

New Take-Over Bid Regime

FEBRUARY 25, 2016 11 MIN READ

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The Canadian Securities Administrators (CSA) have published fundamental amendments (the Amendments) to the take-over bid regime that are expected to come into force on May 9, 2016. The Amendments will increase the amount of time afforded to a target issuer to respond to a hostile bid, effectively resulting in a 105-day “permitted bid” regime, and will result in a completely harmonized take-over bid regime across Canada, as National Instrument 62-104 *Take-Over Bids and Issuer Bids* (NI 62-104) will be adopted in Ontario. The Amendments have important implications for the use of both tactical and strategic rights plans, and may also influence how transactions are structured in the future.

The Amendments are largely unchanged from the [proposed amendments previously published for comment in March 2015](#), with the most notable difference being a reduction in the minimum bid period from 120 to 105 days. This change was made to ensure that bidders that make 105-day bids can extend their bids for a 10-day period and still avail themselves of the compulsory acquisition provisions under Canadian corporate statutes, which permit a compulsory acquisition to be effected if holders of 90% of the shares (other than shares held by the offeror or its affiliates and associates) have accepted a bid within 120 days of the launch of a bid. The CSA have indicated that the reduction in the minimum bid period from 120 to 105 days meets the policy objective of providing target issuer boards with a longer, fixed period of time to respond to a bid while making it reasonably practicable for a bidder to avail itself of the compulsory acquisition provisions. The shortening of the minimum bid period will also be received positively by some of those market participants who viewed the 120-day minimum bid period as being too lengthy and potentially having a chilling effect on take-over bid activity.

The CSA have also contemporaneously published in final form amendments to the early warning regime that requires disclosure of ownership positions in public companies – [see our separate Osler Update](#).

Overview

Under the Amendments, all non-exempt take-over bids (including partial bids) will be subject to the following new requirements:

- **50% Minimum Tender Requirement** – Bids will be subject to a mandatory minimum tender requirement of more than 50% of the outstanding securities of the class that are subject to the bid, excluding those beneficially owned, or over which control or direction is exercised, by the bidder and its joint actors (the Minimum Tender Requirement).
- **10-Day Extension Requirement** – Following the satisfaction of the Minimum Tender

Requirement and the satisfaction or waiver of all other terms and conditions, bids will be required to be extended for at least an additional 10-day period (the 10-Day Extension Requirement).

- **105-Day Bid Period** – Bids will be required to remain open for a minimum of 105 days, subject to two exceptions. First, the target issuer’s board of directors may issue a “deposit period news release” in respect of a proposed or commenced take-over bid providing for an initial bid period that is shorter than 105 days but not less than 35 days. If so, any other outstanding or subsequent bids will also be entitled to the shorter minimum deposit period counted from the date that other bid is made. Second, if an issuer issues a news release that it has entered into an “alternative transaction” – effectively a friendly change of control transaction that is not a bid, such as an arrangement – then any other outstanding or subsequent bids will be entitled to a minimum 35-day deposit period counted from the date that other bid is made (the 105-Day Requirement).

Highlights

The main consequences and implications of the Amendments are as follows:

- The 105-Day Requirement will give directors of target issuers in Canada more time to respond to and consider alternatives to a take-over bid. Under the current regime, which provides for a 35-day minimum deposit period, issuers have made use of rights plans to effectively extend the deposit period. Such rights plans have historically been cease traded by securities regulators within 50 to 70 days of the commencement of an offer (although there have been notable variations in recent pill decisions). A typical shareholder rights plan provides that a 60-day “permitted bid” does not trigger the rights plan if the bid remains open for a minimum of 60 days and includes provisions equivalent to the Minimum Tender Requirement and 10-Day Extension Requirement. The 105-Day Requirement will ensure that boards of directors have at least 105 days to respond to an initial unsolicited offer.
- Costs and risks for hostile bidders may increase as a consequence of giving target issuers more time to respond. Higher financing costs, for example, as well as the greater likelihood of an interloper, may add incremental cost and risk from a hostile bidder’s perspective. Despite these potential increased costs and risks, however, a hostile bid will remain easier to complete in Canada than in the United States. Hostile bidders in Canada will generally be assured that their offer is capable of completion after 105 days, subject to satisfaction or waiver of the bid conditions. By contrast, rights plans in the United States can generally only be removed following a successful proxy contest to replace a majority of the directors of the target issuer board – a process that can take well over a year where a U.S. incorporated target issuer has a staggered board of directors.
- Friendly take-over bids can still be completed in 35 days from the commencement of the bid.
- Partial bids will be significantly more difficult to complete due to the Minimum Tender Requirement. The mandatory 10-day extension period in a partial bid will be limited to

exactly 10 days and the bidder will not be able to extend its partial bid after the expiry of such time.

- The ability to make any-or-all bids will be eliminated due to the Minimum Tender Requirement.
- Take-over bids for a target issuer with significant minority shareholders will be more difficult to complete due to the Minimum Tender Requirement. There may be exceptional circumstances in which the securities regulators will be prepared to grant exemptive relief from the Minimum Tender Requirement to allow a non-coercive bid to proceed without the support of those significant minority shareholders who do not support the bid (e.g., in circumstances where the significant minority shareholder may have ulterior motives for not tendering to a bid that is otherwise supported by a clear majority of other minority shareholders).

