

Securities Law Bulletin

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Major Changes to Canada's Take-Over Bid Rules

By: Daniel Overall

The Canadian Securities Administrators (“CSA”) have announced major amendments (the “**Amendments**”) to the Canadian take-over bid regime that are expected to come into force on May 9, 2016 throughout Canada.¹

The Substance and Purpose of the Amendments

The Amendments reflect a re-balancing of the dynamics among offerors, offeree issuer board of directors (“**offeree boards**”) and offeree issuer security holders (“**offeree security holders**”). According to the CSA, the Amendments are intended to (i) facilitate the ability of offeree security holders to make voluntary, informed and co-ordinated tender decisions, and (ii) provide offeree boards with additional time and discretion when responding to a take-over bid. In effect, the Amendments take many aspects, as will be seen below, of privately-enacted shareholder rights plans and turn them into mandatory default rules for Canadian issuers.

Specifically, once in effect, the Amendments will require non-exempt take-over bids to:

1. remain open for a minimum deposit period of 105 days (as opposed to the current 35 day minimum) unless: (a) 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 (b) the issuer issues a news release that it intends to effect, pursuant to an agreement or otherwise, a specified alternative transaction, in which case all contemporaneous take-over bids must remain open for a deposit period of at least 35 days;

2. 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**”); and
3. 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**”).

Shareholder Rights Plans

The Amendments have turned several standard provisions under shareholder rights plans into mandatory statutory rules. Specifically, the standard shareholder rights plan has provisions similar to the Minimum Tender Requirement and the 10 Day Extension Requirement. However, shareholder rights plans typically extend the minimum period for deposit from 30 days to 60 days, whereas the Amendments will require a minimum deposit period of 105 days.

Despite many aspects of shareholder rights plans being formalized in the Amendments, Canadian reporting issuers may still find shareholder rights plans useful, particularly to regulate certain bids remaining exempt under the amended take-over bid regime. “Creeping bids” (e.g. bids made through normal course purchases in the open market) and hard lock-up agreements, for instance, will remain exempt under the Amendments.

¹ Except in Ontario, where the Amendments will come into force on the later of (a) May 9, 2016, and (b) the day on which certain sections of Schedule 18 of the *Budget Measures Act, 2015* (Ontario) are proclaimed in force.

As the CSA's commentary has indicated that National Policy 62-202 *Take-Over Bids – Defensive Tactics* will remain in effect after the Amendments, we expect securities regulatory authorities to continue to assess whether particular shareholder rights plans are abusive to offeree security holders. We further expect that, barring unordinary circumstances, a shareholder rights plan would be cease traded if it remained in effect for a period longer than 105 days (plus the 10 Day Extension Requirement).

As companies proceed through the 2016 proxy season, they should be aware that their shareholder rights plans

may not comply with the upcoming Amendments. For example, rights plans may need to be amended to reflect the requirement that the minimum deposit period is reduced to 35 days for all bids upon the offeree entering into an alternative transaction.

The Corporate Finance Group at Aird & Berlis LLP has extensive experience in advising clients on take-over bids and shareholder rights plans. For more information, please contact any member of the Corporate Finance Group. Details can be found on our **Corporate Finance Group** web page, by clicking on **members**.

If you have questions regarding this article, please contact the author or any member of the Aird & Berlis LLP Corporate Finance Group:

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