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INTRODUCTION

On February 1, 2008, new rules governing take-over bids and issuer bids came into force across Canada (collectively, the "New Rules"). The New Rules preserve the fundamental structure of the previous take-over bid and issuer bid regime and are primarily designed to harmonize and clarify the requirements and formalize certain exemptions. The principal changes introduced in the New Rules are to:

- deem (as opposed to presume) affiliates of an offeror, and parties to agreements with an offeror to acquire securities of a target, to be acting jointly or in concert with the offeror;
- formalize an exemption to the prohibition against collateral benefits in respect of certain employment arrangements;
- exempt from the formal bid requirements foreign bids where 90% of the securities subject to the bid are held outside of Canada; and
- require the offeror and the target to file merger agreements, lock-up agreements and other agreements affecting control of the target.

The following provides a general overview of the new legal regime governing take-over bids and issuer bids made in Canada and highlights the principal legislative and regulatory amendments implemented under the New Rules.

The New Rules stem from an initiative to harmonize the take-over bid and issuer bid regime across Canada. In April 2006, the Canadian Securities Administrators ("CSA") published for comment proposed National Instrument 62-104 Take-Over Bids and Issuer Bids outlining amendments to the provisions governing take-over bids and issuer bids in all Canadian jurisdictions that regulate such bids. It was initially contemplated that the detailed bid provisions in the respective statutes, rules and regulations of all applicable Canadian jurisdictions would be repealed and substituted with the proposed National Instrument before the end of 2006. However, the proposed National Instrument did not come into force during that year, and in April 2007 the Ontario Securities Commission ("OSC") proposed a combination of legislative amendments revising Part XX of the Securities Act (Ontario) ("Revised Part XX") and a new OSC Rule 62-504 Take-Over Bids and Issuer Bids ("OSC Rule 62-504") having substantially the same provisions as those contained in the proposed National Instrument. In November 2007, the CSA announced the implementation of the proposed changes in all jurisdictions except Ontario through the adoption of Multilateral Instrument 62-104 Take-Over Bids and Issuer Bids ("MI 62-104"), and the OSC confirmed that it would seek governmental approval of OSC Rule 62-504 and proclamation of the Revised Part XX. Concurrently, the CSA also adopted National Policy 62-203 Take-Over Bids and Issuer Bids, which contains explanations and discussions of the Revised Part XX, OSC Rule 62-504 and MI 62-104. In connection with the coming into force of the New Rules, Québec and Ontario have also harmonized their requirements applicable to transactions involving minority securityholders by implementing Multilateral Instrument 61-101 Protection of Minority Security Holders in Special Transactions in place of former OSC Rule 61-501 and Québec Regulation Q-27. The various aspects of this harmonization initiative became effective on February 1, 2008.
TAKE-OVER BIDS

What Is a Take-Over Bid?

A take-over bid is an offer to acquire the outstanding voting or equity securities of a class made to a person or company in a Canadian province or whose last address on the books of the target is in such province, where the securities subject to the offer, together with the securities of the same class that are already held by the offeror, constitute 20% or more of the outstanding securities of the class.2

The take-over bid requirements apply only to offers for (i) voting securities, which are those carrying a voting right either under all circumstances, or under limited circumstances that have occurred and are continuing, and (ii) equity securities, which are those carrying a residual right to participate in the earnings of an issuer and, upon its liquidation or winding-up, in its assets.

The definition of "offer to acquire" continues to be broad and includes offers to purchase, solicitations of offers to sell, and acceptances of offers to sell, whether or not such offers have been solicited. The New Rules preserve broad anti-avoidance provisions requiring that direct or indirect offers to acquire securities be considered take-over bids.3 However, a step in an amalgamation, merger, reorganization or arrangement that requires approval by way of a vote of securityholders is specifically excluded from the definition of take-over bid on the basis that these corporate transactions are instead subject to the requirements of applicable corporate law and, in transactions where the rights of minority securityholders are affected, the requirements of Multilateral Instrument 61-101 Protection of Minority Security Holders in Special Transactions ("MI 61-101") (formerly Ontario Rule 61-501).

For the purpose of determining the number of securities of a target held by an offeror, the New Rules continue to provide that an offeror is deemed to have beneficial ownership of securities where the offeror is the beneficial owner of a security convertible into such securities and has the right, whether or not subject to conditions, to acquire those securities within 60 days.4 Securities deemed to be so beneficially owned are also deemed to be outstanding for the purpose of calculating the total number of outstanding securities of the class.5

Acting Jointly or in Concert

The New Rules maintain the anti-avoidance provisions that apply when two or more persons are acting jointly or in concert to acquire securities of a target. Securities subject to offers to acquire by persons acting jointly or in concert must be aggregated to determine whether the 20% threshold has been exceeded and a take-over bid has been made.

