

# Utilizing New and Existing Legislation to Your Advantage When Structuring an M&A Deal

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December 1, 2008

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## Purpose of Session

- Comprehending securities laws that govern M&A transactions while structuring a deal
- Analyzing the new MI 62-104 *Take-Over Bids and Issuer Bids*
  - What is the purpose of MI 62-104?
- Examining Part XX of the *Securities Act* (Ontario) and OSC Policy 62-504 *Take-over Bids and Issuer Bids*
  - What are the recent changes and how will they impact M&A deals?
- Exploring the new MI 61-101 *Protection of Minority Security Holders in Special Transactions*
- What does the future hold?

## Comprehending securities laws that govern M&A transactions while structuring a deal

- MI 62-104 (All Canadian jurisdictions, except Ontario) / Revised Part XX of the *Securities Act* (Ontario) and OSC Policy 62-504
- National Policy 62-203 *Take-over Bids and Issuer Bids*
  - Outlines how the securities regulators interpret and apply provisions of MI 62-104, and Part XX of the *Securities Act* (Ontario) and OSC Rule 62-504
  - Provides guidance on the conduct of parties involved in a bid
- National Policy 62-202 *Defensive Tactics*

## Comprehending securities laws that govern M&A transactions while structuring a deal (Continued)

- Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions*
- Also need to consider:
  - Rules of the relevant exchange or quotation system on which the target's securities are listed or quoted
  - Corporate, limited partnership and trust law, as the case may be

## Analyzing the new MI 62-104 *Take-Over Bids and Issuer Bids*

- What is the purpose of MI 62-104?
  - To harmonize and consolidate take-over bid and issuer bid regimes (including exemptions) across all Canadian jurisdictions
  - To codify routinely granted relief
- Governs the conduct of take-over bids and issuer bids in all Canadian jurisdictions, except Ontario
  - In Ontario, governed by Part XX of the *Securities Act* (Ontario) and OSC Policy 62-504

## Examining Part XX of the *Securities Act* (Ontario) and OSC Policy 62-504

- Significant Recent Changes to Part XX of the *Securities Act* (Ontario) include:
  - Definitions of Take-over Bid and Issuer Bid
    - Exclude steps in certain transactions that requires security holder vote
    - Exclude from issuer bid definition offers if no valuable consideration offered or paid
  - Acting Jointly or in Concert
    - Question of fact, two classes of persons presumed to be joint actors and two classes of persons deemed to be joint actors

## Examining Part XX of the *Securities Act* (Ontario) and OSC Policy 62-504 (Continued)

- New “Foreign Target” Exemption
  - Security holders whose last address as shown on the books of target are in Canada hold less than 10% registered and beneficial security holders
  - Offeror reasonably believes security holders in Canada hold less than 10% of the outstanding securities
  - Published market with greatest dollar volume during previous 12 months was outside Canada
  - Ontario security holders participate in bid on the same terms as other security holders
  - Bid materials or advertisement of bid in Ontario (in OSC Policy 62-504)

## Examining Part XX of the *Securities Act* (Ontario) and OSC Policy 62-504 (Continued)

- Access to List of Security Holders
  - Imposes obligation on target not otherwise required by law to provide a list of security holders to offeror
- Significant portions of OSC Policy 62-504 include:
  - Offeror can purchase a target's securities during bid even if offeror had no intention of doing so at the commencement of the bid if offeror discloses its changed intention in a new release filed at least one business day in advance of any such purchase

## Examining Part XX of the *Securities Act* (Ontario) and OSC Policy 62-504 (Continued)

- Collateral Benefits Exemptions
  - Benefits resulting from participation in a group plan for employees of successor to business of the target
  - Three other exemptions for employment-related agreements
    - Employee holds less than 1% securities
    - Value of benefit is less than 5% value of employee's securities
    - Employee is providing "equivalent value"
- Filing of Agreements
  - Obligations on offeror and target to file agreements, including lock-up agreements and other agreements affecting control of target
  - Ability to redact

## Examining Part XX of the *Securities Act* (Ontario) and OSC Policy 62-504 (Continued)

- Exceptions from Proportionate Take Up and Pay Requirement in formal bids
  - Allows offeror to acquire “odd lots”
  - Codifies relief for “modified Dutch auctions”
- Acquisitions during formal take-over bid
  - Must disclose current intention to make purchases
  - Process for changing intention during course of bid

## Examining Part XX of the *Securities Act* (Ontario) and OSC Policy 62-504 (Continued)

- How will the foregoing recent significant changes impact M&A deals?
  - Broader net cast for those deemed and presumed to be acting jointly and in concert
  - Reduce need to apply for technical exemptions based on differences in take-over bid legislation across jurisdictions (but some circumstances will still exist)
  - Reduce need to apply for technical exemption to conduct an issuer bid by way of a “modified Dutch auction”

## Exploring MI 61-101

- Harmonization of OSC Rule 61-501 and AMF Policy Q-27
- Significant Recent Changes to OSC Rule 61-501 in MI 61-101 include:
  - Special Committee of Independent Directors
    - Prohibits members from receiving any payment or other benefit that is contingent upon the completion of the transaction

## Exploring MI 61-101 (Continued)

- Valuation exemptions
  - For unlisted issuers is available to those issuers listed on AIM or PLUS markets
  - For amalgamations or equivalent transactions with no adverse effect on issuer or minority available for both related party transactions and business combinations
- MI 61-101CP provides guidance on the applicability of certain provisions of MI 61-101 where a related party has the opportunity to maintain or acquire an equity interest in the issuer upon completion of a bid or a business combination

## What does the future hold?

- Securities regulators may:
  - amend National Policy 62-203 *Take-over Bids* (or create new rules) to address circumstances where bids are varied, including where bid prices are reduced
  - amend take-over bid and issuer bid exemptions (e.g. private agreement exemption) in MI 62-104 / Part XX of the *Securities Act* (Ontario) and OSC Policy 62-504

## Questions?

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