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# Canada

## Takeover Guide

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Jay A Lefton

*Fasken Martineau DuMoulin<sup>1</sup>, Toronto, Ontario*

[jlefton@fasken.com](mailto:jlefton@fasken.com)

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<sup>1</sup> The information contained herein is current as of March 2022, and is a summary only of the applicable laws and regulations and is subject to more detailed provisions thereof. This article is intended to provide general information and is not intended as legal advice. The language used in this article frequently utilises the exact language of legislation. This article does not generally include any commentary or interpretations arising from any decisions that may have been made by Canadian securities regulators in connection with proceedings relating to particular transactions.

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# THE REGULATION OF TAKEOVER BIDS

## The regulatory map

Securities laws in Canada are a matter of provincial rather than federal jurisdiction and, accordingly, the issues described below may give rise to slightly different obligations in certain Canadian provinces. Nevertheless, an inter-provincial initiative among the various Canadian securities administrators (CSA, the regulators of securities laws in each provincial jurisdiction) has been implemented with a view to attempting to enact a national rule, which has the force of law, and which effectively harmonises much of the inconsistency that previously existed. As a result, regulators in all provinces of Canada developed Multilateral Instrument 62-104 titled 'Take-Over Bid and Issuer Bids' and related forms to harmonise and consolidate takeover bid, and issuer bid, regimes nationally ('MI 62-104').

The CSA also issued National Policy 62-203 titled 'Take-Over Bids and Issuer Bids' (the 'National Policy'), which contains explanations and discussions of MI 62-104 (collectively, together with the National Policy, herein referred to as the 'Bid Regime' and, for the purposes of this paper, the term 'legislation' is intended to be used interchangeably with the term 'Bid Regime'). It should be noted, however, that the National Policy does not have the force of law, but is merely an indication by the CSA of what the intentions and desires of regulators are in the areas covered by their policies. MI 62-104, for all intents and purposes, has legislative effect for regulating takeover bids in all provinces of Canada; as a result, the CSA has effectively achieved the harmonisation of the takeover bid regime in Canada.

Unlike some regimes where the takeover bid rules are primarily policy-driven, in Canada the regulatory framework for takeover bids is primarily rules-based. While the Bid Regime results in the uniform treatment of takeover bids in Canada, related party transactions, issuer bids and insider bids are still subject to individual requirements in particular jurisdictions. See, for example, 'Eliminating the Minority After a Takeover Bid: Protection of Minority Securityholders: A "Made in Canada" Solution'.

For the purposes of this article, a 'person' includes:

- an individual;
- a corporation;
- a partnership, trust, fund and an association, syndicate, organisation or other organised group of persons, whether incorporated or not; and
- an individual or other person in that person's capacity as a trustee, executor, administrator, or personal or other legal representative.

For the purposes this article (unless otherwise noted), an 'Offeror' has various meanings, including:

- in some contexts, the person who is making the bid; and
- in other contexts (including for the purposes of the discussion under 'Notice and trading restrictions prior to takeover rules applying'), both a person who makes a takeover bid and a person who acquires a security from an issuer (whether or not by way of a takeover bid or otherwise).

In certain contexts, the definition may be construed more broadly and may include 'Joint Actors' (as defined under 'When the Regulatory Rules Apply: Relevant Thresholds – Takeover bids'), 'control persons' (as defined under 'Formal Takeover Bid Requirements: Trading restrictions before, during and after formal bids') and certain types of affiliates.

The appropriate regulator may grant an exemption from the provisions of MI 62-104, in whole or in part, subject to such conditions or restrictions as the regulator may determine.

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## WHEN THE REGULATORY RULES APPLY: RELEVANT THRESHOLDS

### Takeover bids

A 'takeover bid' (or 'bid') means an offer to acquire outstanding voting or equity securities of a class, made to any person who is in one of the provinces of Canada or to any securityholder of an offeree issuer whose last address as shown on the books of a target is in such a province, where the securities subject to the offer to acquire, together with the 'Offeror's Securities', constitute in the aggregate 20 per cent or more of the outstanding securities of that class of securities on the date of the offer to acquire. See also 'Calculation of ownership for early warning reporting, insider reporting and takeover bids'. Where used herein, references to a 'target' include references to a company that is the subject of a takeover bid and a company whose securities are otherwise being traded.

For the purposes of legislation, an 'offer to acquire' includes:

- an offer to purchase, a solicitation or an offer to sell securities; and
- an acceptance of an offer to sell securities, whether or not such an offer to sell has been solicited (and a person who accepts an offer to sell is deemed to be making an offer to acquire).

'Offeror's Securities' are defined to be:

- securities beneficially owned, or over which control or direction is exercised, by the Offeror; and
- securities beneficially owned, or over which control or direction is exercised, by any person acting jointly and in concert with the Offeror (a 'Joint Actor'; see below under 'Relevant interests and voting power: persons acting 'jointly or in concert'').

'Equity securities' are those that carry a residual right to a share in the earnings and, upon liquidation or winding up, the assets of the issuer. Legislation provides that references to 'an offer to acquire', 'the acquisition or ownership of securities' or 'control or direction over securities' are to be seen as references to both direct and indirect actions of that nature. The definition of a takeover bid specifically excludes an offer to acquire, which is a step in an amalgamation, merger, reorganisation or arrangement that requires approval in a vote by securityholders. When used herein, and where the context implies, 'bid' also means the documentation sent to securityholders in connection with the takeover bid.

### Notice and trading restrictions prior to takeover rules applying: 'early warning' reporting obligations

Subject to the discussion below, every Offeror that directly or indirectly acquires control or direction over, or beneficial ownership of, or securities convertible into, voting or 'equity securities' of any class of a target that, together with the Offeror's Securities, would

constitute ten per cent or more of the outstanding securities of that class shall promptly (and in any event no later than the opening of trading on the next business day) issue and file a news release containing certain prescribed information, and within two business days, shall file an early warning report containing the same information as contained in the news release. The CSA has permitted further streamlining of the news release content by permitting the news release to make references to the early warning report for specified further details. Where used herein, references to the 'filing' of a document shall be construed as references to the filing of such a document with the applicable securities regulators.

Where an Offeror is required to file an early warning report, or a further report, as described in this paragraph, and the Offeror or Joint Actor of the Offeror acquires beneficial ownership of, or the power to exercise control or direction over, an additional two per cent or more of the outstanding securities of the class, or where the ownership decreases by two per cent or more or falls below the ten per cent reporting threshold, the Offeror must issue an additional press release and file a new early warning report. Any material change in a previously filed early warning report will require the issuance and filing of a new press release and early warning report.

During the period commencing on the occurrence of an event in respect of which an early warning report is required and terminating on the expiry of one business day from the date that the early warning report is filed, neither the Offeror nor any Joint Actor of the Offeror shall acquire or offer to acquire beneficial ownership of any securities of the class in respect of which the early warning report was required to be filed or any securities convertible into securities of that class. This requirement does not apply to an Offeror that has beneficial ownership of, or control or direction over securities that, together with the Offeror's Joint Actors, comprise 20 per cent or more of the outstanding securities of the class.

The CSA has issued guidance to National Policy 62-203 (Takeover Bids and Issuer Bids) relating to the circumstances under which an investor may have to take into account considerations relating to equity swaps or similar derivative instruments (including where the investor has a formal or informal ability to acquire the equity securities or to direct the voting of voting securities that are held by any counterparties).

The early warning regime also provides an exemption for lenders from the early warning reporting trigger for securities transferred or lent pursuant to a 'specified securities lending arrangement'. There is no corresponding exemption for persons that borrow securities under the arrangement. As a result, securities lending arrangements in effect at the time of a reportable transaction must be disclosed in the report, even if the triggering transaction did not involve a securities lending arrangement.

The requirements also include detailed disclosure in relation to the class of securities in respect of which the report is filed, the purpose of the transaction and the acquirer's future intentions to acquire securities. The disclosure is also required about the material terms of 'related financial instruments', any securities lending arrangements, and other agreements, arrangements and understandings involving the securities. The CSA's intent is to result in more comprehensive disclosure about the acquirer's economic and voting interests in the class of securities of the reporting issuer for which the report is filed, and address what the regulators considered to be transparency concerns.

### **Alternative monthly reporting**

Despite the foregoing, an 'eligible institutional investor' that does not intend to:

- make a formal bid (as defined below under 'Formal Takeover Bid Requirements') for securities of a reporting issuer (essentially a publicly traded entity for Canadian securities law purposes); or

- propose a reorganisation, business combination or similar transaction that would result in the 'eligible institutional investor' (alone or with Joint Actors) possessing effective control of a reporting issuer or part of the business of a reporting issuer

can fulfil its early warning obligations by filing a report (an 'Alternative Report') that contains certain prescribed information. The CSA has clarified that the alternative monthly reporting regime is unavailable to an eligible institutional investor that solicits, or intends to solicit, proxies from the securityholders of a reporting issuer regarding the election of directors or a reorganisation, amalgamation, merger, arrangement or similar corporation action involving the securities of the reporting issuer.

The information required by an Alternative Report is similar to the information required by an early warning report referred to above. An 'eligible institutional investor' is:

- a Canadian or foreign financial institution;
- a Canadian or foreign pension fund;
- a mutual fund that is not a public entity;
- an investment manager in relation to securities managed in a discretionary account; or
- an entity referred to in clauses (D) or (F) of Rule 13d-1(b)(1)(ii) under the United States Securities Exchange Act of 1934.

Two benefits of being an 'eligible institutional investor' relate to the requirements for an 'eligible institutional investor' to file early warning reports and the requirements to file insider reports, as referred to below under 'Insider trading reporting obligations'.

An 'eligible institutional investor' is required to file an Alternative Report within ten days of the end of each month in which the 'eligible institutional investor' increases or decreases its percentage holdings of a reporting issuer past 2.5 per cent thresholds that are equal to, or in excess of ten per cent, namely ten per cent, 12.5 per cent, 15 per cent, 17.5 per cent and 20 per cent.

Once an 'eligible institutional investor' crosses the 20 per cent threshold, the regular rules relating to takeover bids apply to the 'eligible institutional investor'. In addition, an 'eligible institutional investor' is exempt from its insider reporting obligations (referred to under 'Insider trading reporting obligations', below) in respect of a particular month provided that it and its Joint Actors do not purchase or sell in such a month more than 50 per cent of the securities of a reporting issuer that were reported as sold in such a month. If the eligible institutional investor does 'control the market', then the eligible institutional investor is required to file insider reports in respect of each trade for the subsequent month after which time the question as to whether the 'eligible institutional investors' 'control of the market' test is reconsidered. The applicable regulations also exempt directors and officers of an 'eligible institutional investor' from their respective insider reporting obligations, provided that such directors and officers are insiders of a reporting issuer, solely as a result of being directors or officers of an 'eligible institutional investor'.

Notwithstanding the concept of 'Joint Actors' (as referred to under 'When the Regulatory Rules Apply: Relevant Thresholds – Takeover bids'), if an 'eligible institutional investor' and its affiliates and associates conduct business or investment activities through business units, they are, in certain circumstances, able to treat securities that are owned or controlled through a business unit, or securities into which those securities are convertible, exercisable

or exchangeable, separately from securities owned or controlled through any other of its business units. These exceptions include situations where each of those separate business units makes its own independent decisions on the acquisition, disposition, holding and voting of the securities owned or controlled by the business unit, provided that the business unit is not a Joint Actor with any other business unit with respect to the securities, determined without regard to the presumption set out above for the determination of Joint Actors. The prescribed relief has implications both for the purposes of the early warning reporting requirements and for bid thresholds. There are similarly exemptions available for 'eligible institutional investors' in certain circumstances from the insider trading reporting obligations described below.

### **Acquisitions during a takeover bid by persons other than the Offeror**

If, after a 'formal bid' has been made, as described under 'Formal Takeover Bid Requirements', and before the expiry of the bid, an Offeror (other than the Offeror making the bid) acquires control or direction over, or beneficial ownership of, securities of the class subject to the bid that, together with the Offeror's securities and the securities of Joint Actors of the Offeror, that constitute five per cent or more of the outstanding securities of that class, the Offeror must, prior to the opening of trading on the next business day, issue and file a news release. If the person issuing the news release or any Joint Actor acquires an additional two per cent or more of the class, such a person must also issue and file a further press release before the opening of trading on the next business day.

### **Insider trading reporting obligations**

By virtue of the CSA's National Instrument 55-104 titled 'Insider Reporting Requirements and Exemptions' ('NI 55-104'), significant changes were made to the Canadian insider reporting regime. As a result of NI 55-104, 'reporting insiders' (and not 'insiders' generally, as was previously the case) are required to file reports within five calendar days of a trade, and NI 55-104 extended the concept of 'deemed beneficial ownership' referred to herein from the Bid Regime to the insider reporting regime. Previously, the obligation was upon all 'insiders', which included an officer or director of a reporting issuer or of a company that is itself an insider or subsidiary of the reporting issuer, or any person that beneficially owns, directly or indirectly, or exercises control or direction over, more than ten per cent of a reporting issuer's voting securities.