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2 S. 89(1) of Revised Part XX; s. 1.1 of MI 62-104.
3 S. 92 of Revised Part XX; s. 1.10 of MI 62-104.
4 S. 90(1) of Revised Part XX; s. 1.8(1) of MI 62-104.
5 S. 90(2) of Revised Part XX; s. 1.8(2) of MI 62-104.
Under the New Rules the determination of whether a person or company is a joint actor remains a question of fact. However, the New Rules deem certain persons or companies to be acting jointly or in concert with an offeror, where previously there would have been only a presumption that the offeror was acting jointly or in concert with such persons or companies. As a result, the New Rules eliminate the ability of an offeror to take the position that it is not acting jointly or in concert with such persons or companies.\(^6\)

The New Rules continue to provide that every person or company that has entered into an agreement, commitment or understanding to exercise voting rights jointly or in concert with the offeror and every associate of the offeror will be presumed to be acting jointly or in concert with the offeror. However, (i) a person or company that, as a result of any agreement, commitment or understanding with an offeror or with any other person or company acting jointly or in concert with an offeror, acquires or offers to acquire securities of the same class as those subject to the offer to acquire, or (ii) any affiliate of an offeror, will be deemed to be acting jointly or in concert with the offeror. Unlike situations where evidence may be presented to rebut a presumption (for example, in the case of an associate of an offeror), persons or companies that are deemed to be acting jointly or in concert with an offeror would not be able to present evidence to the contrary.

The new provisions relating to joint actors clarify that a securityholder who has entered into a lock-up agreement with an offeror to tender securities under a formal bid will not become a joint actor solely because of such agreement. However, the practical benefit of this new exception may be somewhat limited given that lock-up agreements may also contain voting provisions requiring a securityholder to vote in favour of proposals made by the offeror or against defensive tactics, such as poison pills, adopted by the target, which could result in the application of the joint actor presumption depending on the specific facts.

The New Rules adopt a special definition of "affiliate" for the purposes of the bid regime: an issuer is an affiliate of another issuer if one of them is a subsidiary of the other or if each of them is controlled by the same person or company. A special definition of "control" for purposes only of the bid regime is also introduced by the New Rules. Unlike the general definition of "control" which applies where a person or company holds voting securities carrying more than 50% of the votes for the election of directors and the votes carried by such securities are entitled, if exercised, to elect a majority of the board, for purposes of the bid regime, "control" is established if a person beneficially owns, or exercises control or direction over, securities carrying votes which if exercised would entitle the person to elect a majority of the directors. This has the effect of broadening the reach of the "affiliate" definition.

The New Rules also provide that a general partnership is controlled by a person or company holding more than 50% of the interests of the partnership, and that a limited partnership is controlled by its general partner.

\(^6\) S. 91 of Revised Part XX; s. 1.9 of MI 62-104.
Equal Treatment of Target's Securityholders

A fundamental objective of the Canadian take-over bid regime is the equal treatment of securityholders of a target. This objective is achieved principally by (i) restricting the purchases an offeror can make outside of a formal bid through "bid integration rules", (ii) requiring that all holders of the same class of securities be offered identical consideration under the bid, and (iii) prohibiting collateral benefits that would have the effect of providing consideration of greater value to certain securityholders than that offered to the other securityholders of the same class.

- **Restrictions on Purchases Before Commencement of Bid**
  
  The intention of the pre-bid integration provisions is to prevent private transactions which provide a benefit to the selling securityholder that are not made available to securityholders under a take-over bid. This concept is maintained without any significant modification in the New Rules. Private agreements entered into by a purchaser before making a take-over bid are "integrated" with a subsequent formal take-over bid that occurs within 90 days. The offeror is required to offer consideration at least equal to and in the same form as the highest consideration that was paid on a per security basis under any such pre-bid transaction or at least the cash equivalent of that consideration. Thus, if the pre-bid purchase was made with cash, the bid consideration must be cash; if the pre-bid purchase consideration was shares, the bid consideration must be shares, or their cash equivalent. The offeror is also required to offer to acquire a percentage of securities under the formal bid at least equal to the highest percentage that the number of securities acquired from a seller in any such pre-bid transaction was of the total number of securities of the class beneficially owned by that seller at the time of the prior transaction. For purposes of pro rata take-up in a partial bid, the New Rules provide that securities acquired in an integrated pre-bid transaction will be deemed to have been deposited under the bid by the seller.

  Trades effected in the normal course on a published market are exempted from the pre-bid integration rules so long as the broker involved in such trades provides only customary broker functions and receives only customary fees or commissions, and no solicitation is made by the offeror, the seller or their agents.

- **Restrictions on Purchases and Sales During Bid**

  Subject to the exceptions described below, an offeror is generally prohibited from making any offer to acquire or entering into any agreement, commitment or understanding to acquire beneficial ownership of any securities of the class subject to a formal take-over bid while the bid is outstanding. The New Rules clarify that convertible securities are included in such prohibition.

