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Take-over Bid Code Reset: 50-10-105

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The Canadian Securities Administrators (CSA) have announced today the final adoption of previously proposed amendments to Canada's take-over bid regime. The new rules are designed to shift the balance of power between target boards and shareholders by extending the minimum bid period to 105 days and mandating a minimum 50% tender condition.

The three main features of the rules are as follows:

- **50% Mandatory Minimum Tender Condition.** Bids must be subject to a mandatory tender condition requiring more than 50% of target securities held by persons other than the bidder to be tendered before the bidder can take up any securities under the bid.
- **10-Day Extension.** Once the minimum tender condition and other bid conditions have been met, bids must be extended for an additional 10 days to permit undecided shareholders to accept the bid.
- **105-Day Bid Period.** Bids must remain open for a minimum of 105 days unless either (i) the target board announces that it is reducing the bid period to a shorter period of at least 35 days, in which case the shorter period would apply to all contemporaneous bids; or (ii) the target announces a friendly transaction, in which case the minimum deposit period for all contemporaneous bids would be automatically reduced to 35 days.

The amendments to the take-over bid rules are largely as previously proposed on March 31, 2015. However, instead of lengthening the minimum bid period from the current 35-day period to 120 days, the final rules provide for a 105-day minimum bid period.

The shortening of the originally proposed 120-day bid period by 15 days is intended to allow for the compulsory acquisition provisions of various Canadian corporate statutes to continue to be available for unsolicited bids. Compulsory acquisition provisions of the *Canada Business Corporations Act* and other provincial and territorial business corporation statutes are only available where the bidder has acquired 90% of the shares subject to the bid within 120 days of the commencement of its bid. Had the minimum bid period not been shortened, it would have become impossible to use the compulsory acquisition provisions to squeeze out non-tendering shareholders. A bid period of 105 days will allow a successful bidder achieving less than 90% to extend its bid for a further 10-day period in an effort to reach 90% and still have five days to commence the compulsory acquisition process.

More Time and More Leverage for Target Boards

The CSA's rebalancing efforts will make bids more challenging for hostile bidders. Under current rules and practice, the minimum bid period is 35 days and any shareholder rights plan, or "poison pill", that the target might adopt to fend off a hostile bidder is routinely dismantled by securities regulators within 45 to 70 days of bid commencement.

The new 105-day period will give target boards a significantly longer period of time to evaluate a bid, seek alternatives or make the case for rejection of a bid. This period also provides a greater degree of predictability for a target board and its advisers to establish a strategic process, providing a fixed period of time, as opposed to the variable and shorter durations that securities commissions have allowed poison pills to last.

By giving target boards control over the ability to shorten the 105-day bid period, the new rules will give interested bidders a greater incentive to negotiate with target boards, rather than taking their offer directly to shareholders. A short bid period is typically key to limiting interloper risk. Under the new rules, bidders will have to bargain with the target to get that benefit, giving target boards the opportunity to negotiate for price and other concessions in return.

Power to the Collective

The new rules facilitate a form of collective shareholder decision-making in response to a bid, a marked departure from the current regulatory policy of protecting the rights of shareholders to make individual decisions to tender.

The requirement for a 50% minimum tender condition will prevent shareholders from selling to a bidder if the bid is not supported by a majority of the target shareholders. In the past, hostile bidders would typically reserve the right to waive their own self-imposed minimum tender condition. This meant that even if a bidder was unsuccessful in achieving a targeted majority of shares, it might seize the opportunity to become a significant minority shareholder (*e.g.*, 40% owner) by waiving its minimum tender condition and thus achieve a blocking position. This tactic was employed in Carl Icahn's hostile bid for Lions Gate Entertainment, in which Icahn waived his minimum tender condition in order to acquire 13.2% of the outstanding shares, giving him a 31% ownership block. Under the new rules, Icahn would have been prevented from acquiring any shares under his bid because a majority of Lions Gate shareholders had declined to tender.

The rule changes will also make partial bids more difficult. Even if a bidder is not seeking to acquire majority ownership of the target, the 50% minimum tender condition will apply – meaning that a majority of shareholders will have to be willing to sell a portion of their shares to the bidder.

The Future of Poison Pills?

The new rules do not address the continued use of poison pills. In its release accompanying the new rules, the CSA confirms that it has decided not to amend the existing policy on defensive tactics (National Policy 62-202). However, the CSA warns that it is prepared to examine the actions of target boards in light of the amended bid regime to determine whether they are abusive of securityholder rights. Given the significant extension of the minimum bid period, we expect that the use of shareholder rights plans to further postpone take-up by a hostile bidder will be met by swift intervention from securities regulators.

Rights plans will of course continue to be relevant to restrict shareholders from accumulating large positions through transactions that are exempt from the take-over bid rules. Consequently, boards wary of shareholders making "creeping" acquisitions of control through the private agreement purchase exemption and other take-over bid exemptions will still find utility in shareholder rights plans.

Securities Commissions' Focus to Turn to Other Defensive Tactics

Although routine pill hearings in the context of hostile bids are likely a thing of the past, the new 50% minimum tender condition will result in greater scrutiny of other defensive tactics, particularly private placements of equity securities. The minimum tender requirement will give shareholders holding significant blocks of shares great influence over the success of a bid. In many cases, a single minority shareholder or a control block holder could effectively block another bid from proceeding. The potential for large blocks of shares to make the satisfaction of the minimum tender condition more difficult, or to block a bid from proceeding altogether, is likely to result in continued securities commission involvement in hostile bids.

Although intervention on defensive private placements is clearly contemplated under National Policy 62-202, Canadian securities regulators have stated that abusive conduct is the threshold for exercising their jurisdiction to intervene in a private placement. A review of a private placement requires examining the true motivations of a target, considering whether capital was in fact required, questioning whether that capital was raised in an appropriate manner and assessing the impact of the placement on the success of a bid. In contrast to the nature of the inquiry in typical poison pill hearings, these are tougher inquiries concerning more nuanced issues for securities commission tribunals to consider.

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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