The definition of 'reporting insider' includes:

- a director or the chief executive officer, chief financial officer or chief operating officer of:
  - the reporting issuer;
  - a 'significant shareholder' of the reporting issuer; or
  - a 'major subsidiary' of the reporting issuer (ie, a subsidiary that contributes 30 per cent or more of the consolidated assets or revenues based on the most recent annual or quarterly financial statements);
- a person or company responsible for a principal business unit, division or function of the reporting issuer;
- a significant shareholder of the reporting issuer;

- a significant shareholder based on post-conversion beneficial ownership of the reporting issuer's securities (as disclosed below), and the chief executive officer, chief financial officer and chief operating officer and every director of the significant shareholder based on post-conversion beneficial ownership;
- a management company that provides significant management or administrative services to the reporting issuer or a major subsidiary of the reporting issuer, as well as the chief executive officer, chief financial officer and chief operating officer, and every director of the management company and every significant shareholder of the management company;
- the reporting issuer itself; and
- any other insider that:
  - in the ordinary course receives or has access to information as to material facts or material changes concerning the reporting issuer before the material facts or material changes are generally disclosed; and
  - directly or indirectly exercises, or has the ability to exercise, significant power or influence over the business, operations, capital or development of the reporting issuer.

A 'significant shareholder' is included in the definition of 'reporting insider' and is a person that beneficially owns, directly or indirectly, or exercises control or direction over, more than ten per cent of such a company's voting securities. NI 55-104 introduces the concept of a 'significant shareholder based on post-conversion beneficial ownership'. Similar to the Bid Regime, a shareholder is considered to beneficially own any securities that may be acquired within 60 days. Accordingly, a shareholder who holds less than ten per cent of the votes attaching to the outstanding securities of a reporting issuer may be a 'reporting insider' as a result of holding convertible securities, such as warrants, or through other rights to acquire securities. Also, similar to the Bid Regime, the existence of any conditions to the right to acquire securities, such as the payment of an exercise price, are ignored and only those securities that may be acquired by the particular shareholder are deemed to be outstanding for the purposes of determining the percentage ownership (ie, a 'partially fully diluted basis'). Accordingly, the level of post-conversion beneficial ownership calculated under the rule may be larger than the percentage ownership of a shareholder on a fully diluted basis. This expanded definition affects not only the reporting obligations of the significant shareholder itself, but also those persons (eg, directors and specified officers) who gain the status of being a reporting insider by virtue of their relationship with a 'significant shareholder'.

The insider reporting requirement now applies to both: (1) direct or indirect changes in beneficial ownership of, or control or direction over, securities of a reporting issuer; and (2) interests or rights associated with related financial instruments involving a security of the reporting issuer. The definition of a 'related financial instrument' includes derivatives and other instruments that affect a reporting insider's economic interest in securities of a reporting issuer or economic exposure to a reporting issuer. NI 55-104 also includes a supplementary insider reporting obligation that applies to any other agreement, arrangement or understanding that has the effect of altering a reporting insider's economic exposure to a reporting issuer that involves a security of the reporting issuer or a related financial instrument.

The broad definition of the insider reporting requirements in NI 55-104 makes it clear that reporting insiders are expected to disclose all dealings that affect their interests in the reporting issuer. The Companion Policy and response to the comments published with NI



55-104 indicate that the CSA expects all transactions to be reported, including cash-settled and synthetic arrangements.

The System for Electronic Disclosure by Insiders ('SEDI') is the insider trade reporting system available over the internet. SEDI requires insiders to file certain information electronically over the internet. Insider reports may be filed with all relevant jurisdictions via SEDI.

### **Insider trading reporting obligations for eligible institutional investors**

Under National Instrument 62-103 titled 'The Early Warning System and Related Takeover Bid and Insider Reporting Issues', an eligible institutional investor is permitted to file reports exclusively under the early warning or alternative monthly reporting regimes, provided that it discloses its position in respect of any related financial instruments in its early warning or alternative monthly reports and treats a significant change to its position as a change in a material fact giving rise to an obligation to amend the report. Changes in interests in, or rights or obligations associated with, related financial instruments that have a similar economic effect as an increase or decrease of 2.5 per cent of the investor's security holding percentage of voting or equity securities of the reporting issuer are considered to be significant.

### **Relevant interests and voting power: persons acting 'jointly or in concert'**

For the purposes of calculating the ten per cent threshold for early warning reports and the 20 per cent threshold for takeover bids, the following rules apply.

It is a question of fact as to whether a person is a 'Joint Actor' of the Offeror. The following persons are explicitly deemed to be Joint Actors of the Offeror:

- every person that, as a result of any agreement, commitment or understanding with the Offeror or with any Joint Actor of the Offeror, acquires or offers to acquire securities of the same class as those subject to the offer to acquire; and
- every affiliate of the Offeror.

The following persons are presumed to be Joint Actors of the Offeror:

- every person that, as a result of any agreement, commitment or understanding with the Offeror or with any Joint Actor of the Offeror, intends to exercise jointly or in concert with the Offeror or with any Joint Actor of the Offeror any voting rights attaching to any securities of a target; and
- every associate of the Offeror.

Where persons are presumed to be Joint Actors, the presumption is rebuttable. Because of the deeming provisions contained in the Bid Regime, it may be necessary to apply for discretionary relief from the regulators to conclude that a person who is deemed to be a Joint Actor is not so in fact. The Ontario Securities Commission has stated that 'the policy underpinning of the Joint Actor concept is to ensure that all persons or companies who are effectively engaged in a common investment or purchase programme, whether in support or in opposition to a takeover bid, are required to abide by the requirements of Ontario securities law that governs securities transactions prior to, during and subsequent to the bid'.

A person is not a Joint Actor solely because there is an agreement, commitment or understanding (frequently referred to as a 'lock-up agreement') that the person will tender securities under a formal bid made by the Offeror.

### **Calculation of ownership for early warning reporting, insider reporting and takeover bids**

A person is deemed to beneficially own or exercise control or direction over securities that are beneficially owned, controlled or directed:

- by a company controlled by such a person;
- by an affiliate of such a company; or
- through such a person's trustee, legal representative, agent or other intermediary.

In general, a company is considered to be controlled by a person if voting securities of the company carrying more than 50 per cent of the votes that may be cast to elect directors are held by or for the benefit of such a person and such votes are titled, if exercised, to elect a majority of the board of directors.

In determining the beneficial ownership of securities of the Offeror or any Joint Actor of the Offeror at any given date, any security, right or obligation permitting or requiring the Offeror or any Joint Actor of the Offeror, whether or not on conditions, to acquire a security, including an unissued security, of a particular class within 60 days by a single transaction or a series of linked transactions is deemed to be a security of a class, and beneficially owned by the Offeror or Joint Actor. Such securities are deemed to be outstanding for the purpose of calculating the number of outstanding securities of that class in respect of the Offeror's offer to acquire. In this way, outstanding securities are calculated on a 'partially fully diluted' basis having regard only to those securities held by the Offeror, but these incremental securities are included in both the numerator and denominator for the purposes of the calculation. For these purposes, an Offeror is not a beneficial owner of securities solely because there is an agreement, commitment or understanding that a securityholder will tender the securities under a formal bid made by the Offeror.

For many purposes of legislation, a reference to an offer to acquire, acquisition or ownership of securities, or control or direction over securities, is construed to include direct or indirect offers, acquisitions, ownership, control or direction. The National Policy recognises that more than one person may constitute an Offeror under a takeover bid, and notes that a party that uses an acquisition entity to make a takeover bid may itself be making an indirect bid; in that case, the named Offeror and the primary party may be Joint Actors, and be subject to the requirements of the Bid Regime, including the requirements to certify and deliver documentation thereunder. The National Policy notes that it is a question of fact as to whether an Offeror that is not a wholly owned entity would be considered to be a Joint Actor, and identifies certain criteria that are relevant for the consideration.

### **Consequences of a breach**

A breach of securities legislation constitutes an offence under the applicable provincial securities legislation. As noted above, each province of Canada has its own securities legislation. In Ontario, every person who contravenes Ontario securities laws (including every director and officer who authorises, permits or acquiesces in the commission of an offence) is liable to a fine of not more than CAD 5m or imprisonment for a term of not more than five years less a day, or both.

Securities commissions in Canada also have powers that can be asserted in the context of an improper or abusive takeover bid. Regardless of whether there has been a breach of securities legislation, regulation or policy, securities commissions have general remedial power to act in the 'public interest', which is typically exercised when the particular conduct or transaction is considered to be 'abusive of shareholders in particular, and of capital markets in general'. Such powers include, for example:

- the power to 'cease trade' a particular takeover bid (effectively enjoining the takeover bid from proceeding);
- the power to restrain the distribution of any document or any communication used or issued in connection with a takeover bid;
- the power to require an amendment of any document or other communication used or issued in connection with a takeover bid, and requiring the distribution thereof; and
- the power to affect thresholds of approval for subsequent transactions.

The Securities Act (Ontario), for example, contains express authorisation for the Ontario Securities Commission to, among other things, restrain the distribution of any document or communication used in connection with a takeover bid, and require the amendment or distribution of a document. See 'Formal Takeover Bid Requirements: General provisions – Offeror's circular'. Courts in Canada generally extend great deference to the decisions of securities regulators and generally only grant appeals from 'unreasonable decisions'. A decision is held to be unreasonable only if it is in no way supported by the facts, regardless of whether the court would have come to a different conclusion.

### **Trading restrictions generally based on knowledge**

The description contained below relating to general restrictions on trading is in addition to the more detailed regulatory regime set out below under 'Trading restrictions before, during and after formal bids'.

### **Prohibition on trading by persons in a special relationship**

Any 'person in a special relationship' with a target that is a reporting issuer is prohibited from purchasing or selling securities of the target with the knowledge of a material fact (as defined below) or a material change (as defined below) with respect to the target that has not been generally disclosed. While this is frequently referred to as 'insider trading', the trading restriction applies to both insiders and to persons who are not technically 'insiders' within the meaning of securities legislation. The prohibitions extend to limit the ability of persons in a special relationship to inform other persons of such undisclosed material information. A 'person in a special relationship' with a target that is a reporting issuer includes, among other persons:

- a person who is an insider, affiliate or associate of:
  - the reporting issuer;
  - any person that is considering or evaluating whether to make a takeover bid, or that proposes to make a takeover bid, for the securities of the target (a 'Takeover Party');
  - any person that is considering or evaluating whether to become a party, or that proposes to become a party, to a reorganisation, amalgamation, merger

or arrangement or similar business combination with the target or to acquire a substantial portion of its property (a 'Business Combination Party');

- any person that is engaging in any business or professional activity, that is considering or evaluating whether to engage in any business or professional activity, or that proposes to engage in any business or professional activity, if the business or professional activity is:
  - with or on behalf of the target; or
  - with or on behalf of a Takeover Party or a Business Combination Party;(collectively, an 'Advising Party');
- a person who is a director, officer or employee of:
  - the target;
  - a subsidiary of the target;
  - a person that controls, directly or indirectly, the target; or
  - a Takeover Party, a Business Combination Party or an Advising Party;
- a person that learned of the material fact or material change with respect to the target while the person was a person described above; and
- any person who learned of the material fact or the material change from any person who was himself/herself in a special relationship with the target (including a person described in this clause), and who knows or ought reasonably to have known that the other person is a person in such a relationship (such a person is frequently referred to as a 'tippee').

A 'material fact' with respect to securities is a fact that would reasonably be expected to have a significant effect on the market price or value of the securities. A 'material change' means a change in the business, operations or capital of a target that would reasonably be expected to have a significant effect on the market price or value of any of its securities. This includes a decision to implement such a change made by the board of directors or by senior management if it believes that the confirmation of the decision by the board of directors or by other such persons acting in a similar capacity is probable.

In addition to the restrictions on insider trading discussed above, persons in a special relationship with a target are also prohibited from informing, other than in the necessary course of business, another person of a material fact or a material change with respect to a target before the material fact or material change has been generally disclosed ('tipping').

It should also be noted that no person that is considering or evaluating whether, or that proposes:

- to make a takeover bid for the securities of a target;
- to become a party to a reorganisation, amalgamation, merger, arrangement or similar business combination with a target; or
- to acquire a substantial portion of the property of a target

may inform another person of a material fact or material change with respect to the target before the material fact or material change has been generally disclosed, except where the information is given in the necessary course of business relating to the takeover bid, business combination or acquisition.