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7 S. 93.1 to 93.4 of Revised Part XX; Part 2, Division 1 of MI 62-104.
8 S. 93.2(1) of Revised Part XX; s. 2.4(1) of MI 62-104.
9 S. 97.2(2) of Revised Part XX; s. 2.26(4) of MI 62-104.
10 S. 93.2(2) of Revised Part XX; s. 2.6 of MI 62-104.
11 S. 93.1 of Revised Part XX; s. 2.2(1) of MI 62-104.
However, an offeror is allowed to purchase securities beginning on the third business day following the date of a formal take-over bid if, among other things:

(a) the offeror discloses its intention to make such purchases in the take-over bid circular, or such intention is stated in a news release issued and filed at least one business day prior to making such purchases;

(b) the purchases are made in the normal course on a published market;

(c) the aggregate number of securities acquired does not exceed 5% of the outstanding securities of the class of securities subject to the bid;

(d) the offeror issues and files a news release containing certain required information immediately after the close of business of the published market on each day on which securities are so purchased; and

(e) the broker involved in such trades provides only customary broker services and receives only customary fees or commissions, and no solicitation is made by the offeror, the seller or their agents.\(^\text{12}\)

It is no longer sufficient to "reserve the right" in the bid circular to make market purchases when the offeror has no such intention at the commencement of the bid. The New Rules permit an offeror that does not have an intention to make market purchases at the time a bid is commenced to subsequently change its intention, without amending the circular, simply by issuing and filing a press release disclosing the offeror’s new intention at least one business day prior to making purchases.

An offeror is also prohibited from selling, making or entering into any agreement, commitment or understanding to sell any securities subject to the bid from the date of announcement of the offeror's intention to make the bid until its expiry.\(^\text{13}\) However, an exception permits the offeror to enter into an agreement to sell securities after the take-up of securities if such intention is disclosed in the bid circular.\(^\text{14}\)

- **Restrictions on Purchases Following Bid**

Regardless of whether or not securities are taken up under a formal bid, an offeror may not acquire beneficial ownership of securities of the class that was subject to the bid for a period of 20 business days following the expiration of the bid unless the acquisitions are made by way of a transaction that is generally available to all securityholders on identical terms.\(^\text{15}\)

However, as with the pre-bid integration rules, normal course purchases on a published market are permitted so long as the broker involved provides only customary broker services and receives only customary fees or commissions, and no solicitation is made by the offeror, the seller or their agents.

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12 S. 93.1(2) of Revised Part XX; s. 2.1 of OSC Rule 62-504; s. 2.2(3) of MI 62-104.
13 S. 93.4 of Revised Part XX; s. 2.7(1) of MI 62-104.
14 S. 2.5 of OSC Rule 62-504; s. 2.7(2) of MI 62-104.
15 S. 93.3(1) of Revised Part XX; s. 2.5 of MI 62-104.
services, receives only the usual fees, and no solicitation is made by the offeror, the seller or their agents. 16

- \textit{Prohibition against Collateral Benefits}

The New Rules continue to reflect the fundamental principle that all holders of the same class of securities of a target should be offered identical consideration in a bid, but clarify that an offeror may offer a choice of consideration so long as all securityholders are offered an identical choice. 17

A corollary of this principle is that the offeror is prohibited from entering into any collateral agreements with any holder of securities of the target that has the effect of providing that holder with consideration of greater value than that offered to the other holders of the same class of securities. 18 The New Rules do not provide any guidance on the meaning or interpretation of the phrase "consideration of greater value".

However, the New Rules formalize the exemptions from the collateral benefit prohibition for employment compensation arrangements, severance arrangements or other employment benefit arrangements that were commonly the subject of discretionary relief granted by the securities regulators under the prior regime. 19 The new exemptions for employment arrangements are intended to mirror the exemptions from the definition of collateral benefit under MI 61-101 used to determine which shareholders can vote as part of the minority in a business combination or related party transaction. The exemptions include, for example, situations where the value of the benefit is so small in relation to the securityholder's interest in the target that the decision to tender is unlikely to have been induced by the benefit.

The first exemption applies in respect of benefits resulting from participation by the securityholder in a group plan, other than an incentive plan, for employees of a successor to the business of the target, if the benefits are generally provided to other employees who hold positions similar to the position held by the securityholder.

The other exemptions relate to benefits received solely in connection with the securityholder's services as an employee, director or consultant where:

- the securityholder and its associates beneficially own or exercise control or direction over less than 1% of the securities of each class subject to the bid;
- an independent committee of the target has determined that the value of the benefit, net of any offsetting costs to the securityholder, is less than 5% of the consideration the securityholder expects to receive under the bid; or
- the independent committee has determined that the securityholder is providing equivalent value in exchange for the benefit.

16 S. 93.3(2) of Revised Part XX; s. 2.6 of MI 62-104.
17 S. 97 of Revised Part XX; s. 2.23 of MI 62-104.
18 S. 97.1(1) of Revised Part XX; s. 2.24 of MI 62-104.
19 S. 97.1(2) of Revised Part XX and s. 4.1 of OSC Rule 62-504; s. 2.25 of MI 62-104.
These exemptions also require that the purpose of the benefit not be, in fact, to increase the consideration paid to the securityholder or to provide an incentive to deposit the securities under the bid; that the benefit not be conditional upon supporting the bid; and that full particulars of the benefit be disclosed in the take-over bid circular, directors' circular or issuer bid circular relating to the bid.

National Policy 62-203 Take-Over Bids and Issuer Bids ("NP 62-203") provides guidance with respect to the meaning of "independent committee" and the determination of equivalent value by an independent committee for the purposes of the new exemptions. A director will generally be considered to be independent if the director is disinterested in the bid and any related transactions. The determination will be made on the same principles applicable under MI 61-101, and it will remain a question of fact as to whether a specific director is independent.

