CSA/ACVM Canadian Securities Administrators Autorités canadiennes en valeurs mobilières

Notice

National Policy 62-203
Take-Over Bids and Issuer Bids

November 16, 2007

Introduction
We, the Canadian Securities Administrators, have developed Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids* (MI 62-104) and related forms to harmonize and consolidate take-over bid and issuer bid regimes nationally. In Ontario, the government is seeking to achieve the same harmonization and modernization effect through proposed amendments to Part XX - Take-Over Bids and Issuer Bids of the *Securities Act* (Ontario) (Part XX) and by adoption of Ontario Securities Commission Rule 62-504 *Take-Over Bids and Issuer Bids* (Rule 62-504).

National Policy 62-203 *Take-Over Bids and Issuer Bids* (the Policy) contains explanations and discussions of MI 62-104, Part XX, and Rule 62-504 (together, the Bid Regime). We expect the Policy will be adopted in all jurisdictions.

Provided all necessary ministerial approvals are obtained, the Bid Regime and the Policy will come into effect on February 1, 2008. Concurrent with the adoption of the Policy, we intend to revoke National Policy 62-201 *Bids Made Only in Certain Jurisdictions*, and withdraw CSA Staff Notice 62-303 *Identifying the Offeror in a Take-over Bid*, the substance of which will largely be found in the Policy.

Substance and Purpose
This Policy outlines how the provincial and territorial securities regulatory authorities interpret or apply certain provisions of the Bid Regime and provides guidance on the conduct of parties involved in a bid.

Summary of the Policy
The Policy provides guidance concerning:

(i) varying terms after a bid has been commenced,
(ii) interpretation of the prohibition against collateral agreements,
(iii) independent committees for the purposes of the collateral agreement exceptions,
(iv) independent committee's determination of equivalent value, and
(v) redacting or omitting filed information.

We have removed the guidance on "determination of shareholdings" previously provided in the proposed Companion Policy published for comment on April 28, 2006 because we are of the view that it is up to the bidder to determine whether it has taken all necessary steps to determine whether its bid falls within the relevant exemption.

Questions
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NATIONAL POLICY 62-203

TAKE-OVER BIDS AND ISSUER BIDS

PART 1 INTRODUCTION AND PURPOSE

1.1 Introduction – Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids* (the Instrument) governs take-over bids and issuer bids in all jurisdictions of Canada, except Ontario, and has been implemented as a rule or regulation in all jurisdictions, except Ontario. Part XX of the *Securities Act* (Ontario) (the Ontario Act) and Ontario Securities Commission Rule 62-504 *Take-Over Bids and Issuer Bids* (the Ontario Rule) govern take-over bids and issuer bids in Ontario only. This Policy, the Instrument, the Ontario Act and the Ontario Rule are collectively referred to as the "Bid Regime". This Policy outlines how the provincial and territorial securities regulatory authorities interpret or apply certain provisions of the Bid Regime and provides guidance on the conduct of parties involved in a bid.

PART 2 BID REGIME FOR TAKE-OVER BIDS AND ISSUER BIDS IN CANADA

2.1 General – The Bid Regime is designed to establish a clear and predictable framework for the conduct of bids in a manner that achieves three primary objectives

- equal treatment of offeree issuer security holders,
- provision of adequate information to offeree issuer security holders, and
- an open and even-handed bid process.

2.2 Identifying the offeror – More than one person may constitute an offeror under a take-over bid. This can arise if an offer is made indirectly, because the terms "offer to acquire" in section 1.1 of the Instrument and subsection 89(1) of the Ontario Act and "take-over bid" in section 1.1 of the Instrument and subsection 89(1) of the Ontario Act apply to both direct and indirect offers to acquire securities.

For example, a party (the primary party) that uses an acquisition entity, subsidiary or other affiliate (the named offeror) to make a take-over bid, may itself be making an indirect bid. In that case, the named offeror and the primary party may be joint offerors. As joint offerors, both would be subject to the requirements of the Bid Regime, including the requirements to certify and deliver the bid circular.