As with actual trading, the prohibition on tipping extends to persons who learned of a material fact or material change while in a special relationship with a target but who are no longer in such a relationship.

### **Exemption to the prohibition on trading by persons in a special relationship**

A person (other than an individual) that purchases or sells securities of a target with knowledge of a material fact or material change with respect to a target that has not been generally disclosed is exempt from the prohibition on trading described above if the person proves that:

- no director, officer, partner, employee or agent of the person who made or participated in making the decision to purchase or sell the securities of a target had actual knowledge of the material fact or material change; and
- no advice was given with respect to the purchase or sale of the securities to the director, officer, partner, employee or agent of the person who made or participated in making the decision to purchase or sell the securities by a director, partner, officer, employee or agent of the person who had actual knowledge of the material fact or the material change.

Accordingly, to the extent that there is what is generally referred to as a 'Chinese wall' between an entity's group with knowledge of the undisclosed facts or changes and the group that is making the determinations as to whether to buy and sell securities of a target, the restrictions on trading outlined above are not applicable.

In determining whether a person has sustained the burden of proof set out above, it is relevant whether and to what extent the person has implemented and maintained reasonable policies and procedures to prevent contraventions of the 'insider trading' provisions of legislation by persons making or influencing investment decisions on its behalf and to prevent the transmission of information concerning a material fact or material change contrary to legislation.

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## **FORMAL TAKEOVER BID REQUIREMENTS**

### **What is a 'formal takeover bid'?**

Canadian securities legislation contemplates two types of bids:

- a formal bid; and
- a bid that does not constitute a formal bid.

A 'formal bid' is a takeover bid that is not exempt from the general takeover bid provisions of legislation as a result of the availability of the exemptions described below under 'Takeover bids not subject to the general takeover bid requirements'. References to the rules associated with 'bids' and 'takeover bids' below are generally considered to be references to 'formal bids'.

## Trading restrictions before, during and after formal bids

For the purposes of the discussion under this heading relating to the bid integration rules in the context of formal bids, 'Offeror' means not only the person making a bid, but also includes such a person's Joint Actors, as well as a 'control person' of the person making the takeover bid (as well as affiliates), and certain Joint Actors of the control person. A 'control person' is a person (or person within a combination of persons who are acting in concert) that holds a sufficient number of shares to materially affect the control of the target (and, if the ownership is greater than 20 per cent, the person(s) are deemed, in the absence of evidence to the contrary, to hold a sufficient number of shares to materially affect control). As the definition uses the phrase 'acting in concert', which is different from the defined concept of 'acting joint or in concert', described above, it is unclear whether the latter's deeming and presumptive provisions would apply in these circumstances (although it is the author's understanding that the administrative position of the regulators is that there is no intended distinction). The restrictions described below are in addition to the general restrictions on trading as set out above under 'Trading restrictions generally based on knowledge'. In addition to the Bid Regime, see Ontario Securities Commission Rule 48-501, 'Trading during Distributions, Formal Bids and Share Exchange Transactions'.

## Integration with pre-bid transactions

Legislation provides for a statutory definition of linked transactions in connection with a takeover bid and provides for at least equal treatment to the public holders of the securities in connection with such linked transactions.

If within the period of 90 days immediately preceding a formal bid, the Offeror acquired beneficial ownership of securities of the class subject to the bid in a transaction not generally available on identical terms to holders of that class of securities:

- the Offeror must offer under the bid:
  - consideration per security at least equal to (and in the same form as) the highest consideration that was paid on a per security basis under the prior transaction; or
  - at least the cash equivalent of that consideration; and
- the Offeror must offer to acquire under the bid that percentage of the securities of the class subject to the bid that is at least equal to the highest percentage that the number of securities acquired from a seller in that prior transaction was of the total number of securities of that class beneficially owned by that seller at the time of that prior transaction (so that, eg, if an Offeror purchases, on a private agreement basis, 75 per cent of a seller's securities 60 days prior to the commencement of a takeover bid, then the Offeror would be prohibited from subsequently making an offer to acquire only 51 per cent of the outstanding securities of that target in a formal bid).

The foregoing does not apply if the transaction that occurred within the 90 days immediately preceding the bid was a trade in the normal course through a published market, so long as, among other things:

- any broker acting for the Offeror did not perform services beyond the customary broker's function and did not receive more than reasonable fees or commissions;

- neither the Offeror nor any person or company acting for the Offeror solicited or arranged for the solicitation of offers to sell securities of the class subject to the bid (other than the Offeror or its agents under the takeover bid); and
- neither the seller or any person acting for the seller, to the knowledge of the Offeror, solicited or arranged for the solicitation of offers to buy the securities of the class subject to the bid.

The integration provisions do not apply so as to affect the consideration offered or the number of securities offered to be acquired under a formal bid where the prior acquisition was made from the target itself (eg, as in the case of a public offering or private placement).

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## TRADING RESTRICTIONS DURING AND AFTER BIDS

### Acquisitions during the bid

During formal bids, the Offeror shall not offer to acquire, or make or enter into an agreement, commitment or understanding to acquire beneficial ownership of any securities of the class that are subject to a takeover bid other than under the bid on and from the day of the announcement of the Offeror's intention to make the bid until the bid's expiry; as discussed under 'Calculation of ownership for early warning reporting, insider reporting and takeover bids', this would include securities in respect of which the Offeror has a right to acquire within 60 days. This prohibition does not apply to an agreement (frequently referred to as a 'lock-up agreement') between a securityholder and the Offeror to the effect that the securityholder will, in accordance with the terms and conditions of a takeover bid, deposit the securityholder's securities under the bid.

Another exception to the prohibition set out in the immediately preceding paragraph is that an Offeror may purchase securities of the class that are subject to the takeover bid and securities convertible into securities of that class beginning on the third business day following the date of the bid until the expiry of the bid if certain conditions are satisfied, including that:

- on the date of the bid, the intention of the Offeror is to make the purchases and the intention to make those purchases is stated in the takeover bid circular (notwithstanding that the regulators acknowledge that the party may subsequently change its stated intention);
- the purchases are made in the normal course through the facilities of a published market (and no person solicits or arranges for such purchases and sales);
- the Offeror's acquisitions of beneficial ownership are limited to five per cent or less, in the aggregate, of the outstanding securities of the class subject to the bid; and
- the Offeror issues and files a news release immediately after the close of business on the published market on each day on which securities have been purchased disclosing certain prescribed information.

### Sales during the bid

An Offeror shall not, except pursuant to the formal bid, sell or enter into an agreement, commitment or understanding to sell any securities of the class (or securities convertible into securities of that class) subject to the bid on and from the date of the announcement of the intention to make the bid until the expiry of the bid. An Offeror may, before the expiry of the

bid, agree or enter into a commitment or understanding to sell the securities that may be taken up by the Offeror pursuant to the bid after the expiry of the bid if such an intention to sell is disclosed in the circular.

During the period from the expiry of the formal bid until the end of the 20th business day thereafter (whether or not any securities are taken up under the bid), an Offeror shall not acquire beneficial ownership of securities of the class subject to the bid by way of a transaction not generally available on identical terms to holders of that class of securities. This prohibition does not, however, apply to trades effected in the normal course on a published market, so long as certain conditions, as described above under 'Integration with pre-bid transactions', are met.

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## MECHANICS OF FORMAL BIDS

### General provisions

The discussion under this heading contained below applies to all takeover bids other than those which are exempt as provided below under 'Takeover bids not subject to the takeover bid requirements'. For the purposes of the discussion under this heading, 'Offeror' means the person making the takeover bid. The philosophy of rules relating to the initiation and implementation of bids is that the securityholders of the target must be provided with sufficient time and information with which to make an informed decision about whether to accept the offer.

### Commencement of the bid

A formal takeover bid may be commenced by:

- publishing an advertisement containing a summary of the takeover bid; or
- sending the takeover bid materials (or 'bid materials', being the offer and accompanying takeover bid circular) to securityholders.

Bids must be made to all holders of the class of securities subject to the bid who are in the province or territory of Canada. They must be made by sending the bid materials to the holders whose last address as noted on the books of the target is in that jurisdiction, and to the holders of securities that, before the expiry of the deposit period for the bid, are convertible into securities of that class, whose last address as noted on the books of the target is in that jurisdiction. Documents relating to the bid, including notices of change and variation as contemplated below, must either be mailed or delivered by personal delivery, courier, or in another manner acceptable to the regulator. Documents are, for the purposes of legislation, deemed to be dated on the date they are sent to all or substantially all of the persons titled to receive them (except a takeover bid commenced by advertisement, in which case the date of the bid and bid materials are deemed to be the date of first publication of the advertisement).

The National Policy notes that the CSA believes that the failure to make a bid to securityholders in one or more Canadian jurisdictions is not consistent with the framework of securities regulation in Canada, which aims to ensure that all securityholders in Canada are treated equally. If the bid is not made in all jurisdictions, the regulators have signalled that they may issue orders prohibiting the completion of the bid.



## Obligation to file agreements

The Bid Regime has introduced a new filing requirement under which an Offeror would be obligated to file copies of documents related to the takeover bid, including:

- agreements between an Offeror and:
  - a securityholder of the target (eg, lock-up agreements, voting agreements and deposit agreements);
  - directors or officers of the target;
  - the target itself; and
- any other agreement of which the Offeror is aware that could affect control of the target if those documents have not already been filed (including any agreement with change of control provisions, any securityholder agreement or any voting trust agreement that the Offeror has access to and that can reasonably be regarded as material to a securityholder in deciding whether to deposit securities under the bid).

Legislation also includes a similar filing obligation on the target in respect of the enumerated category of agreements of which the target is aware. The purpose of this requirement is to provide greater transparency regarding agreements that affect control, and to make the disclosure more akin to those which are required in the context of acquisition transactions that are subject to a securityholder vote. The obligation on the Offeror is to make such filings on the date the offering circular is filed, and the obligation upon the target is to make such filings on the date the directors' circular is filed; agreements entered into after those times must be filed promptly and in no event later than two business days after the agreement is entered into.

These documents may be 'redacted' (so that certain provisions may be omitted or marked as being unreadable) if:

- the party filing the document has reasonable grounds to believe that the disclosure of the provision would be 'seriously prejudicial' to the interests of the filer or would violate confidentiality provisions;
- the provision does not contain information relating to the filer or its securities that would be necessary to understand the document; and
- the party filing the document includes in the document a brief description of the type of information that has been omitted.

The National Policy signals the CSA's view that it is not appropriate for a filer to omit or redact an entire document, as opposed to particular provisions, on the basis that the information in the document is subject to confidentiality. The Bid Regime does not require clean copies of such agreements to be filed in addition to the redacted version.

## Bid consideration

If a takeover bid is made, all securityholders of the same class of securities must be offered 'identical' consideration or an 'identical' choice of consideration (as opposed to 'equal', which is a term used elsewhere in legislation).

If the value of the consideration offered for the securities subject to the bid is increased prior to the expiry of the bid, the Offeror must pay that increased consideration to each person whose securities are taken up pursuant to the bid, whether or not the securities were taken up by the Offeror before the increase.

Under legislation, no 'collateral agreement, commitment or understanding' may be entered into by the Offeror or any Joint Actor with any holder that has the 'effect', directly or indirectly, of providing the holder a consideration of greater value than offered to other holders of the same class of securities. This prohibition applies whenever an Offeror has made or intends to make a bid. The National Policy provides that the prohibition applies to a direct or indirect benefit being provided to a securityholder and includes participation by the holder in another transaction with the Offeror that has the effect of providing consideration of greater value to the holder than that offered to other securityholders of the same class.

Certain types of collateral agreements are expressly permitted, including benefits relating to certain types of employment-related agreements.

Certain of such collateral benefits that are received solely in connection with a securityholder's services as an employee, director or consultant of the target (or affiliate of the target or of a successor to the business of the target) may not be provided unless:

- at the time the bid is publicly announced, the securityholder and its associates beneficially own or control less than one per cent of the securities subject to the bid; or
- an independent committee of the board of directors of the target, acting in good faith, determines that:
  - the net value of the benefit (net of offsetting costs to the securityholder) is less than five per cent of the amount the securityholder will receive under the bid in exchange for the securities beneficially owned by the securityholder; or
  - the securityholder is providing at least 'equivalent value' in exchange for the benefit.

In order to rely on the foregoing exceptions, the following conditions must be satisfied:

- the benefit must not be for the purpose, 'in whole or in part', of increasing the value of the consideration paid to the securityholder or of providing an incentive to deposit under the bid;
- entitlement to the benefit must not be conditional on supporting the bid; and
- full particulars of the benefits must be disclosed in the takeover bid circular or the directors' circular (see 'Offeror's circular' and 'Directors' circular', below).