The "equivalent value" exemption provides independent committees of targets with some latitude in determining what constitutes "equivalent value". In making this determination, the committee would be required to take into account, among other things, whether the employment or other compensation arrangement or benefit is on terms consistent with those of others holding comparable positions with the offeror and in the industry generally. The retention of an expert is recommended when an independent committee does not have sufficient expertise to evaluate the appropriate comparables. It should also be noted that, as it will likely be impractical or impossible for a hostile bidder to obtain the required approval from an independent committee of the target, hostile bidders will likely be required to continue to apply for exemptive relief to obtain a comparable exemption.

- Proportionate Take-up and Payment for Partial Bids

Where a formal bid is made for less than all of the securities of a class and more securities are deposited under the bid than the offeror intends to and is required to take up, then the offeror is required to take up and pay for the securities proportionately according to the number of securities deposited by each securityholder.20

Take-Over Bid Mechanics

- Commencement of Bid

A take-over bid may be commenced through the publication of an advertisement containing a summary of the bid in at least one major daily newspaper (in English, except in Québec where it can be in French or in French and English) or by sending a bid circular to each holder of securities subject to the bid and each holder of securities convertible into securities subject to the bid.21

If a take-over bid is commenced through delivery of a bid circular to securityholders, the bid will be deemed to have been dated the date the circular was sent to all or

20 S. 97.2(1) of Revised Part XX; s. 2.26(1) of MI 62-104.
21 S. 94.1 of Revised Part XX; s. 2.9 of MI 62-104.
substantially all of the target's securityholders entitled to receive it.\textsuperscript{22} If a take-over bid is commenced by advertisement, it will be deemed to be dated the date of the first publication of the advertisement.

- **Financing of Bid**

  In contrast with bid regulation in the United States, in a Canadian bid, an offeror is required to make "adequate arrangements" before the commencement of a bid to ensure that the required funds are available to make full payment of all cash consideration offered in respect of the securities subject to the bid.\textsuperscript{23} The New Rules have explicitly incorporated prior guidance by the Canadian Securities Administrators ("CSA") in respect of the level of conditionality to which the financing may be subject. The New Rules confirm that financing arrangements may be subject to conditions if, at the time the bid is commenced, the offeror reasonably believes the possibility to be remote that, if the conditions of the bid are satisfied or waived, the offeror will be unable to pay for the securities deposited under the bid due to a financing condition not being satisfied. Where the offeror is not capable of making such arrangements prior to a bid, consideration should be given to structuring the proposed acquisition as a plan of arrangement or amalgamation where the requirements applicable to financing are more flexible.

- **Bid Circular**

  An offeror making a formal take-over bid must prepare a take-over bid circular in accordance with the appropriate form.\textsuperscript{24}

  For bids commenced by way of advertisement, the bid circular must be delivered to the target's principal office and filed with the securities commissions, and a list of securityholders must be requested from the target on or before the date of first publication of the advertisement. Within two business days after receipt of such list, the offeror must send the bid circular to the target's securityholders. It is the offeror's obligation to ensure that the information in the bid circular is current as of the date the bid is mailed.

  The New Rules now impose on non-corporate issuers such as trusts an obligation similar to the corporate law requirement to provide access to securityholder lists within 10 days following a request by an offeror (as found in s. 21 of the *Canada Business Corporations Act*).\textsuperscript{25}

  For bids commenced by delivery of the bid circular to securityholders, the bid circular must be delivered to the target's office and filed with the securities commissions on the day the bid is sent, or as soon as practicable after sending.

- **Filing of Agreements Affecting Control of Target**

  One of the substantive areas in which the New Rules are more burdensome than the prior regime relates to the requirement to file all agreements affecting the control of a target. The New Rules require the public filing by an offeror making a formal take-over bid of the

\textsuperscript{22} S. 94.8 of Revised Part XX; s. 2.10 of MI 62-104.
\textsuperscript{23} S. 97.3 of Revised Part XX; s. 2.27 of MI 62-104.
\textsuperscript{24} S. 94.2 of Revised Part XX and Ontario Form 62-504F1; s. 2.10 of MI 62-104 and Form 62-104F1.
\textsuperscript{25} S. 99.1 of Revised Part XX; s. 3.4 of MI 62-104.
following: (i) any agreement between the offeror and a securityholder of the target relating to the bid, including any lock-up agreement whereby the securityholder agrees to deposit its securities under the bid, (ii) any agreement between the offeror and the target or its directors or officers relating to the bid, and (iii) any other agreement of which the offeror is aware that could affect control of the target, including any agreement with change of control provisions, securityholder agreement or voting trust agreement, that the offeror has access to and that can reasonably be regarded as material to a securityholder in deciding whether to deposit securities under the bid. The target is also subject to a positive requirement to file similar agreements of which it is aware that could affect control of the target and can reasonably be regarded as material to a securityholder in deciding whether to deposit securities under the bid.\textsuperscript{26} It is unclear how this requirement will be interpreted, particularly in the context of a hostile take-over bid where a target may be reluctant to publicly disclose sensitive documents.

