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Canadian Regulators Adopt Rules for Takeover Bids, Issuer Bids and Special Transactions Affecting Minority Shareholders

LESLIE MCCALLUM

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Canadian securities regulators have adopted a new set of takeover bid rules that harmonize the requirements across the country. This is a welcome development that reduces regulatory uncertainty for bidders and targets alike. In some areas, the harmonized rules are stricter -- for example, in "joint actor" determinations and in the filing requirements associated with bids. On the other hand, there are new exemptions from the prohibition on collateral benefits for employment arrangements. And the regulators dropped their original proposal to limit the private agreement exemption.

The changes became effective on Friday. Bids commenced before that date will be governed by the old rules. The Ontario Securities Commission and Quebec's regulator have also adopted harmonized requirements for enhanced disclosure, independent valuations and majority-of-minority approval for special transactions affecting minority shareholders.

CHANGES TO THE EXISTING BID REGIME

Ontario's new takeover bid and issuer bid regime will consist of amended Part XX of the Securities Act, Takeover Bids and Issuer Bids, as well as new OSC Rule 62-504 and related

rules and forms. Equivalent changes to the bid regimes of the other jurisdictions have been adopted in Multilateral Instrument 62-104. In addition, new National Policy 62-203 outlines how securities regulators will interpret and apply certain parts of the new rules and provides guidance to the parties involved in a bid.



TORYS' LESLIE MCCALLUM

JOINT ACTORS

The new rules include stricter tests to determine when two or more parties are "acting jointly or in concert" in bidding for a target (the significance being that joint actors are, generally, subject to all the same legal requirements governing bids, and their holdings of target securities must be aggregated for certain purposes, such as the early warning requirements). Under the new rules, a bidder will be deemed to be acting jointly with its affiliates and with any party acquiring securities in concert with the bidder. In contrast, the rules are not being changed with respect to a bidder's associates or any party exercising voting rights in concert with the bidder: Those parties are subject to a rebuttable presumption that they are acting jointly with the bidder.

COLLATERAL BENEFITS

To reduce bidders' need to seek discretionary relief from the collateral benefits rules in connection with post-bid employment arrangements with the target's employees or

Leslie McCallum (lmccallum@torys.com) practices corporate law with a focus on capital markets and mergers and acquisitions. She also develops precedents, writes client communications and tracks and researches new Canadian and U.S. legal developments and cross-border matters.

directors, the new rules explicitly permit these kinds of collateral benefits if certain conditions are met as long as:

1. They involve a group plan that generally provides benefits to employees in similar positions;
2. They involve a security holder owning less than 1 percent of the class of target securities; or

An independent committee of the target determines that: A) The security holder is providing at least equivalent value for the benefits; or B) The value of the benefits is less than 5 percent of the consideration being paid to the security holder under the bid.

These provisions generally align with the collateral benefits provisions of new MI 61-101, Protection of Minority Shareholders in Special Transactions (see below), but the "equivalent value" exception is not available under MI 61-101 for collateral benefits provided to related parties in a second-step squeeze-out transaction or other business combination.

PURCHASES OF TARGET SECURITIES DURING BIDS

Both the old and the new rules permit bidders to purchase target securities during a bid if the bidder's intention to do so was disclosed in the bid circular and certain other conditions are met. The new rules go further by permitting bidders to purchase target securities during a bid even if they originally had no intention of doing so, as long as the bidder discloses its changed intention in a news release filed at least one business day in advance of any purchases.

FILING REQUIREMENTS

Bidders and targets will have to file the following bid-related documents with securities regulators:

- Lockup agreements;
- Support and other agreements between the bidder and target;
- Agreements between the bidder and directors or officers of the target; and
- Any material documents that could affect control of the target.

Sensitive portions of a filed document may be redacted and replaced with a brief description if disclosure would be seriously prejudicial or would violate confidentiality provisions.

BIDS FOR FOREIGN TARGETS

A new exemption from the bid rules is available for Canadian security holders who own less than 10 percent of the target's securities and certain other conditions are met, including that the target's largest trading market is

outside Canada and Canadian security holders are entitled to participate equally in the bid.

PROPOSED RULES THAT WERE NOT ADOPTED

When the new bid rules were originally published for comment in 2006, the regulators proposed some changes that have not been adopted. The abandoned proposals include restrictions on the use of the private agreement exemption and prohibitions on varying bids in certain circumstances. With respect to the latter, the regulators intend to rely on their public interest mandate to deal with potential abuses of the bid process.

RULES IN ONTARIO AND QUEBEC FOR PROTECTING MINORITY SHAREHOLDERS IN SPECIAL TRANSACTIONS

The OSC and Quebec's securities regulator have adopted MI 61-101 Protection of Minority Security Holders in Special Transactions, which harmonizes the two provinces' requirements for enhanced disclosure, independent valuations and majority-of-minority approval for certain transactions affecting minority shareholders. The new rules are substantially similar to Rule 61-501 and Quebec's Regulation Q-27.

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