The involvement of the independent committee is intended to add additional objectivity. The National Policy provides that the CSA consider a director to be independent if the director is disinterested in the bid or any related transactions. The National Policy also provides that when determining the 'equivalent value' criteria set out above, the independent committee should consider, among other things, whether the particular arrangement is on terms consistent with arrangements made with individuals holding comparable positions with the Offeror and in the industry generally. Where an independent committee does not have the expertise or resources to ascertain whether an arrangement is on terms consistent with

industry standards, the National Policy recommends that the committee retains an 'appropriately qualified independent expert' to advise on the point.

In determining the beneficial ownership of securities of a holder at a given date, any security or right or obligation permitting or requiring the securityholder or any Joint Actor of the securityholder, whether or not on conditions, to acquire a security (including an unissued security) within 60 days by a single transaction or series of linked transactions is deemed to be a security of a particular class.

## **Withdrawal**

A securityholder may withdraw securities deposited under a bid:

- at any time before the securities have been taken up by the Offeror (the 'Take-Up Condition');
- at any time before the expiration of ten days from the date of a notice of change or a notice of variation (the 'Change/Variation Condition'); or
- if the securities have not been paid for by the Offeror within three business days after the securities have been taken up.

Notwithstanding the Take Up Requirements described under 'Taking up and paying for deposited securities', if an Offeror that has made a partial bid becomes obligated to take up securities as described under 'Taking up and paying for deposited securities', a securityholder must not withdraw securities deposited before the expiry of the 'initial deposit period' and not taken up by the Offeror in certain prescribed circumstances.

For the purposes of the Bid Regime, 'initial deposit period' means the period (including extensions) during which securities may be deposited under a bid, but does not include a mandatory ten-day extension period (see 'Mandatory ten-day bid extension') or any extension to the period during which securities may be deposited if the extension is made after a mandatory ten-day extension period.

Notwithstanding the Change/Variation Condition, a securityholder must not withdraw deposited securities if:

- the securities have been taken up by the Offeror before the date of the change or variation;
- in the case of a partial bid, the securities were deposited before the expiry of the initial deposit period and not taken up by the Offeror in reliance on certain provisions, and the date of the notice of change or notice of variation is after the date that the Offeror became obligated to take up securities under the Take Up Requirements described under 'Taking up and paying for deposited securities' (the 'Partial Bid Restriction'); or
- any of the following apply:
  - there is a variation in the terms of the bid consisting only of an increase in consideration offered for the securities and an extension of the time for deposit to no later than ten days after the notice of variation has been sent; or
  - there is a variation limited solely to the waiver of one of the conditions of a bid where the consideration consists solely of cash; or

- there is a variation in the terms after the expiry of the initial deposit period consisting of either:
  1. an increase in the consideration offered for the securities subject to the bid; or
  2. an extension of the time for deposit to not later than ten days from the date of the notice of variation.

Rights of withdrawal are affected by sending a notice of withdrawal to the applicable depository and are effective upon receipt by the depository.

### **Offeror's circular**

A takeover bid circular is required to be prepared by the Offeror and delivered to securityholders in prescribed form in connection with takeover bids. A circular contains disclosure relating to the offer itself, the target issuer and the Offeror, and other matters as are prescribed by legislation. Takeover bids in connection with which the Offeror offers securities require prospectus-level disclosure regarding the Offeror. A takeover bid circular is generally not reviewed by the securities regulators other than when a complaint is filed by a disgruntled party. In a high-profile decision, the Ontario Securities Commission underscored the difference between:

- disclosure in a circular that strictly and technically adheres to the 'line item requirements' in the rules setting out what disclosure is required; and
- disclosure that addresses information that securityholders may consider to be material in making a determination as to whether or not to tender to the offer.

In this case, the Ontario Securities Commission ordered that the takeover bid could not proceed unless the Offeror amended the circular to address certain deficiencies by making certain additional disclosures. As a result, it is possible for the disclosure to be technically complete but deficient because it does not address the spirit of the intended disclosure.

If the takeover bid is commenced by advertisement, then on or before the date of the publication of the advertisement, the person making the takeover bid must:

- deliver a copy of the bid materials to the target's principal office;
- file the bid materials and advertisement with the regulators; and
- request from the target a list of securityholders in order to satisfy the mailing obligations set out above under 'Commencement of the bid'.

Not later than two business days after receipt of such a list, the bid materials (including the bid circular) must be sent. If the bid is commenced by the sending of materials as set out above, such materials must be delivered to the target's principal office and filed with the regulators as soon as practicable thereafter.

### **Changes in information**

If:

- before the expiry of the bid; or

- after the expiry of the bid but before the expiry of withdrawal rights, a change has occurred in the information contained in either the circular or any notice delivered that would reasonably be expected to affect the decision of holders to accept or reject the bid, then the Offeror must promptly:
  - issue and file a news release; and
  - deliver a notice of change in prescribed form to every person to whom a bid circular was required to have been sent (unless their securities have previously been taken up).

This requirement does not apply to a change not within the control of the Offeror or its affiliates unless it is a change in a material fact relating to the securities offered in connection with a securities exchange bid. For the purposes of the foregoing requirements, variations in the terms of the bid do not constitute a change of information. Notwithstanding the foregoing, the Offeror is not required to send a notice of change to a securityholder if the securityholder is restricted from withdrawing securities that have been deposited as a result of the Partial Bid Restriction referred to under 'Withdrawal of securities'.

If an Offeror is required to send a notice of change before the expiry of the 'initial deposit period', then:

- the initial deposit period for the bid must not expire before ten days after the date of the notice of change; and
- the Offeror must not take up securities deposited under the bid before ten days after the date of the notice of change.

### **Variation in the terms**

Where there is a variation in the terms of a bid, including: (1) any reduction of the period during which the securities may be deposited under the bid (as a result, eg, of the 'Shortened Deposit Period Conditions' described under 'Expiry of a bid: minimum deposit period and prohibition on take-up'; or (2) any extension of the period during which securities may be deposited or the exercise by the Offeror of rights contained in the bid, the Offeror must promptly:

- issue and file a news release; and
- deliver a notice of variation in prescribed form to every person to whom a bid circular was required to have been sent (unless their securities have previously been taken up).

An Offeror is not required to send a notice of variation to a securityholder if, as a result of the Partial Bid Restriction referred to under 'Withdrawal of securities' the securityholder is not permitted to withdraw securities that have been deposited under the bid.

As noted above under 'Withdrawal', if there is a variation in the terms of a bid, the period during which securities may be deposited pursuant to the bid must not expire before ten days after the sending of the notice of variation.

If as a result of a variation in the terms of the offer an Offeror is required to send a notice of variation before the expiry of the initial deposit period, then:

- the initial deposit period must not expire earlier than ten days after the date of the notice of variation; and
- the Offeror must not take up securities deposited under the bid earlier than ten days after the date of the notice of variation.

The foregoing requirements do not apply where the variation consists solely of a waiver of a condition in the bid and any extension of the bid (other than an extension in respect of the mandatory ten-day extension period) resulting from such a waiver, where the consideration offered for the securities consists solely of cash, but in these circumstances, the Offeror must promptly issue and file a news release announcing the waiver.

An Offeror may not make a variation in the terms of a bid, other than a variation to extend the time during which the securities may be deposited under the bid or a variation to increase the consideration offered for the securities subject to the bid, after the Offeror becomes obligated to take up securities deposited under the bid as set out under 'Taking up and paying for deposited securities'.

In the case of a bid that is commenced by advertisement, if the change or variation occurs before the Offeror has sent the bid (including the bid circular) to securityholders (as contemplated above under 'Commencement of the bid'), advertisements must be used to disseminate information relating to the change or variation.

The National Policy provides that if an Offeror varies the terms of its bid after the bid has been commenced, the variation may have the effect of making the bid less favourable to the securityholders where the Offeror:

- lowers the consideration offered under the bid;
- changes the form of consideration offered under the bid, other than to add to the consideration already offered under the bid;
- lowers the proportion of outstanding securities for which the bid is made; or
- adds new conditions.

The National Policy notes the intention of the CSA that, depending on the circumstances, the variations may be so fundamental to the bid that they may exercise their public interest mandate to ensure that the target's securityholders are not prejudiced by the variations. The CSA has published a staff notice setting out the view of CSA staff relating to the ability of an Offeror to make negative variations to a bid and noted that the commencement of a bid 'creates a legitimate expectation... that the bid will be completed at the specified price provided that the conditions of the bid are satisfied'. The view of the CSA staff is that the Bid Regime does not contemplate the 'unilateral withdrawal' of a bid or, if all of the terms and conditions have been satisfied or waived, a reduction in the price or introduction of new conditions. CSA staff noted that offer documents and bid circulars occasionally contain language to the effect that the Offeror may vary the bid at any time in its sole discretion, including varying the offer price downwards or introducing new conditions; CSA staff noted that such language, and the ability to do so, 'may be inconsistent with the requirements of the Bid Regime'. In determining whether to challenge a negative variation, CSA staff noted that they will consider various factors, including whether the variation: (1) is in response to failure of a bona fide condition; (2) is effected as an alternative to allowing the bid to expire unsuccessfully; (3) provides sufficient procedural protections to offeree securityholders and other market participants affected by the variation; and (4) would not be abusive to offeree securityholders. In CSA staff's view, an Offeror that reserves 'sole discretion' with respect to

a condition should act honestly, in good faith and on reasonable grounds (so that the exercise of such discretion is not capricious or arbitrary).

### **Financing arrangements**

If all or part of the consideration payable under a bid is in cash, the Offeror must make 'adequate arrangements' before the bid to ensure that the required funds are available. These financing arrangements may be subject to conditions if, at the time the bid is commenced, the Offeror reasonably believes the possibility to be 'remote' that, if the conditions of the bid are satisfied or waived, the Offeror will be unable to pay for the securities deposited under the bid as a result of the financing conditions not being satisfied (and this statement must be made in the Offeror's circular). The Offeror's circular must identify the source of funds and, if the funds are to be borrowed, must also identify:

- the name of the lender;
- the terms and financing conditions of the loan;
- the circumstances under which the loan must be repaid; and
- the proposed method of repayment.

### **Proportionate take-up and payment**

If a bid is made for less than all of the class of securities subject to the bid and a greater number of securities is deposited under the bid than the Offeror is bound or willing to acquire under the bid, the Offeror must take-up and pay for the securities pro rata, disregarding fractions, according to the number of securities deposited by each securityholder (the 'Proportionate Condition'). Any securities acquired in a pre-bid transaction as described under 'Trading restrictions before, during and after formal bids' and 'Integration with bid transactions' above are deemed to have been deposited under the bid by the person who was the seller in the pre-bid transaction. While the application of this provision is perhaps unclear, many practitioners believe that the implication of this provision is that if one is intending to conduct a takeover bid for less than all of the securities, then one should not be acquiring securities in the open market. The purpose of these provisions is to limit the ability of a seller of securities to 'double dip' by selling a proportionate share of its securities under the pre-bid integration exemption and then tendering additional shares under the bid. For example, if a bidder acquired 50 per cent of a seller's target shares less than 90 days prior to the commencement of a bid and then launched a bid for 50 per cent of the shares, the seller in the pre-bid transaction could not tender any more securities under the bid as it will be deemed to have tendered the securities it sold under the prior transaction; as noted above, this prohibition only applies if a bid is made for less than all of the class of securities subject to the bid and a greater number of securities is deposited under the bid than the Offeror is bound or willing to acquire under the bid.

### **Minimum tender requirements**

All non-exempt bids are required to receive unwithdrawn tenders of more than 50 per cent 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) before the bidder can take up and pay for any securities under the takeover bid (the 'Minimum Bid Requirements'). The policy purpose of these provisions is to ensure that a change of control of a target is only effected in circumstances where holders of a majority of the shares, independent of the transaction, are supportive of the transaction.

If an Offeror has purchased securities as permitted under 'Trading restrictions before, during and after formal bids', those purchased securities are to be included in the calculation as to whether a condition relating to the minimum number of securities deposited has been satisfied, although these shares, when acquired outside of the bid, do not reduce the number of securities the Offeror is required to take up under the bid.

Notwithstanding that the Bid Regime permits partial bids to be implemented – a partial bid would be subject to the minimum tender conditions being satisfied because this would require the support of holders of more than 50 per cent of the target's 'independent' shareholders – partial bids have become less common. As a result of the minimum tender requirement, bids for 'any and all shares' tendered or bids for up to ten per cent of the shares are not permitted. Moreover, because of the minimum tender requirement, shareholders who may otherwise be prepared to tender into an 'any and all shares' bid may be prevented from doing so if shareholders holding more than 50 per cent of the outstanding shares determine not to support or tender into the bid.