The specified agreements are required to be filed by the offeror or target on the date on which a take-over bid circular or directors' circular is filed by the offeror or the target, respectively. If the agreement is entered into or amended after such date, the agreement or amendment is required to be filed promptly and no later than two business days from the date on which the agreement or amendment is entered into. In a take-over bid context, the New Rules will accelerate the timing of the target's obligations to file these agreements as compared to the existing continuous disclosure regime, which generally requires that a material agreement be filed by an issuer with a material change report within 10 days following the date of announcement.

As a result of the New Rules, a bidder may find itself obliged to publicly file target documents which it obtained in the due diligence process. While the New Rules provide for the redaction of information protected by confidentiality provisions, a provision of an agreement can only be omitted if it does not contain information relating to the filer or its securities that would be necessary to understand the document and the filer includes in the redacted document a description of the omitted information.

- **Minimum Bid Period and Expiry**

A formal bid must be open for at least 35 days and the offeror may not take up securities deposited under the bid before the expiration of 35 days from the date of the bid.\textsuperscript{27}

A formal bid expires at the later of the end of the period during which securities may be deposited under the bid and the time the offeror becomes obligated to take up or reject securities under the bid.\textsuperscript{28} If the terms and conditions of a bid have been complied with or waived, the offeror is required to issue a press release disclosing the approximate number of securities deposited and the approximate number that will be taken up.\textsuperscript{29} Following the expiry of a bid, the offeror is required to issue a press release and return securities to depositing securityholders if the offeror knows that it will not take up securities deposited under the bid.

\textsuperscript{26} S. 98.7 of Revised Part XX and s. 5.1 of OSC Rule 62-504; s. 3.2 of MI 62-104.
\textsuperscript{27} S. 98 of Revised Part XX; s. 2.28 and s. 2.29 of MI 62-104.
\textsuperscript{28} S. 98.4 of Revised Part XX; s. 1.6 of MI 62-104
\textsuperscript{29} S. 98.6 of Revised Part XX; s. 2.34 of MI 62-104.
- **Withdrawal Rights**

The New Rules do not modify the existing rights of securityholders to withdraw securities deposited under the bid. Depositing securityholders are entitled to withdraw their securities at any time before the securities are taken up by the offeror.  

Depositing securityholders are also entitled to withdraw their securities at any time before the expiration of 10 days from the date of a notice of change to the bid circular (as described below) so long as the securities have not been taken up prior to the date of the notice of change. However, variations in the terms of the bid which consist only of an increased consideration and an extension of the time for deposit by no more than 10 days, or a waiver of a condition to the bid where the consideration offered consists solely of cash, will not trigger the extended withdrawal rights.  

Finally, securityholders also have the right to withdraw securities deposited under a bid if the securities have not been paid for within three business days after they have been taken up by the offeror.

- **Payment for Deposited Securities**

If all terms and conditions of the bid have been complied with or waived, deposited securities must be taken up and paid for within 10 days after the expiry of the bid or within 10 days of their deposit if it is after the date shares are first taken up under the bid. The offeror must pay for the securities as soon as possible and in any event within three business days of take-up.

- **Material Change in Information and Variation of Terms**

If, before the expiry of the bid or the expiry of all rights of withdrawal, a change occurs in the information contained in the bid circular that would reasonably be expected to affect the decision of the securityholders to accept or reject the bid, the offeror is required to deliver a notice of change of information, in the required form, to every person to whom the circular was required to be delivered and whose securities have not yet been taken up. The New Rules also require the prompt issuance and filing of a news release by the offeror. A change that is not within the control of the offeror will not trigger these requirements unless it is a change in a material fact relating to securities offered by the offeror as consideration under the bid. A notice of change of information triggers a further 10-day withdrawal right but does not automatically extend the deposit period.

Where there is a variation in the terms of a bid, the offeror must file and deliver a notice of variation, in the required form, to securityholders whose securities have not yet been

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30 S. 98.1(1)(a) of Revised Part XX; s. 2.30(1)(a) of MI 62-104.
31 S. 98.1(1)(b) and s. 98.1(2) of Revised Part XX; s. 2.30(1)(b) and s. 2.30(2) of MI 62-104.
32 S. 98.1(1)(c) of Revised Part XX; s. 2.30(1)(c) of MI 62-104.
33 S. 98.3 of Revised Part XX; s. 2.32 of MI 62-104.
34 In Ontario: Form 62-504F5; in other jurisdictions: Form 62-104F5.
35 S. 94.3 of Revised Part XX; s. 2.11 of MI 62-104.
36 In Ontario: Form 62-504F5; in other jurisdictions: Form 62-104F5.
taken up. The New Rules also require the offeror to promptly issue and file a news release. To ensure that securityholders have sufficient time to respond to the variation, the deposit period must not expire before 10 days following the date of the notice of variation. The above rules for variation of terms do not apply to a waiver of a condition of a bid and the related bid extension if the consideration offered for the target securities consists solely of cash. However, the New Rules require that the offeror issue and file a news release announcing the waiver. No variation in the terms of a formal bid, other than a waiver of a condition that was identified as waivable at the sole option of the offeror, is permitted after the expiry of a bid.  