Implications for Shareholder Rights Plans

Rights Plans in the Face of Bids

The Amendments do not specifically address how rights plans will be treated after the new take-over bid regime comes into force. In the commentary accompanying the Amendments, the CSA have simply indicated that National Policy 62-202 *Defensive Tactics* (the policy under which securities regulators review defensive tactics, including rights plans) continues to apply following the implementation of the Amendments.

Our expectation is that rights plans will not be permitted to remain in effect after a 105-day formal bid, absent unusual circumstances, and therefore securities regulators will be called upon less frequently to hold hearings as to when “the pill must go.” This will result in greater certainty as to timing of bids than under the current regime. There may be exceptional circumstances in which regulators will be prepared to allow a rights plan to delay a bid beyond 105 days, such as where a clear majority of shareholders have approved the rights plan in the face of the bid, or where there have been late-breaking developments in an auction that justify providing the target issuer with additional time.

Since the Amendments will give a target issuer 105 days to respond to a hostile bid (i.e., a period that is well in excess of the amount of time that securities regulators have typically provided Canadian issuers before cease trading a rights plan), in many cases target issuers may well conclude that they have sufficient time to respond to a hostile bid without needing to adopt a rights plan. Accordingly, we would expect that there will be less of an incentive for issuers to adopt rights plans either “strategically” at their annual meetings or “tactically” in the face of a bid.

As the Amendments do not apply to exempt bids, there will still be a role for rights plans in protecting target issuers against “creeping bids,” such as bids made through the normal course purchase and private agreement exemptions, and to prevent hard lock-up agreements. Issuers may also attempt to adopt tactical “voting pills” in proxy contests (for example, a rights plan with a lower than 20% threshold), however, it remains to be seen how securities regulators will respond to such rights plans.

Rights Plans Up for Renewal at Upcoming Annual Meetings

For issuers with an existing rights plan that is up for renewal at an upcoming annual meeting, one immediate practical issue is what changes, if any, to make to their rights plans in light of the Amendments.

A sensible outcome would be for the definition of a “permitted bid” in rights plans to be amended to mean any formal bid made in compliance with NI 62-104 (i.e., any bid made in compliance with the Amendments). We suggest that until such time as the proxy advisory firms have published revised rights plan policies or otherwise indicate the changes to rights plans that they will support in light of the Amendments, issuers should defer amending their rights plans until they have full visibility on what changes may be needed to satisfy proxy advisory firms whose recommendations their institutional shareholders typically follow.

We note that the potential exists for conflict between the requirements of most if not all existing strategic rights plans and NI 62-104. For example, where a friendly deal is structured as an arrangement, a subsequent hostile bid would be required to have a minimum deposit period of 60 days under a typical ISS-approved rights plan. Under the Amendments, however, such a subsequent hostile bid would only need to remain open for 35 days.

Timing Implications for Contested Transactions

Under the Amendments, hostile bidders that make an initial bid for a target issuer must keep their bids open for at least 105 days. If the target issuer subsequently enters into a white knight transaction, however, the hostile bidder may shorten its bid period by an amount of time that varies depending on the structure of the white knight transaction.

If the white knight transaction is structured as a bid, the hostile bidder will be entitled to the same bid period as the white knight bid. For example, if the white knight bid has a 35-day deposit period, then the hostile bidder may amend its existing offer by shortening the deposit period from 105 days to not less than 35 days from its original commencement date, provided at least 10 days’ notice is given of the revised expiry date. If the white knight bid has a 50-day deposit period, however, then the hostile bidder would only be able to shorten its deposit period to 50 days. Alternatively, if the white knight transaction is structured as an “alternative transaction,” such as an arrangement, the hostile bidder may shorten its bid period to a minimum of 35 days from its original commencement date in all cases, provided at least 10 days’ notice is given of the revised expiry date.

Since the amount of time a hostile bid must remain open following a white knight transaction depends on whether that transaction is structured as a bid or an alternative transaction, the Amendments have arguably created an incentive to structure white knight transactions as bids rather than alternative transactions in order to equalize the white knight bidder’s timing with a hostile bidder, or even provide the white knight bidder with a slight timing advantage.

For example, if a white knight transaction is structured as a 105-day bid, the white knight may be able to shorten the bid period with the target issuer’s consent when the white knight is in a position to take up shares under its bid. Since the white knight will be able to issue a notice of variation shortening its bid period on at least the same day as the hostile bidder, the white knight would be able to equalize timing with or obtain a slight timing advantage over the hostile bidder. There are arguably also similar incentives to structure friendly transactions as bids rather than arrangements (or other “alternative transactions”) in order to avoid the risk that a topping hostile bidder may have a timing advantage over the initial friendly transaction.

While the Amendments may allow for white knight or friendly transactions to be structured

as bids to equalize timing, this is likely to be only one factor in deciding on an appropriate structure and, as a practical matter, timing may be of little consequence if the white knight or friendly transaction offers clearly superior value to shareholders.

Effectiveness of Amendments and Transitional Rules

The Amendments are expected to come into force on May 9, 2016. At that time, Part XX of the *Securities Act* (Ontario) will be amended, OSC Rule 62-504 *Take-Over Bids and Issuer Bids* will be repealed and the take-over bid regime in Ontario will be governed by NI 62-104.

Any bids commenced prior to May 9, 2016, will be governed by the current rules. The current rules will also govern any bids in respect of a target issuer that: (a) was subject to a bid commenced prior to May 9, 2016; or (b) issued a news release prior to May 9, 2016, announcing that it intends to effect an alternative transaction. In these circumstances, the current rules will govern prior to the expiry of such bid or to the completion or abandonment of such alternative transaction, as applicable.