If an Offeror purchases securities under 'Acquisitions during the bid', the purchased securities are not counted in determining whether the Minimum Bid Requirement condition is satisfied, and the purchase does not reduce the number of securities the Offeror is required to take up under the bid.

### **Mandatory ten-day bid extension**

All non-exempt bids must, after the mandatory minimum tender condition set out above is satisfied and all other conditions to the offer are satisfied or waived, be extended by the bidder for at least ten additional days; in the case of a partial bid, the extension must be for only ten days and the Offeror will be unable to extend the partial bid further. The rationale for this change is to address the concern that shareholders of the target were being forced to tender into a bid prior to the initial expiry of the bid (as a result, eg, of the concern that the shareholder may theoretically be 'left behind' as a minority shareholder of a corporation with a new controlling shareholder).

### **Taking up and paying for deposited securities**

When an Offeror is obligated to take up securities deposited under a bid, the Offeror is required to issue a press release disclosing, among other things:

- that the minimum tender requirement has been satisfied;
- the number of securities deposited and not withdrawn as at the expiry of the initial deposit period;
- that the period during which securities may be deposited under the bid has been extended for the mandatory ten-day extension period; and
- if the bid is:
  - not a partial bid, that the Offeror will immediately take up the deposited securities and pay for the securities take up as soon as possible (and in any event not later than three business days after the securities are taken up), or
  - a partial bid, that the Offeror will take up and pay for the deposited securities proportionately in accordance with applicable securities legislation and, in any event, will take up the deposited securities not later than one business day after the expiry of the mandatory ten-day extension period and pay for the



securities taken up as soon as possible and in any event not later than three business days after the securities are taken up.

In the case of a partial bid, the extension must be for only ten days (and no longer) and the bid must not be extended after the expiry of the mandatory ten-day extension period.

An Offeror must not take up securities deposited under a bid unless:

- a period of 105 days (or the number of days determined as a result of the 'Shortened Deposit Period Conditions' described under 'Expiry of a bid: minimum deposit period and prohibition on take-up') has elapsed from the date of the bid;
- all the terms and conditions of the bid have been complied with or waived; and
- the Minimum Bid Requirements referred to above have been satisfied.

An Offeror must immediately take up securities deposited under a bid if, at the expiry of the initial deposit period:

- the deposit period of 105 days (or the number of days determined as a result of the 'Shortened Deposit Period Conditions' described under 'Expiry of a bid; minimum deposit period and prohibition on take-up') has elapsed;
- all of the terms and conditions of the bid have been complied with or waived; and
- the conditions set out in the first paragraph under 'Minimum Tender Requirements' are satisfied;

(the 'Take Up Requirements'). An Offeror must pay for any securities taken up under a bid as soon as possible, and in any event, not later than three business days after the securities are taken up.

In the case of a bid that is a partial bid:

- notwithstanding the foregoing requirements, an Offeror who has made a partial bid is required to take up, by the time specified above, only the maximum number of securities that the Offeror can take up without contravening:
  - the provisions of the Bid Regime requiring that all holders of the same class be offered identical consideration; and
  - the 'Proportionate Condition' as described under 'Proportionate take-up and payment';

at the expiry of the bid; and

- securities deposited before the expiry of the initial deposit period and not taken up by the Offeror in reliance on the foregoing provision, and securities deposited during the mandatory ten-day extension period, must be taken up by the Offeror in the manner required under the 'Proportionate Condition' not later than one business day after the expiry of the mandatory ten-day extension period.

Notwithstanding the foregoing, if at the expiry of the mandatory ten-day extension period rights of withdrawal arising from the Change/Variation Condition referred to under 'Withdrawal' are applicable, securities deposited before the expiry of the initial deposit period

and not taken up by the Offeror in reliance on the foregoing, and securities deposited during the mandatory ten-day extension period, must be taken up by the Offeror, as described under 'Proportionate take-up and payment', not later than one business day after the expiry of the withdrawal period conferred by the 'Change/Variation Condition'.

In the case of a bid that is not a partial bid:

- securities deposited under the bid during the mandatory ten-day extension period, or an extension period made after the mandatory ten-day extension period, must be taken up and paid for by the Offeror not later than ten days after the deposit of the securities;
- an Offeror must not extend its bid beyond the expiry of the mandatory ten-day extension period unless the Offeror first take up all securities deposited under the bid and not withdrawn (provided, however, that if the Offeror extends the bid in circumstances where the rights of withdrawal conferred by the Change/Variation Condition referred to under 'Withdrawal' apply, the Offeror must extend the bid without the Offeror first taking up the securities which are subject to the rights of withdrawal).

Securities deposited under the bid subsequent to the date on which the Offeror first takes up securities deposited under the bid must generally be taken up and paid for by the Offeror not later than ten days after the deposit of the securities. An Offeror may generally not extend its bid if all the terms and conditions of the bid have been complied with or waived, unless the Offeror first takes up all securities deposited under the bid and not withdrawn (provided that, in certain circumstances, where the Offeror waives any terms or conditions of a bid and extends the bid, the bid must be extended without the Offeror first taking up any securities which are subject to the right of withdrawal).

### **Language requirements**

Bid materials must be filed in the French language or in the English language, provided that in Quebec, documents must be in French or in both French and English.

### **Expiry of a bid: minimum deposit period and prohibition on take-up**

Legislation provides that a takeover bid expires at the later of:

- the end of the period, including any extension, during which securities may be deposited under the bid; and
- the time at which the Offeror becomes obligated by the terms of the bid to take up or reject securities deposited under the bid. See 'Taking up and paying for deposited securities'.

An Offeror must allow securities to be deposited pursuant to a bid for at least 105 days (rather than the 35-day period that was required prior to amendments implemented in 2016) from the commencement of the bid unless:

- the offeree board states in a news release a shorter deposit period for the bid (the 'First Bid') of not less than 35 days, in which case the First Bid must remain open for at least the stated shorter deposit period and all existing and subsequent takeover bids must remain open for at least the stated shorter deposit period if:

- the Offeror commenced the bid (the 'Additional Bid') before the issuance of the news release and the bid has not yet expired; or
- the Offeror, after the issuance of the news release, commences a bid before:
  1. the date of completion or abandonment of the First Bid; or
  2. the date of expiry of an Additional Bid; or
- the target issues a news release that it intends to effect, pursuant to an agreement or otherwise, a specified alternative transaction (generally an amalgamation, plan of arrangement, a sale or lease of all of substantially all of the property of the issuer, or other form of transaction that will result in a change of control and requires shareholder approval), in which case all existing and subsequent takeover bids must remain open for a deposit period of at least 35 days from the date of the bid if:
  - the Offeror commenced the bid before the issuance of the news release and the bid has not yet expired (the 'Earlier Bid'); or
  - the Offeror, after the issuance of the news release, commences a bid before:
    1. the date of completion or abandonment of the alternative transaction; or
    2. the date of expiry of the Earlier Bid

(the 'Deposit Period') (the circumstances described above being herein referred to as the 'Shortened Deposit Period Conditions'). An Offeror must not take-up securities deposited under the bid until the expiration of the Deposit Period. The change from a minimum period of 35 days to a minimum period of 105 days was intended to respond to concerns that targets did not have adequate time to respond to hostile takeover bids. As a result of the foregoing, friendly takeover bids can still be completed with a 35-day deposit period from the commencement of the bid.

A period of days is considered to start on the day following the event that began the period, and end at 2359 on the last day of the period (provided that if the last day is not a 'business day' (being a day other than a Saturday, a Sunday or a statutory holiday in the particular jurisdiction), then at 2359 on the next business day).

The increase of the minimum period of the deposit from 35 days to 105 days shifts some of the control in connection with a hostile bid from the bidder to the target's board, thereby allowing the board to consider alternatives or negotiate alternate terms to the unsolicited offer. Moreover, because it is within the control of the board to determine to reduce the minimum bid period to as little as 35 days, bidders may face greater uncertainty and may, therefore, be more interested in seeking a negotiated transaction. As a result of having a minimum bid period of 105 days, when combined with the ten-day mandatory extension period, a successful bidder is able to continue to rely upon the compulsory acquisition provisions which generally exist in corporate law legislation in Canada. See 'Eliminating the Minority After a Takeover Bid: Statutory and compulsory acquisitions'.

It remains to be seen whether the extension of the minimum tender period will result in an increased use of proxy battles where a hostile bidder will try to requisition a meeting of the shareholders in order to compel a board to deal with the unsolicited bid (and waive the 105-day period) or effect a change in the composition of the board.

## Certification

The offering circular, the directors' circular (see 'Directors' circular' below), notices of change and notices of variation must be signed by the chief executive officer and chief financial officer (or persons holding similar positions) and two directors certifying that the document contains all material facts.

## Directors' circular

The board of directors of a target has the responsibility of evaluating a takeover bid; although the Bid Regime has changed the language surrounding the obligations of the board of directors, the change in language was intended only to clarify the original intent and not to change the substance of their obligations. As a general principle, directors must act in good faith on what they believe are reasonable and probable grounds to be in the best interests of the target and its securityholders. The provisions of securities legislation relating to takeover bids indicate that the primary role of the directors in respect of a takeover bid is to advise the securityholders rather than to decide the issue for them. The primary objective of legislation is to protect the bona fide interests of the securityholders of the target and to permit takeover bids to proceed in an open and even-handed environment.

Legislation provides that a directors' circular of the board of directors of the target shall be prepared and delivered not later than 15 days after the commencement of the bid.

Legislation provides that the circular is required to contain either:

- a recommendation to accept or reject the offer; or
- a statement that they are unable to make or are not making a recommendation, along with the reasons for not making a recommendation.

Alternatively, the circular could contain a statement that the board is considering making a recommendation, and advising securityholders not to tender until further communication is received. In such a circumstance, the board of directors shall deliver the recommendation or the decision not to make a recommendation at least seven days prior to the scheduled expiry of the period during which securities may be deposited. An individual director or officer may make a recommendation if such a person delivers with a recommendation a separate circular in prescribed form.

If:

- prior to the expiry of a bid; or
- after the expiry of the bid but prior to the expiry of all rights of withdrawal

a change has occurred in the information contained in the directors' circular (or in any notice of change to the directors' circular) that would reasonably be expected to affect the decision of holders with respect to the bid, the directors must issue a news release relating to the change and thereafter send a notice of change disclosing the nature and substance of the change. If an individual director or officer makes a recommendation in a separate director's or officer's circular, the same obligation arises other than a change that is not within the control of the individual director or officer.

Any circular or notice of change submitted by an individual director or officer shall be delivered at the expense of the target. Legislation seems to imply, however, that the preparation of such a circular or notice of change would be at the expense of the director or officer, although as a practical matter this is unlikely to be the case.

## **Takeover bids not subject to the general takeover bid requirements**

A takeover bid is exempt from the general provisions of legislation relating to formal bids, including the requirement to prepare a takeover bid circular, if certain conditions are met.

Certain of the exemptions are based on the concept of the 'market price' of the securities acquired. Generally, the market price of securities in which there is a published market is the average closing price for each business day on which there was a closing price during the 20 business-day period preceding the date in question. Additional rules in respect of determining 'market price' apply in cases where:

- there is more than one published market;
- the security is infrequently traded;
- if there is not a closing price; or
- there is a closing price for fewer than ten of the 20 preceding business days.

## **Stock exchange bids**

As of January 2005, the Toronto Stock Exchange repealed its rules relating to stock exchange takeover bids. To be consistent with the abolition of the rules that related to a potential exempt takeover bid regime, the Bid Regime does not contain an exemption for stock exchange takeover bids.

## **Normal course purchase exemption**

A takeover bid is exempt from the formal bid requirements of legislation if:

- the bid is for not more than five per cent of the outstanding securities of a class of securities of the target;
- the aggregate number of securities acquired in reliance on this exemption by the Offeror and any Joint Actors of the Offeror within any period of 12 months, when aggregated with acquisitions otherwise made by the Offeror and any Joint Actors of the Offeror within the same 12-month period (other than under a bid that is subject to the requirements described above), does not constitute more than five per cent of the outstanding securities of that class at the beginning of the period;
- there is a published market for the class of securities that are the subject of the bid; and
- the value of the consideration paid for any of the securities acquired is not in excess of the 'market price' at the date of acquisition, plus reasonable brokerage fees or commissions actually paid.

Legislation does not permit the five per cent exemption to apply independently of other exemptions. For instance, acquisitions pursuant to the private agreement exemption described below reduce the number of shares permitted to be purchased pursuant to the five per cent exemption. In addition, the five per cent threshold includes both securities acquired from existing securityholders and those acquired from the Treasury.