Offerors must be aware that new NP 62-203 articulates the willingness of the CSA to exercise their public interest jurisdiction to intervene in situations where a variation to the terms of a bid relates to a fundamental aspect of the offer in a manner detrimental to the target's securityholders. In response to comments received on the proposed New Rule, the CSA and the Ontario Securities Commission (the "OSC") withdrew a proposal to prohibit specific variations and instead provided examples of situations that might trigger the exercise of their public interest jurisdiction, including lowering the consideration offered under a bid, changing the form of consideration, lowering the proportion of securities subject to the bid, or adding new conditions to an existing bid.

### Directors' Circular

The board of directors of a target subject to a take-over bid is required to send to the target's securityholders a directors' circular, in the prescribed form, not later than 15 days after the date of the bid. The board of directors is required to include in the directors' circular either a recommendation to accept or reject the bid, or to advise securityholders that the board is unable to make, or is not making, a recommendation and state the reasons therefor. Alternatively, the board of directors may advise securityholders that the board is considering whether or not to make a recommendation to accept or reject the bid and state the reasons for not making a recommendation, in which case the board is required to communicate to securityholders a recommendation or advise that the board is unable to make, or is not making, a recommendation, together with the reasons therefor, at least seven days before the scheduled expiry of the deposit period under the bid.

If, prior to the expiry of the bid, there is a change in the information contained in the directors' circular that would reasonably be expected to affect the decision of the securityholders, the target's board of directors is required to send a notice of the change to securityholders, in the prescribed form, and issue and file a news release relating to the change.

An individual director or officer may separately recommend acceptance or rejection of a take-over bid if the director or officer sends a circular, in the prescribed form, to

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37 S. 94.4 of Revised Part XX; s. 2.12 of MI 62-104.
38 In Ontario: Form 62-504F3; in other jurisdictions: Form 62-104F3.
39 S. 95 of Revised Part XX; s. 2.17 of MI 62-104.
40 In Ontario: Form 62-504F5; in other jurisdictions: Form 62-104F5.
41 S. 95.1 of Revised Part XX; s. 2.18 of MI 62-104.
42 In Ontario: Form 62-504F4; in other jurisdictions: Form 62-104F4.
the target's securityholders. An individual director's or officer's obligation to send the circular may also be satisfied by sending the circular to the board of directors of the target. The board must deliver a copy of the individual director's or officer's circular to the securityholders at the target's expense. 43

Exemptions from Formal Take-Over Bid Requirements

An offeror acquiring voting or equity securities representing 20% or more of the outstanding securities of a class is required to make a formal take-over bid in compliance with the requirements of the New Rules summarized above, unless an exemption from these requirements is available.

The New Rules have introduced a new exemption for foreign bids, confirmed and clarified previously existing exemptions, and eliminated prior exemptions for substantial take-over bids made through the facilities of a stock exchange because both the Toronto Stock Exchange and the TSX Venture Exchange have recently repealed their rules governing substantial take-over bids. Below is a summary of the principal exemptions that may now be available to an offeror:

- **Foreign Bid Exemption**

  The New Rules introduce a new exemption for issuers with minimal share ownership presence in Canada. 44 This new exemption is available where less than 10% of the securities subject to the bid are held by securityholders in Canada (including beneficial ownership) and the published market with the greatest dollar value of trading in the securities subject to the bid during the 12 months preceding the commencement of the bid is not in Canada. In order for an offeror to rely on this exemption, securityholders in Canada must be able to participate in the bid on terms at least as favourable as the terms that apply to the general body of securityholders (although they need not necessarily receive an identical form of consideration).

  In response to comments provided during the comment process relating to the New Rules, the CSA have rejected the position that an offeror should be able to rely exclusively on the list of registered shareholders of the target as conclusive evidence of the number of securities held in Canada, and have instead indicated their view that the offeror is responsible for ensuring it has taken all necessary steps to determine whether the 10% threshold is met and the exemption is available.

  When the conditions for the foreign bid exemption are met, the offeror may use the exemption by sending the materials relating to the bid to the securityholders in Canada. Where the bid materials are not in English, a summary of key terms must be prepared in English (or French and English in Québec). Where no bid materials are sent but a notice or advertisement is published by the offeror in the jurisdiction of incorporation of the target, an advertisement in English (or French and English in Québec) specifying where and how the

43 S. 96 of Revised Part XX; s. 2.20 of MI 62-104.
44 S. 100.3 of Revised Part XX; s. 4.4 of MI 62-104.
securityholders may obtain a copy of the bid materials must be published in the Canadian jurisdictions where securityholders of the target reside.\textsuperscript{45}

- **Minimal Connection to Jurisdiction**

  An exemption is also available for take-over bids where the number of registered holders of securities of the class subject to the bid in each province is fewer than 50 and securityholders in each province beneficially own less than 2% of the outstanding securities of the class.\textsuperscript{46} In this case, the information and take-over bid materials must be filed in Canada and sent to the securityholders in each province.\textsuperscript{47}

- **Normal Course Purchase Exemption**

  The New Rules enlarge in a minor way the normal course take-over bid exemption. The exemption permits the acquisition of not more than 5% of the outstanding securities of a class during a period of 12 months at a price not in excess of the market price plus reasonable brokerage fees or commissions actually paid.\textsuperscript{48} Purchases no longer need to be made on a "recognized stock exchange". Under the New Rules, it is enough that there is a published market in the securities. A published market is generally defined in the New Rules as a market in or outside Canada that regularly publishes or electronically disseminates the price at which the applicable securities are traded.