If a take-over bid is made by a wholly-owned entity, we regard the entity's parent to be a joint offeror. If the named offeror is not a wholly-owned entity, assessment of whether the primary party is a joint offeror would depend on its role, taking into account, among other factors, the answers to the following questions:

- Did the primary party play a significant role in initiating, structuring and negotiating the bid?

- Does the primary party control any of the terms of the offer?
- Is the primary party financing the bid, guaranteeing the financing, or integral to obtaining the financing?
- Does the primary party directly or indirectly control the named offeror?
- Did the primary party form, or cause to be formed, the named offeror?
- Are the primary party's securities being offered as consideration under the bid?
- Will the primary party beneficially own the assets or securities of the target after completion of the bid?

We think a "*yes*" answer to any of these questions could mean that the primary party is making an indirect offer and is a joint offeror under the bid.

2.3 Bids made only in certain jurisdictions – The failure to make a bid to security holders of an offeree issuer in one or more jurisdictions if the bid is made to security holders in other jurisdictions is not consistent with the existing framework of securities regulation in Canada, which aims to ensure that all security holders of the offeree issuer in Canada are treated equally. If the bid is not made in all jurisdictions, securities regulatory authorities in the jurisdictions in which the bid is made may issue cease trade orders in respect of the bid.

2.4 Varying terms – 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 offeree security holders in circumstances where the offeror

(a) lowers the consideration offered under the bid,

(b) changes the form of consideration offered under the bid, other than to add to the consideration already offered under the bid,

(c) lowers the proportion of outstanding securities for which the bid is made, or

(d) adds new conditions.

Depending on the circumstances, these variations may be so fundamental to the bid that we may exercise our public interest mandate to ensure that offeree security holders are not prejudiced by the variations. We may intervene to cease trade the bid, require that the deposit period be extended for a period longer than mandated under the Bid Regime or require that an offeror commence a new bid with the varied conditions.

2.5 Interpretation of prohibition against collateral agreements – An offeror or anyone acting jointly or in concert with an offeror is prohibited from entering into a collateral agreement, understanding or commitment that has the effect of providing a security holder of the offeree issuer with consideration of greater value than that offered to other

security holders of the same class. This prohibition applies to a direct or indirect benefit being provided to a security holder 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 security holders of the same class.

2.6 Independent committees for the collateral agreement exceptions – The Bid Regime excludes employment-related arrangements from the scope of the collateral agreement prohibition if, among other conditions, an independent committee of the offeree issuer has determined that the value of the benefit received by a security holder is less than 5% of the total consideration to be received by the holder under the bid or that a security holder is providing at least equivalent value in exchange for the benefit. For the purposes of these exceptions, we consider a director to be independent if the director is disinterested in the bid or any related transactions. Although this is a factual determination based on the particular circumstances of the bid, we think that the definitions of independent director and independent committee in Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions* provide relevant guidance on determining director independence.

2.7 Equivalent value exception – In determining that a security holder is providing at least equivalent value in exchange for a benefit under clause 2.25(1)(b)(ii)(B) of the Instrument or clause 4.1(1)(b)(ii)(B) of the Ontario Rule, an independent committee should consider, among other things, whether the employment compensation arrangement, severance arrangement or other employment benefit arrangement is on terms consistent with arrangements made with individuals holding comparable positions (i) with the offeror and (ii) 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, we recommend the committee retain an appropriately qualified independent expert to advise it concerning industry standards.

2.8 Redacting or omitting filed information – The Bid Regime requires the offeror and offeree issuer to file prescribed documents relating to control of the offeree issuer and to the bid. The filer is permitted, under certain conditions, to omit or mark provisions of a filed document so as to make the provisions unreadable. However, we do not think it appropriate for a filer to omit or redact an entire document on the basis that the information in the document is subject to confidentiality.

2.9 Section 1.2 of the Instrument – Saskatchewan is not included in subsection 1.2(1) of the Instrument because the definitions of "offer to acquire" and "offeror" are in the regulations to *The Securities Act, 1988* (Saskatchewan). The definitions are the same.