As an exception to the general rule outlined above under 'Takeover bids not subject to the general takeover bid requirements' with respect to the calculation of 'market price', for the

purposes of this exemption legislation provides that where an Offeror acquires securities on a published market, the market price of such securities is the price of the last board lot of such securities purchased before the acquisition by the Offeror by a person who is not a Joint Actor.

### **Private agreement exemption**

A takeover bid is exempt from the formal bid requirements of legislation if:

- purchases are made from not more than five persons in the aggregate, including persons located outside Canada;
- the bid is not made generally to securityholders of the class of securities that is the subject of the bid, provided there are more than five securityholders of the class; and
- the value of the consideration paid for any of the securities (including brokerage fees or commissions) is not greater than 115 per cent of the 'market price' of securities of that class at the date of the acceptance of the bid.

If the Offeror knows or ought to know (after reasonable enquiry) that the seller of the securities is acting as a nominee or trustee or other representative for one or more other persons having a direct beneficial interest in those securities, then each such person is to be included in the determination of the number of persons from whom purchases are made; this rule does not apply in respect of certain trusts and estates. If securities are acquired by a vendor in order to be able to permit a third party to rely on the exemption, then each person from whom the vendor acquired securities shall be counted in the determination.

While there was a proposal to restrict this exemption to a single use by an Offeror in respect of a particular target and that all purchases would have to be negotiated at the same time, this proposal was not adopted in the Bid Regime although this issue may be revisited at some point given the regulators' concern about 'creeping' takeover bids. Against this background, it is prudent to avoid the use of this exemption too frequently and to avoid linked transactions in order to ensure that the five-person limit is not exceeded.

### **Non-reporting issuer**

An exemption also exists if:

- the target is not a 'reporting issuer' (ie, an issuer that, generally speaking, is subject to the ongoing reporting obligations under applicable Canadian securities legislation (generally as a result of having filed a prospectus in Canada or having its securities listed on a Canadian stock exchange));
- there is no published market in respect of the securities in question; and
- the number of holders of securities of that class is not more than 50 (excluding securityholders who are employees of, or were certain types of former employees of, the issuer or its affiliates).

### **Foreign takeover bid exemption**

A takeover bid is exempt if:

- persons whose last address as shown on the books of the target is in Canada hold less than ten per cent of the outstanding securities of the class subject to the bid (and

the Offeror reasonably believes that Canadian securityholders beneficially own less than ten per cent);

- the published market on which the greatest dollar volume of trading in securities of that class occurred during the 12 months immediately preceding the date of the bid was not in Canada;
- securityholders in Canada are entitled to participate in the bid on terms at least as favourable as the terms that apply to the general body of securityholders;
- all of the material relating to the bid that is sent by or on behalf of the Offeror is concurrently filed and sent to securityholders whose last address as shown on the books of the offeree issuer is in Canada; and
- an advertisement containing a summary of the terms of the bid and specifying where and how a securityholder may obtain a copy of the bid is filed and published in at least one major daily newspaper of general and paid circulation in the local jurisdiction.

This exemption is not available unless:

- the prescribed information and documents are filed in Canada and sent to the securityholders in Canada at the same time as material relating to the bid is sent to the other securityholders of the target;
- if the bid materials are not in English, a brief summary of the key terms of the bid prepared in English, and in Quebec in French or French and English, are filed and sent to securityholders in Canada at the same time the bid materials are filed and sent; and
- if no material relating to the bid is sent, but a notice or advertisement of the bid is published by the Offeror in the jurisdiction where the target is incorporated or organised, an advertisement of the bid specifying where and how securityholders may obtain a copy or, of access to, the bid materials is filed and published in English in at least one major daily newspaper of general and regular paid circulation in Ontario.

The purpose of this provision is to permit a bid to be made to Canadian securityholders in accordance with the rules in the principal foreign jurisdiction.

### **Minimal holdings**

A takeover bid is exempt from the general provisions if:

- the number of beneficial holders in the particular Canadian jurisdiction is less than 50, and the securities held by them in the aggregate are less than two per cent of the outstanding securities of the class in question;
- securityholders in a local Canadian jurisdiction are entitled to participate in the bid on terms at least as favourable as the terms that apply to the general body of securityholders; and
- all of the material relating to the bid that is sent by or on behalf of the Offeror is concurrently filed and sent to securityholders whose last address as shown on the books of the offeree issuer is in Canada.

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## ELIMINATING THE MINORITY AFTER A TAKEOVER BID

### Statutory and compulsory acquisitions

Most corporate statutes in Canada provide that if a takeover bid is accepted by the holders of not less than 90 per cent of the shares of any class to which the takeover bid relates (*other than shares held at the date of the takeover bid by or on behalf of the Offeror or an affiliate or associate of the Offeror*), the Offeror is entitled to acquire the shares held by holders of such a class of shares who do not accept the takeover bid ('dissenting shareholders'). The italicised language should be considered carefully in order to ensure the Offeror's ability to rely upon such compulsory acquisition provisions if the 90 per cent threshold is attained. Most income trust declarations also provide for a right of compulsory acquisition in similar circumstances.

Although the corporate statutes generally permit the Offeror in those circumstances to acquire the shares of the dissenting shareholders on the same terms as those offered pursuant to the takeover bid, the statutes also allow the dissenting shareholders to apply to court to have the court determine the 'fair value' of the shares (and to require the Offeror to acquire the shares of the dissenting shareholder at their 'fair value'). The fair value may not necessarily be equal to the amount of the bid.

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## PROTECTION OF MINORITY SECURITYHOLDERS: A 'MADE IN CANADA' SOLUTION

### Regulatory requirements

Given the significant number of public corporations in Canada that are not 'widely held' (ie, where control rests in the hands of a single or small number of securityholders), the Ontario and Quebec securities regulators have established rules to protect against the possibility of self-dealing by enacting a consolidation of their prior individual directives under Multilateral Instrument 61-101 titled 'Protection of Minority Security Holders in Special Transactions' ('MI 61-101'). It is beyond the scope of this paper to outline in detail the provisions of such regulations, but this paper will highlight certain of the considerations that would be of particular relevance to persons proposing to undertake takeover bids. MI 61-101 harmonises the requirements regarding required disclosure, independent valuation and majority of the minority securityholder approval in the case of an insider bid, issuer bid, business combination and related party transaction. Most of the changes introduced in the instrument are to make the instrument conform with the Bid Regime. However, MI 61-101 has also extended certain exemptions from the requirement to obtain an independent valuation of certain transactions.

### Insider bids

An 'insider bid' is a takeover bid made by an 'insider' of the target, or by certain other persons, including associates and affiliates of the insider; persons who were insiders (or affiliates or associates of the insider) in the 12 months prior to the bid; and Joint Actors of the foregoing persons (although, for the purposes of MI 61-101, 'Joint Actors' do not include a person who is a Joint Actor solely because there is an agreement, commitment or understanding that such a person will tender to the bid or vote in favour of the transaction (generally referred to as a 'lock-up agreement')). In the case of insider bids, the Bid Regime applies only to insider bids that are 'formal bids' for the securities of the target (as described under 'Formal Takeover Bid Requirements: What is a 'formal takeover bid?'). In such an insider bid, the acquirer is generally required to include a formal valuation that is prepared in



accordance with the rules set out in MI 61-101 under the direction of an independent committee of the board of directors of the target, and the Directors' Circular must contain certain additional disclosures, including disclosure of prior valuations made in the 24 months prior to the insider bid. The Companion Policy to MI 61-101 provides that, although it is appropriate for members of a special committee or independent committee to be adequately compensated for their time and effort, the compensation should not compromise their independence. MI 61-101 prohibits committee members from receiving payments that are contingent upon the completion of the transaction, and the Companion Policy provides that the compensation should ideally be set when the committee is created and be based on fixed-sum payments or the work involved.

## **Business combinations**

A 'business combination' means, in respect of an issuer, an amalgamation, arrangement, consolidation, amendment to the terms of a class of equity securities or any other transaction of the issuer, as a consequence of which the interest of a holder of an equity security of the issuer may be terminated without the holder's consent, regardless of whether the equity security is replaced with another security. While this may be seen as a broad definition, and potentially encompass all types of acquisition transactions, it implicitly does not include all takeover bids (because a business combination must directly involve the issuer as a participant, which is not the case in the case of a takeover bid, where the issuer is merely the subject of the transaction) and expressly does not include certain types of specified transactions such as:

- an acquisition of an equity security of the issuer under a statutory right of compulsory acquisition; or
- a transaction in which no person or company that is a 'related party' of the issuer at the time the transaction is agreed to:
  - would, as a consequence of the transaction, directly or indirectly acquire the issuer or the business of the issuer, or combine with the issuer, through an amalgamation, arrangement or otherwise, whether alone or with Joint Actors;
  - is a party to any 'connected transaction' to the transaction (ie, one or more transactions that have at least one party in common, directly or indirectly, other than transactions related solely to services as an employee, director or consultant, and:
    - which is negotiated or completed at approximately the same time; or
    - the completion of which is conditional on the completion of the other); or
  - is entitled to receive, directly or indirectly, as a consequence of the transaction:
    - consideration per equity security that is not identical in amount and form to the entitlement of the general body of holders in Canada of securities of the same class;
    - a 'collateral benefit'; or
    - consideration for securities not greater than the entitlement of the general body of holders in Canada of every other class of equity securities of the

issuer in relation to the voting and financial participating interests in the issuer represented by the respective securities.

A 'collateral benefit' means any benefit that a related party of the issuer is entitled to receive, directly or indirectly, as a consequence of the transaction or bid, including, without limitation, an increase in salary, a lump sum payment, a payment for surrendering securities, or an enhancement in benefits related to past or future services as an employee, director or consultant of the issuer or of another person, regardless of the existence of any offsetting costs to the related party or whether the benefit is provided, or agreed to, by the issuer, another party to the transaction or the Offeror in the bid, but 'collateral benefits' do not include certain types of benefits that, as a matter of policy, are not considered to be objectionable, such as *de minimis* employment, directorship or consultancy-related benefits. See, for example, the approach taken under 'Formal Takeover Bid Requirements: General requirements – Bid consideration', above. For these purposes, a 'related party' of the issuer includes, among others, a 'control person' of the issuer (as defined under 'Formal Takeover Bid Requirements: Trading restrictions before, during and after formal bids'), a person who alone or in combination with others holds more than ten per cent of the voting rights in respect of the issuer, or a director or officer of the issuer or of any such person.

### **Application of the business combination rules to a takeover bid transaction**

One of the factors in considering whether a transaction is a 'business combination' is whether the party to the business combination is a 'related party'. While this would theoretically be an irrelevant consideration to a proposed arm's-length acquirer of a target, it should be recognised that at the time when an acquirer has been successful in acquiring a significant number (but not all) of the securities of the target under a takeover bid, the acquirer will have become a 'related party' of the issuer. If the acquirer is not able to avail itself of the statutory rights of acquisition described under 'Rights of statutory acquisition', then the acquirer will generally 'squeeze out' the remaining securityholders by implementing a follow-on transaction, such as an 'amalgamation squeeze-out'. In those circumstances, and at that time, the arm's-length acquirer has become a 'related party' of the issuer by virtue of having acquired control of the issuer.

The instrument set out specific criteria for determining whether a person is a 'related person' or an 'interested person' for the purposes of a specified transaction. Under the Companion Policy to MI 61-101, the regulators signalled that, without limiting the application of the definition of Joint Actor, they may consider a 'related party' to be a Joint Actor with the Offeror in a bid, or with the acquirer in a business combination, if the related party becomes a control person of the issuer or a successor issuer upon completion of the transaction or if the related party, whether alone or with Joint Actors, beneficially owns securities with more than 20 per cent of the voting rights. They may also consider a related party's continuing equity interest in the issuer or a successor issuer upon completion of the transaction in making an assessment of Joint Actor status generally. A Joint Actor characterisation could cause a bid to be regarded as an insider bid, or an otherwise arm's-length transaction to be regarded as a business combination, that requires the preparation of a formal valuation.

### **Amalgamation squeeze-outs**

In an 'amalgamation squeeze-out', implemented after completion of the takeover bid, the acquirer proposes to amalgamate with the target. If the acquirer is not a standalone acquisition vehicle, the acquirer will typically transfer the target securities that it owns to a new wholly owned subsidiary ('NewSub'). The acquirer funds NewSub with cash (the 'Cash') either by way of a loan or share subscription. The target and NewSub amalgamate to form an amalgamated company ('Amalco') on the basis that:

- each shareholder of NewSub receives one common share of Amalco for each common share of NewSub previously held; and
- each shareholder of the target (other than NewSub) receives a redeemable, retractable preferred share of Amalco (the 'Preferred Shares'), redeemable and retractable at a fixed, pre-determined price equal to the price originally offered under the takeover bid.