- **Private Agreement Exemption**

  The New Rules maintain the private agreement exemption permitting purchases made from no more than five persons or companies where the value of the consideration paid, including brokerage fees and commissions, does not exceed 115% of the market price of the securities at the date of the bid.\textsuperscript{49} Where there is no published market for the securities, the New Rules restrict the availability of the private agreement exemption to the situations where there is a reasonable basis for determining that the value of the consideration does not exceed the 115% limit.

  The New Rules require that where an offeror relying on this exemption knows or ought to know after reasonable inquiry that a seller of securities acquired the securities in order that the offeror might make use of this exemption, each person or company from whom those securities were acquired by such seller must be included in the determination of the number of persons or companies to whom an offer to acquire has been made by the offeror for the purposes of this exemption.

  The CSA have indicated that they intend to revisit the private agreement exemption in the near future. In the request for comments for the proposed New Rules, the CSA indicated that they are concerned that the current language permits serial usage of the exemption without any defined timing between each usage. They are concerned that serial usage could be

\textsuperscript{45} S. 6.2(1) of OSC Rule 62-504; s. 4.4 of MI 62-104.
\textsuperscript{46} S. 100.4 of Revised Part XX; s. 4.5 of MI 62-104.
\textsuperscript{47} S. 6.2(2) of OSC Rule 62-504; s. 4.5 of MI 62-104.
\textsuperscript{48} S. 100 of Revised Part XX; s. 4.1 of MI 62-104.
\textsuperscript{49} S. 100.1 of Revised Part XX; s. 4.2 of MI 62-104.
used to avoid the formal bid requirements and permit an offeror to make continuous exempt purchases to take control of a company without an equal allocation of the control premium. The CSA originally attempted to address these ambiguities by proposing only one lifetime usage of this exemption and a requirement that all agreements under the exemption be completed within six months of the first purchase. These proposed restrictions were removed from the final version of the New Rules in response to negative comments received during the comment process. Given the many legitimate reasons for utilizing this exemption more than once, it remains to be seen how the CSA will attempt to revise this exemption to reduce the possibility for abuse.

- **Non-Reporting Issuers with Fewer than 50 Securityholders**

  An exemption from the formal take-over bid requirements continues to be available where the target is not a reporting issuer, the securities acquired have no published market, and the number of holders of the securities of the class subject to the bid is not more than 50, excluding employees and former employees of the target and its affiliates.  

**Early Warning System**

The New Rules do not make any substantive changes to the early warning system. A person or company that acquires voting or equity securities of a reporting issuer or the power to exercise control or direction over such securities, which constitute, together with the securities held or deemed to be held by such person or company, 10% or more of a class of securities of the reporting issuer must issue and file a news release containing certain prescribed information and file within two business days an early warning report containing the same information as well as certain additional required disclosure.

The required disclosure includes, among other things:

(a) the name of the acquiror;

(b) the number of securities over which the acquiror, or any joint actor, acquired ownership or control or direction as a result of the transaction or occurrence giving rise to the press release;

(c) the number of securities and percentage of such securities held by the acquiror and any joint actor immediately after the transaction;

(d) the purpose of the transaction, including disclosure of any future intention to increase the beneficial ownership, control or direction over securities of the reporting issuer;

(e) the general nature and the material terms of any agreement relating to the transaction; and

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50 S. 100.2 of Revised Part XX and s. 6.1 of OSC Rule 62-504; s. 4.3 of MI 62-104.
51 S. 102.1 of Revised Part XX and s. 7.1 of OSC Rule 62-504; s. 5.2 of MI 62-504.
(f) the names of any joint actors.

The acquiror is required to make further disclosure upon the acquisition of each additional 2% of the outstanding securities of the reporting issuer, or if there is a change in a material fact in respect of the required disclosure previously made by the acquiror.

The acquiror is also prohibited from acquiring any further securities of the same class or securities convertible into securities of that class from the occurrence of the event or transaction giving rise to the early warning requirement until the expiry of one business day from the date the early warning report is filed. An acquiror that has beneficial ownership or control over 20% or more of the outstanding securities of the class is exempt from this restriction on further purchases but is subject to the early warning disclosure requirements described above.

If a person acquires beneficial ownership of, or control or direction over, 5% or more of the securities of the class that is subject to a formal bid, that person must issue and file a news release pursuant to the early warning system. In other words, when a formal take-over bid is outstanding, the 10% threshold for early warning reporting is reduced to 5%. An additional news release must be issued and report filed upon the acquisition of an additional 2% or more of the outstanding securities of the reporting issuer.

ISSUER BIDS

What Is an Issuer Bid?

