the same class.

Finally, the new exemption requires that any non-English bid materials that are sent to Canadian security holders must be accompanied by a summary of the terms of the bid prepared in English. Further, where bid materials are not sent to security holders generally but a notice or advertisement of the bid is published in the jurisdiction where the offeree issuer is incorporated or organized, the offeror must publish an advertisement of the bid in at least one major daily Canadian newspaper specifying where and how security holders may obtain a copy of, or access to, the bid documents.

Exceptions from Proportionate Take-Up Requirement

The new regime has codified the following two exceptions from the requirement to take-up and pay for securities proportionately under an issuer bid such that exemptive relief is no longer required in the following circumstances:

The "modified Dutch Auction"

Issuer bids whereby the securities deposited under the terms of a formal issuer bid by security holders who; (i) are entitled to elect a minimum price per security, within a range of prices, at which they are willing to sell their

securities under the bid, and (ii) elect a minimum price which is higher than the price that the offeror pays for securities under the bid.

Odd-lots

Issuer bids whereby the offeror from acquiring securities under the terms of a formal issuer bid that, if not acquired, would constitute less than a standard trading unit (odd-lot) for the security holder.

Acquisitions during formal take-over bid

Whereas previously bidders were restricted in their ability to acquire additional securities of a target company unless they had previously announced their intent to do so, the new regime permits the purchase of securities by the bidder in circumstances where it may initially have had not intention of doing so as long as the bidder issues a press release stating its intention to make such purchases at least one day prior to such action.

Access to List of Security Holders

The new regime imposes the obligation on target companies which were not previously subject to the legal obligation to provide a list of security holders to now furnish such a list to an offeror seeking the information in connection with a take-over bid.

Proposals which were not adopted

The securities regulators abandoned certain of the initial proposals put forward as part of the review choosing instead to provide interpretive guidance regarding those instances where an offeror seeks to amend or vary the terms of a take-over bid once it has been commenced. As such, the regulators have indicated their willingness to rely on their public interest powers in circumstances where an offeror seeks to change the form of consideration offered under a take-over bid, lower the proportion of outstanding securities for which a bid is made as well as adding new conditions to a bid. The regulators decided not to restrict the use of the private agreement exemption as was initially contemplated in the original proposal.

This update is intended as a summary only and should not be regarded or relied upon as advice to any specific client or regarding any specific situation. If you would like further information regarding the issues discussed in this update or if you wish to discuss any aspect of this commentary, please feel free to contact any of the following:

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