Immediately after the amalgamation, the directors of Amalco resolve to redeem the Preferred Shares (the 'Redemption'), and use the Cash to fund the Redemption.

After giving effect to the Redemption, Amalco is a wholly owned subsidiary of the acquirer. It should be noted that an amalgamation is similar to a US-style merger, other than that there is no 'surviving corporation' for corporate purposes. As a result, it is more akin to a US corporate consolidation.

### **Securityholder approvals to amalgamations**

Most corporate statutes in Canada provide that:

- in order for an amalgamation to be approved, shareholders holding not less than two-thirds of the shares of each class represented at the meeting must approve the amalgamation; and
- shareholders who disapprove of the amalgamation are entitled to dissent from the amalgamation and to have their shares purchased at their 'fair value' (the determination of which is similar to that described above in respect of a dissenting shareholder relating to a compulsory acquisition following a 90 per cent successful takeover bid).

### **Regulatory approvals to amalgamations that are business combinations**

Under MI 61-101, the implementation of a business combination requires the preparation of a valuation of the type referred to above in respect of 'insider bids', as well as the approval of a 'majority of the minority', as described below.

### **Exemption from the valuation requirements**

In order for a business combination that occurs as a 'second-step business combination' (ie, as the second step to a formal bid) to be exempt from the valuation requirements:

- the business combination must be completed not more than 120 days after the expiry of the bid;
- the consideration per security being offered to the securityholders in the business combination must be at least equal in value to and be in the same form as the consideration that the tendering securityholders were entitled to receive in connection with the bid; and
- certain disclosures relating to the proposed second step business combination must be made in the Offeror's bid materials (including the intention to take advantage of statutory rights of acquisition or to implement a business combination).

## Majority of the minority requirements

A business combination must receive 'minority approval'. In this regard, MI 61-101 provides that this constitutes a majority of the votes cast by each class of affected securities (voting separately as a class). In determining minority approval, votes to be excluded are those that, to the knowledge of the issuer or the Offeror or their director and officers, after reasonable enquiry, are beneficially owned or over which control or direction is exercised by the Offeror or certain other parties, including related parties of the Offeror and Joint Actors of the Offeror (as such a definition is modified as contemplated under 'Insider bids'). Notwithstanding this, the votes attached to securities that were previously acquired under a bid may, in certain circumstances, be cast in favour of the subsequent business combination in determining whether minority approval has been obtained.

The Companion Policy to MI 61-101 provides that if a 'related party' of an issuer is provided with the opportunity to maintain or acquire an equity interest in the issuer, or in a successor to the business of the issuer, upon completion of a bid or business combination, then certain provisions of the instrument may be relevant. If the equity interest is to be derived solely from securities-based compensation for services as an employee, director or consultant, the provisions of the instrument regarding collateral benefits may be applicable. In other cases, the acquisition of the equity interest or opportunity to maintain an equity interest may be a connected transaction. In either of these instances, votes attaching to the securities owned by the related party may be excluded from the minority vote required for a business combination, including a second-step business combination following a bid. The regulators are of the view that the employee compensation exemptions to the collateral benefit and connected transaction definitions do not generally apply to an issuance of securities in the issuer or a successor issuer upon completion of the transaction.

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## FIDUCIARY DUTY AND BUSINESS JUDGMENT RULE IN THE CONTEXT OF TAKEOVER BIDS

### Meaning of fiduciary duty

The corporate statutes in Canada generally codify the common law proposition that directors owe a fiduciary duty to the corporations they serve by prescribing that every director of a corporation must:

- act honestly and in good faith with a view to the best interests of the corporation (frequently referred to as a 'duty of loyalty' or 'fiduciary duty'); and
- exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

### Directors' fiduciary duty in the context of takeover bids

The fiduciary duty of the board of directors of a target in assessing a takeover bid and in considering takeover bid defence measures is the same as in the context of any transaction: the directors must act honestly and in good faith with a view to the best interests of the issuer.

In the context of an unsolicited takeover bid or control contest, Canadian courts have held that the directors of a target company have the right and obligation to take action (including defensive measures) that they honestly and reasonably believe are in the best interests of the corporation and its shareholders.

It is not the law in Canada that the board has a duty solely to maximise value for shareholders, and courts have provided for a flexible approach to the discharge of fiduciary duties by directors and certain courts have clarified that directors need not hold an auction every time a company is 'in play'. The maximisation of shareholder value in a change of control situation is only one factor to focus on. Courts have acknowledged that auctions may prevent the conflict of interest that often arises in connection with a change of control by requiring directors to act in a neutral way towards a number of bidders. In a decision of the Ontario Court of Appeal, it was noted that:

'The more recent [*Paramount Communications Inc v QVC Network Inc* (1998)] decision in the United States has recast the obligation of directors when there is a bid for a change of control as *an obligation to seek the best value reasonably available to shareholders in the circumstances. This is a more flexible standard, which recognizes that the particular circumstances are important in determining the best transaction available, and that a board is not limited to considering only the amount of cash or consideration involved as would be the case with an auction... There is no single blueprint that directors must follow...* When it becomes clear that a company is for sale and there are several bidders, an auction is an appropriate mechanism to ensure that the board of a target company acts in a neutral manner to achieve the best value reasonably available to shareholders in the circumstances. When the board has received a single offer and has no reliable grounds upon which to judge its adequacy, a canvass of the market to determine if higher bids may be elicited is appropriate, and may be necessary' [emphasis author's own].

The decision of the Supreme Court of Canada in *BCE Inc* has raised new issues associated with the fiduciary duty analysis when the best interests of shareholders (ie, to maximise the price to be offered to them) may conflict with the interests of other stakeholders, such as bondholders or employees. The Supreme Court rejected the duty to maximise shareholder value, holding that there is no overriding duty to maximise shareholder value and that the interests of all stakeholders must be taken into account. The court held that acting 'in the best interests of the corporation' is not the same as acting in the best interest of the shareholders, but requires the board to consider the interests of all stakeholders. In the *BCE Inc* decision, a significant question was whether it was sufficient for the board to respect the contractual rights of bondholders, or whether the board was required to consider more generally the economic interests of the bondholders, and the court held it was sufficient to look solely to the contractual rights of the bondholders because they did not have 'reasonable expectation' to anything more than their contractual rights. The court held that the duty to act in the best interests of the corporation 'comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly. There are no absolute rules and no principle that one set of interests should prevail over another.' The court held that the board needs to treat affected stakeholders 'in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen'. Since that decision, practitioners have focused more on the process by which the board decision is made whereby the board establishes a reasonable basis for forming its position.

### **Business judgment rule**

Implicit in the *BCE Inc* decision was a determination that decisions of directors are to be given a high degree of deference. Notwithstanding the potential uncertainty that the Supreme Court of Canada decision may have suggested, it nevertheless reinforced the principle that in assessing whether or not directors have met their fiduciary and statutory obligations, courts will continue to apply the business judgment rule, which operates as a shield from court intervention in business decisions. The rule provides that directors who act diligently and in good faith will not generally be found liable for a breach of fiduciary duty even if, in retrospect, a business decision proves not to have been in the corporation's best interest.

Courts will generally defer to the business judgment of a board of directors in assessing whether those directors have met the standard of care of a 'reasonably prudent' person in comparable circumstances. Courts in Canada are generally reluctant to substitute their own judgment for the business judgment of directors provided that an appropriate degree of prudence and diligence was brought to bear in reaching what appeared to be a reasonable business decision when it was made. A court will, however, be prepared to examine whether the board of directors reasonably believed that the matter before it was in the best interests of the corporation. Provided the decision taken is within a range of reasonableness, courts have held that they should not substitute their opinion for that of the board even though subsequent events may have cast doubt on the board's determination. As long as the directors have selected one of the several reasonable alternatives, and as long as the process by which the decision was made was sound and the board's decision respected the reasonable expectations of securityholders and creditors, and had regard to the interests of all stakeholders, deference should be expected to be given to the board's decision.

Nevertheless, deference is not unqualified. In a recent decision, one noteworthy judicial determination suggested that a basis for a court's interference may be based on a consideration of 'the content of their (that is, the directors') decision and the extent of the information on which it was based and [the courts are entitled] to measure this against the facts as they existed at the time the impugned decision was made'. Recognising the particular concerns that arise when a possible conflict of interest exists, the courts have stated that, in circumstances where a board establishes a special independent committee, the burden of proof is upon the plaintiff to show that the directors acted improperly. The board does not have to prove that it, in fact, was adequately informed and acted reasonably. In another recent decision, the Supreme Court of Canada held that issues of the statutory requirements of disclosure are not entitled to judicial deference, and that such deference has no application in determining whether a party has made the right decision about its disclosure obligations under the Securities Act (Ontario).

Careful drafting will also assist directors in fulfilling their fiduciary duty. For example, 'fiduciary-out' clauses when inserted in acquisition-related agreements will allow the board of directors of a company to pursue an unsolicited alternative offer where the directors determine that the competing proposal is on superior terms.

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## DEFENDING A TAKEOVER: WHAT CAN BE DONE?

There are a number of strategies the target or possible target of a takeover bid can implement to resist, or at least slow down, the stages of an unsolicited takeover bid in order to gain the time necessary to respond to the takeover bid in an informed manner and to maximise securityholder value. National Policy 62-202 titled 'Takeover Bids – Defensive Tactics' ('NP 62-202') sets out the view of the Canadian securities regulatory authorities on takeover bid defensive tactics. The Canadian securities regulatory authorities are of the view that the takeover bid provisions of Canadian securities legislation should 'favour neither the Offeror nor the management of the target company', and should 'leave the securityholders of the target company free to make a fully informed decision'. The regulators have signalled that certain defensive measures taken by management of a target company 'may have the effect of denying to securityholders the ability to make such a decision and of frustrating an open takeover bid process'. Against this backdrop, the regulators have expressed their willingness to scrutinise the defensive tactics of a target in specific cases to determine whether they are abusive of securityholder rights and, if they become aware of defensive tactics that are likely to 'deny or limit severely the ability of securityholders to respond to a takeover bid or to a competing bid', to take appropriate action. The National Policy also notes that prior securityholder approval of specific action may allay the concerns of the Canadian securities regulatory authorities.

## Shareholder rights plans (poison pills)

Shareholder rights plans or poison pills (a 'Rights Plan') are the most common strategic tool of Canadian issuers that are or may be facing a takeover bid or potential takeover bid. A Rights Plan is intended to ensure that, in a takeover bid, all securityholders are treated equally, receive the maximum value for their investment and are given adequate time to properly assess the takeover bid on a fully informed basis. Although the CSA has not banned Rights Plans, the longer minimum tender periods are likely to make the application of the Rights Plans less influential in the context of takeover bids, but will perhaps still be relevant to combat 'creeping takeover bids' that are exempt from the formal takeover bid rules. See 'Mechanics of Formal Bids: Minimum tender requirements'.

Rights Plans are implemented by an issuer entering into a shareholder rights plan agreement with a trust company who will act as a rights agent. Rights Plans may be enacted at any time, including in the face of a takeover bid that has been announced, commonly called a 'tactical rights plan'. The Toronto Stock Exchange and Toronto Venture Exchange retain the right to approve Rights Plans, and will only provide their approval to the implementation of a Rights Plan where the plan is approved by shareholders within six months of implementation.

A Rights Plan works by increasing the voting equity of a target's shareholders by enabling shareholders to purchase a massive number of additional shares at a price substantially less than market price on the happening of an event, usually a formal hostile bid for control of the target that does not meet certain minimum requirements such as:

- remaining open for a specified period of time, generally in excess of the 35 days that are required under the takeover legislation for a bid to be open for consideration and acceptance;
- being a full bid rather than partial bid;
- requiring the bidder to take up and pay for all shares tendered rather than providing that the bidder will only take up and pay for shares if there has been substantial interest of shareholders.

The Rights Plan excludes the hostile bidder from obtaining additional voting equity under the Rights Plan. Given the potential for huge dilution following the operation of the plan, a poison pill makes a hostile takeover bid prohibitively costly and is intended to encourage the bidder to proceed by way of a 'permitted bid' (which has characteristics prescribed by the Rights Plan) or to approach the board of directors of the target with a view to negotiation.

## Judicial and regulatory involvement of rights plans

A Rights Plan makes it impossible for a bidder to complete a takeover bid, with the result that shareholders are deprived (unless the Rights Plan is waived or eliminated) of their fundamental right to dispose of the shares by tendering them to the takeover bid. The conflict between the obligation of the board of directors of a target to effectively discharge their fiduciary duty to shareholders by maximising shareholder value in the face of a takeover bid, and the right of shareholders to freely dispose of their shares, has resulted in considerable Canadian regulatory and judicial involvement and intervention in the operation of Rights Plans.