An issuer bid is an offer to acquire or redeem any securities (other than non-convertible debt securities) made by an issuer in respect of securities of its own issue to any person or company in a local jurisdiction. The New Rules specifically exclude from this definition acquisitions or redemptions by an issuer of its own securities where (i) no valuable consideration is offered or paid for the securities, or (ii) the acquisition, redemption or offer is a step in an amalgamation, merger, reorganization or arrangement that requires approval in a vote of securityholders.

Requirements Applicable to Issuer Bids

In general, the rules described above in respect of formal take-over bids are also applicable to formal issuer bids under the New Rules. However, issuer bids are also subject to some specific requirements, including the following:

- Trading Restrictions

Issuer bids are not subject to pre-bid integration rules, but issuers are still restricted with respect to the acquisition of shares during and after an issuer bid. In addition,

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52 S. 102.2 of Revised Part XX and s. 7.2 of OSC Rule 62-504; s. 5.3 of MI 62-104.
53 S. 89(1) of Revised Part XX; s. 1.1 of MI 62-104.
54 S. 93.1(4) of Revised Part XX; s. 2.3 of MI 62-104.
55 S. 93.3 of Revised Part XX; s. 2.5 of MI 62-104.
an issuer is prohibited from selling or agreeing to sell any securities subject to the bid from the date of announcement of the intention to make the bid until its expiry,\(^{56}\) except for sales in respect of dividend plans, dividend reinvestment plans, employee purchase plans and other similar plans.\(^{57}\)

- **Dutch Auction Issuer Bid**

  As with partial take-over bids, the issuer is required in an issuer bid to take up and pay for the securities proportionately according to the number of securities deposited by each securityholder.\(^{58}\) However, the New Rules formalize an exemption from such requirement to permit "Dutch auction" issuer bids without the necessity for discretionary exemptive relief. In a Dutch auction issuer bid, the issuer is not required to take up securities on a Pro Rata basis from those securityholders who elected a minimum price that is higher than the price that the issuer pays for securities under the bid.\(^{59}\)

- **Filing of Issuer Documents**

  The rules described above requiring the filing of certain agreements affecting the control of a target in connection with a take-over bid are not applicable in the context of an issuer bid.

**Exemptions from Issuer Bid Requirements**

When an issuer makes an offer for securities of its own issue, the offeror is required to make a formal issuer bid in compliance with the requirements of the New Rules, unless an exemption from these requirements is available. The formal issuer bid exemptions include exemptions similar to those described above in respect of foreign take-over bids, take-over bids with a minimal connection to a jurisdiction, and take-over bids for securities of certain non-reporting issuers. In addition, the following exemptions are available for issuer bids:

- **Redemption or Retraction Exemption**

  Issuers are permitted to acquire their own securities in accordance with redemption or retraction provisions in the terms and conditions attaching to the class of securities, or as required by statute.\(^{60}\)

- **Employee, Executive Officer, Director and Consultant Exemption**

  The New Rules expand the current exemption for issuer bids to permit repurchases from current and former employees of the issuer or affiliates of the issuer to include consultants and executive officers and directors.\(^{61}\) The exemption continues to require that if there is a published market, the value of the consideration must not be greater than the market

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\(^{56}\) S. 93.4 of Revised Part XX; s. 2.7 of MI 62-104.

\(^{57}\) S. 2.5 of OSC Rule 62-504; s. 2.7(3) of MI 62-104.

\(^{58}\) S. 97.2 of Revised Part XX; s. 2.26 of MI 62-104.

\(^{59}\) S. 4.2(2) of OSC Rule 62-504; s. 2.26(3) of MI 62-104.

\(^{60}\) S. 101 of Revised Part XX; s. 4.6 of MI 62-104.

\(^{61}\) S. 101.1 of Revised Part XX; s. 4.7 of MI 62-104.
price and that purchases not exceed 5% of the outstanding securities of the class in any 12-month period.

- **Normal Course Issuer Bid Exemption**

  An issuer bid is exempt if it is made in the normal course over the Toronto Stock Exchange, the TSX Venture Exchange or another designated exchange in accordance with the rules and regulations of that exchange. The New Rules require that the issuer file any news releases required by the designated exchange.

  An issuer bid made in a published market that is not a designated exchange will also be exempt if (i) the bid is for not more than 5% of the outstanding securities of the class, (ii) the aggregate number of securities acquired under this exemption within any 12-month period under the exemption does not exceed 5% of the outstanding securities at the beginning of the period, and (iii) the value of the consideration paid for any of the securities does not exceed the market price plus reasonable brokerage fees and commissions actually paid. An issuer relying on this exemption is required to issue and file a news release describing the class and number of securities, the dates of the issuer bid, the consideration offered, the manner in which the securities will be acquired and the reasons for the bid.

The foregoing is a summary of recent legal developments in Canadian mergers and acquisitions. For additional information, please contact Patricia L. Olasker or Philippe C. Rousseau in the Toronto office at (416) 863-0900 or Neil Kravitz in the Montréal office at (514) 841-6522.

Davies Ward Phillips & Vineberg LLP, with over 235 lawyers, practises nationally and internationally from offices in Toronto, Montréal, New York and an affiliate in Paris and is consistently at the heart of the largest and most complex commercial and financial matters on behalf of its North American and overseas clients.

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S. 101.2 of Revised Part XX; s. 4.8 of MI 62-104.