

April 2016

SECURITIES ALERT

Ontario Securities Commission Amends Take-Over Bid Regime

Expected to harmonize with other jurisdictions on May 9, 2016

The Ontario Securities Commission (OSC) has announced it intends to adopt National Instrument 62-104 *Take-Over Bids and Issuer Bids* (NI-62-104) on May 9, 2016. Currently, the regime governing take-over bids and early warning reporting is harmonized throughout all jurisdictions of Canada, except Ontario. In Ontario, substantively harmonized requirements for take-over bids and early warning reporting are set out in Part XX of the *Securities Act* (Ontario) (the Act) and OSC Rule 62-504 *Take-Over Bids and Issuer Bids* (Rule 62-504). Ontario will amend the Act to accommodate the adoption of NI 62-104 and will concurrently repeal Rule 62-504.

In addition, the Canadian Securities Administrators (CSA) is concurrently adopting amendments and changes to the regime governing the conduct of take-over bids, including amendments to NI 62-104, which will also become effective on May 9, 2016.

These concurrent actions are intended to eliminate bifurcation and to harmonize and streamline the take-over bid, issuer bid, and early warning reporting regimes into a single, harmonized national instrument. They are also intended to enhance the quality and integrity of the take-over bid regime and rebalance the current dynamics among offerors, offeree issuer boards of directors (offeree boards), and offeree issuer security holders by (i) facilitating the ability of offeree issuer security holders to make voluntary, informed and co-ordinated tender decisions, and (ii) providing the offeree board with additional time and discretion when responding to a take-over bid.

These new measures make some changes to the bid regime to establish a majority acceptance standard for all non-exempt take-over bids, a mandatory extension period to alleviate offeree security holder coercion concerns, and a 105 day minimum deposit period to address concerns that offeree boards do not have enough time to respond to an unsolicited takeover bid. Specifically, the new regime will require that all non-exempt take-over bids:

- receive tenders of more than 50% of the outstanding securities of the class that are subject to the bid, excluding securities beneficially owned, or over which control or direction is exercised, by the offeror or by any person acting jointly or in concert with the offeror (the Minimum Tender Requirement);
- be extended by the offeror for an additional 10 days after the Minimum Tender Requirement has been achieved and all other terms and conditions of the bid have been complied with or waived (the 10 Day Extension Requirement); and
- remain open for a minimum deposit period of 105 days unless
 - the offeree board states in a news release a shorter deposit period for the bid of not less than 35 days, in which case all contemporaneous take-over bids must remain open for at least the stated shorter deposit period, or
 - the issuer issues a news release that it intends to effect, pursuant to an agreement or otherwise, a specified alternative transaction, in which



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case all contemporaneous take-over bids must remain open for a deposit period of at least 35 days.

Neither the CSA nor the OSC will amend National Policy 62-202 Defensive Tactics (NP 62-202) in connection with these amendments. Accordingly securities regulators will still be prepared to examine the actions of offeree boards in specific cases, and in light of the amended bid regime, to determine whether they are abusive of security holder rights.

The take-over bid regime has been the subject of several securities regulatory decisions in recent years, not all of which have been consistent, and which have created some uncertainty as to regulatory expectations. These amendments should help create a more consistent regime throughout Canada; however, we will have to wait and see if they are the final word on this topic.

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