Canadian securities regulatory authorities have the jurisdiction under applicable securities law to make orders to 'cease trade' the securities issued under a Rights Plan if it is in the public interest to do so, thereby preventing the issuance of the shares issuable on the

exercise of the rights. They do so to implement the policy principles set out above as expressed in NP 62-202; in applying those principles in the context of Rights Plans, the regulators balance the interests of the shareholders of the target with the fiduciary duties of directors to maximise shareholder value.

The decisions of securities regulators in Canada have historically focused on shareholder interests to the exclusion of deference to the role of the board of directors and found that the real issue to be determined was 'when does the pill go', meaning when the securities issued pursuant to the Rights Plan would be cease traded.

Since then, there have been a number of decisions of the primary Canadian securities regulatory authorities, all of which have granted greater deference to the role of the board of directors in discharging its fiduciary duties. These cases have formulated a more hands-off test that was expressed in one of the cases as follows:

'If there appears to be a real and substantial possibility that, given a reasonable period of further time, the board of the target corporation can increase shareholder choice and maximise shareholder value, then, absent some other compelling reason requiring the termination of the plan in the interests of shareholders, it seems to us that the Commission should allow the plan to function for a further period, so as to fulfil their fiduciary duties' [emphasis author's own].

This test has also been expressed as a 'reasonable possibility'.

The fundamental issue in Canada historically has been not 'whether' the Rights Plan will be terminated or cease traded but, rather, 'when' it will occur.

Nevertheless, in recent years, that position has been brought into question more frequently, culminating in the publication by the CSA in March 2013 of a draft proposal to establish National Instrument 62-105 titled 'Security Holder Rights Plans' (the 'Rights Plan Rule'). Under the Rights Plan Rule, a Rights Plan would be effective upon adoption by the board, but it would have to be approved by the shareholders (by a majority vote) prior to the 90th day following the earlier of: (i) adoption of the board; and (ii) the earliest date the bid was made (if the Rights Plan was adopted after a bid was made). The continued effectiveness of the Rights Plan would be conditional upon having received shareholder approval/ratification annually thereafter. The role of the regulators would have been limited to intervention in circumstances where the regulators believe that the Rights Plan is being used contrary to the public interest. As a result of the certain amendments implemented in 2016, particularly to provisions described under 'Mechanics of Formal Bids: Minimum bid requirements' and 'Mechanics of Formal Bids: Taking up and paying for deposited securities', the Rights Plan Rule was set aside.

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## REGULATION OF FOREIGN INVESTMENT AND MERGERS IN CANADA

### Investment Canada Act

The Investment Canada Act (the 'ICA') is federal legislation that provides a framework for the review of certain investments in Canada by non-Canadians to ensure that such transactions will be of 'net benefit' to Canada. In general, any acquisition by a 'non-Canadian' of control of a 'Canadian business' is either notifiable or reviewable under the ICA. Some investments by non-Canadians require only that the Director of Investments (an official appointed under the ICA) be notified of the investment, while other investments by non-Canadians, usually larger in terms of Canadian assets or involving sensitive industries, may be subject to pre-closing review by the director and approval by the Minister of Innovation, Science, and Economic



Development, or the Minister of Canadian Heritage in the case of investments in culturally sensitive business activities.

If the transaction is only subject to a notification requirement, the notification must be filed either before or within 30 days following the completion of the transaction. If an application for review is required, it must be filed, and ministerial approval received, before the completion of the transaction.

An application for review will be required if certain monetary thresholds relating to the Canadian business are exceeded. For World Trade Organization (WTO) investors (essentially acquirers who are ultimately controlled by persons who are citizens or nationals in any one or more of the 150 countries that are members of the WTO) who: (1) are not state-owned or state-controlled enterprises ('SOEs'); and (2) are acquiring a company that is not involved in a 'culturally sensitive' industry, it is necessary only to file a post-closing notification (and not seek prior review and approval) if the 'Enterprise Value' of the target does not exceed a specified threshold; this threshold increases annually based on the Canadian gross domestic product (GDP) and, in 2022, the threshold was CAD 1.141bn. For trade agreement investors (provided that the threshold is higher for acquisitions by investors from certain countries that have trade agreements with Canada, the current list of which comprises the European Union, the US, the United Kingdom, Mexico, Australia, Brunei, Chile, Colombia, Honduras, Japan, Malaysia, New Zealand, Panama, Peru, Singapore, South Korea and Vietnam) who are not SOEs and are not acquiring a cultural business, the review threshold is CAD 1.711bn. The 'Enterprise Value' for a share purchase is essentially calculated based on: (1) the total consideration paid to acquire the target (or the value of its market capitalisation, in the case of targets whose shares are publicly traded); *plus* (2) the target's liabilities; *minus* (3) the target's cash (or cash equivalents).

In the case of a direct acquisition by an SOE of a non-culturally sensitive business, the threshold is based on the book value of the assets controlled directly or indirectly by the Canadian target; in 2022, this threshold was CAD 454m and is subject to amendment annually based on the Canadian GDP.

For the purposes of the ICA, a 'state-owned enterprise' is defined to mean:

- a foreign government or government agency;
- an entity controlled or influenced, directly or indirectly, by a foreign government or government agency; or
- an individual acting under the direction or influence (direct or indirect) of a foreign government or agency.

For acquisitions by non-WTO investors and for acquisitions of culturally sensitive businesses, the threshold is CAD 5m for a direct acquisition, above which one cannot close without a review and prior approval.

For indirect acquisitions by WTO investors of non-culturally sensitive businesses, there is no review required (but the post-closing notification form must, nevertheless, still be filed). For indirect acquisitions by non-WTO investors of non-culturally sensitive businesses, or for any indirect acquisitions of culturally sensitive businesses, the threshold is: (1) CAD 50m where the book value of the Canadian business' assets is less than or equal to 50 per cent of the total value of the global assets acquired in the transaction; and (2) CAD 5m where the book value of the Canadian business' assets is greater than 50 per cent of the total value of the global assets acquired in the transaction.

The ICA also allows for the minister and federal cabinet to review a transaction that the minister has reasonable grounds to believe could be 'injurious to national security'. In order to preserve the minister's discretion, there is deliberately no definition of what constitutes 'national security', and any investment may be subject to a national security review, regardless of whether the general monetary thresholds for review under the ICA are met or whether control of the target is acquired.

## **Competition Act**

Canada's Competition Act is a federal statute that provides the Commissioner of Competition (the 'Commissioner'), who is the head of the Competition Bureau (the 'Bureau') and is responsible for administering the Competition Act, the ability to make an application to challenge any 'merger' in litigation before the Competition Tribunal (the 'Tribunal') on the grounds that it will substantially prevent or substantially lessen competition in Canada. The Tribunal is a specialised quasi-adjudicative body established pursuant to the Competition Tribunal Act. A 'merger' is defined as the acquisition or establishment, direct or indirect, of control over or significant interest in the whole or in a part of a business of a competitor, supplier, customer or other person by one or more persons (whether Canadian or non-Canadian), whether by the purchase of shares or purchase of assets, by amalgamation or a combination.

While pre-merger notification is only required with respect to certain types of transactions that exceed certain thresholds as outlined below, the Commissioner retains jurisdiction to challenge any merger, regardless whether it is subject to a pre-merger notification requirement, if he/she is of the view that the transaction will or is likely to prevent or lessen competition substantially. Unless the Commissioner has issued an advance ruling certificate in respect of a transaction, the Commissioner can initiate a challenge at any time until one year after the closing of the transaction.

## **Notification**

The Competition Act provides that the Commissioner must be notified prior to the completion of proposed transactions involving operating businesses in Canada, if two financial thresholds are met.

The first threshold is based on the 'Size of the Parties', and is met if combined the parties to the proposed transaction, together with their affiliates, have:

- assets in Canada (generally based on the value stated in the most recent audited financial statements); or
- gross annual revenues from sales in, from or into Canada

exceeding CAD 400m.

The second threshold is based on the 'Size of the Transaction' (ie, the target entity), and is met when the aggregate value of the assets in Canada being acquired (again, being the value stated in the target's most recent audited financial statements), or the gross annual revenues generated from such assets in or from Canada (ie, domestic or export revenues), exceed CAD 93m (as of 2022, an amount that is revised annually).

In addition to the financial thresholds set out above, the Competition Act sets out an additional ownership threshold with respect to the acquisition of voting shares in a corporation or of interests in unincorporated entities or in an interest in a combination. With respect to acquisitions of publicly traded voting shares, under the Competition Act, a

transaction must only be notified if, as a result of the transaction, the persons acquiring the shares together with their affiliates would own more than 20 per cent of the voting shares of the corporation. If none of the corporation's voting shares are publicly traded, the threshold is 35 per cent. In both instances, a higher threshold of more than 50 per cent of the voting shares will apply if, prior to the proposed transaction, the acquirer and its affiliates' ownership already exceeded the aforementioned 20 per cent or 35 per cent threshold (whichever is applicable). With respect to acquisitions of an interest in a combination (ie, a non-corporate entity, such as a partnership), the Competition Act only requires notification where the persons acquiring the interest in the combination together with their affiliates would, as a result of the proposed transaction, hold an aggregate interest in the combination that entitles these persons to receive more than 35 per cent of the profits of the combination or more than 35 per cent of its assets on dissolution or, where the persons acquiring the interest are already so titled, to receive more than 50 per cent of such profits or assets.

Where these thresholds are exceeded, the parties to the transaction must notify the Commissioner by filing a Notifiable Transactions Form and Certificate, which requires the provision of such information as: (1) a description of the proposed transaction; (2) a description of the business objective(s) of the transaction; (3) copies of the transaction documents; (4) a list of foreign competition/antitrust authorities notified; (5) party information (including contact information, lists of affiliates with significant Canadian assets or revenues, and descriptions of their principal businesses and products); (6) contact information for the parties' (and their affiliates') top 20 suppliers and customers for each relevant product; and (7) the geographic regions of sales made by the parties and their affiliates. Notification triggers an initial 30-day waiting period during which time the transaction cannot be completed. During the waiting period, the Commissioner may advise the parties that he/she does not intend to challenge the transaction (known as a 'no action' letter), at which time the transaction may proceed. Alternatively, where the Commissioner takes the position that there are potential competition issues, he/she may issue a Supplementary Information Request ('SIR'). If the Commissioner issues a SIR, the waiting period is extended. Once the parties file complete responses to the SIR, a second 30-day waiting period begins, during which the parties are not permitted to close (again, unless clearance is received before this period expires).

Where the notification thresholds are met, pre-merger notification is mandatory. The Competition Act invokes criminal sanctions for failure to comply with the pre-merger notification and waiting period requirements.

Following a review of the expected competitive effects of the proposed transaction, the Commissioner may issue a 'no action' letter if he/she concludes that the transaction is not likely to lessen or prevent competition substantially in any Canadian market. Even if a 'no action' letter is issued, however, the Competition Act provides that the Commissioner may still review and challenge the merger for up to one year following completion of the transaction.

Alternatively, after the Commissioner's review of the proposed transaction, the Commissioner may issue an advance ruling certificate (ARC), which certifies that the Commissioner is satisfied that the proposed merger will not prevent or lessen competition substantially. Once an ARC has been issued, the Commissioner cannot apply to the Tribunal in respect of the same transaction, provided the merger is substantially completed within one year following the issuance of the ARC. Parties sometimes apply for an ARC without filing notification forms when it is clear that no substantive competition issues will arise in connection with the proposed transaction. In other cases, the parties may file a request for an ARC coupled with notification forms because only the latter filing triggers the statutory 30-day waiting period referred to above.

In rare cases, the 30-day waiting period may expire without the issuance of an ARC or a 'no action' letter. Although the parties are at liberty to complete the transaction in these circumstances, it is typical for parties to wait for the Commissioner to complete the review (instead of risking potential enforcement action by the Commissioner, which can include an application for an interim injunction to prevent the transaction from proceeding where the Commissioner believes that substantive competition issues may arise and the review is not yet completed, or ultimately, a formal challenge of the merger that, if successful, allows the Tribunal to order that the merger be dissolved or that the parties divest assets or shares to remedy the substantial lessening or prevention of competition that results from the merger).

The Commissioner also has 'service standard' periods, which represent the maximum time within which the Commissioner and the review officers at the Bureau will endeavour to complete their review. The applicable service standard depends on the perceived complexity of the transaction. Transactions designated by the Bureau as 'non-complex' have a corresponding service standard of 14 days. Transactions designated by the Bureau as 'complex' have a corresponding service standard of 45 days (although this standard is extended in the event that the Commissioner issues a SIR). These service standards are not binding on the Commissioner, however, they can serve as useful guidelines.