



Harmonization and Consolidation of Existing Take-over and Issuer Bid Rules

1. Introduction

The Canadian Securities Administrators (“CSA”), the regulatory body responsible for developing and harmonizing securities regulations across Canada, has recently announced the adoption of new measures intended to harmonize and consolidate the regulations presently implemented across Canada in connection with take-over bids and issuer bids. Concurrently, Quebec and Ontario provincial securities regulators have also announced the adoption of new rules intended to standardize the requirements in both provinces in connection with special transactions affecting minority shareholders.

It is important to note that the intention of the new measures adopted by the CSA is harmonization rather than the introduction of a new regulatory framework. Consequently, while the new measures do not appear to introduce any significant changes with respect to the general bidding process or timing of a take-over or issuer bid, the following paragraphs provide an overview of the salient rules that have been adopted under MI 62-104.

1.1 Multilateral Instrument 62-104: Take-Over Bids and Issuer Bids

The new measures, essentially enacted by the CSA under *Multilateral Instrument 62-104 – Take-Over Bids and Issuer Bids* (“MI 62-104”), shall be adopted in every Canadian jurisdiction with the exception of Ontario. The latter province shall instead integrate the CSA’s new measures by way of proposed amendments to its existing securities legislation. The CSA has also adopted guidelines in connection with MI 62-104 in the form of *National Policy 62-203 – Take-Over Bids and Issuer Bids* (“Policy”). The effective date for the coming into force of MI 62-104 has been set for February 1, 2008.

The policy statement relating to MI 62-104 stipulates that the requirements under the foregoing instrument have been designed to “*establish a clear and predictable framework for the conduct of bids in a manner that achieves three primary objectives*”. These objectives include notably, the provision of equal treatment and adequate information to offeree issuer security holders as well as ensuring a fair bidding process.

These objectives have translated into the following noteworthy aspects under MI 62-104:

a) Section 1.9: Identification of Joint Actors

In the context of a take-over bid, a person acting jointly or in concert with an offeror’s bid, also known as a “*joint actor*”, is bound by the same regulations and requirements applicable to the offeror. While the determination of whether a person is acting jointly or in concert with the offeror is a question of fact, MI 62-104 codifies a classification of certain persons as either joint actors or those that benefit from a refutable presumption of being a joint actor.

Essentially, persons that: (1) as a result of any agreement, commitment or understanding with the offeror, or with any other person acting jointly or in concert with the offeror, acquire or offer to acquire securities of the same class as those subject to the offer to acquire; or (2) are affiliates of the offeror, shall be deemed joint actors. However, persons that: (1) as a result of any agreement, commitment or understanding with the offeror or with any other person acting jointly or in concert with the offer, intend to exercise jointly or in concert with the offeror, voting rights attached to any securities of the offeror or with any person acting jointly or in concert with the offeror any voting rights attaching to any security to any securities of the offeree issuer; or (2) are associates of the offeror, shall benefit from a refutable presumption of being considered a joint actor. According to MI 62-104, “*associates*” include entities in which the offeror beneficially owns or controls, directly or indirectly, voting rights attached to outstanding securities that entitle the offeror to more than 10% of the voting rights attached to the outstanding securities of the issuer.

b) Section 2.2: Acquiring the offeree issuer’s securities during a take-over bid

Under the existing rules, an offeror is not permitted to acquire securities of the offeree issuer during a take-over bid otherwise than as determined under the bid, on and from the day of the announcement of the offeror’s intention to make the bid until the expiry of the bid. However, under MI 62-104, the offeror may nonetheless purchase securities of the offeree issuer during a take-over bid provided that the offeror

disclose its intention to do so in a news release and subject to the fulfillment of certain other conditions. Thus, an offeror is permitted to change its intention and acquire securities of the offeree issuer subsequent to the commencement of the take-over bid.

c) Sections 2.24-2.25: Prohibition against collateral benefit agreements

Similar to existing regulations on this issue, MI 62-104 provides that offerors and joint actors may not enter into an agreement or understanding that shall have an effect of providing certain security holders consideration of greater value than other security holders of the same class. This translates into a requirement that all security holders of the same class receive equal treatment and consideration. However, subject to the fulfillment of certain conditions, MI 62-104 provides for certain exemptions to this rule in connection with employment compensation, severance or other employment benefit arrangements.

d) Section 3.2: Filing Requirements

Another important development under MI 62-104 is the requirement for both the offeror and offeree issuer to file the relevant documents in connection with the control of the offeree issuer and the take-over bid. These documents include agreements between the offeror and a security holder of the offeree issuer, agreements between the offeror and directors or officers of an offeree issuer, agreements between the offeror and an offeree issuer and any other agreement that the offeror is aware of, and that could affect control of the offeree issuer.

However, subject to certain conditions, a sensitive or confidential provision in a document that must be filed under MI 62-104 may be omitted or marked so as to be unreadable. The conditions that must be fulfilled include the requirement to file a brief description of the information that has been omitted or marked as unreadable.

e) Section 4.4: Foreign take-over bid exemption

Another important feature of MI 62-104, is the provision of an exemption from the take-over and issuer bid requirements in circumstances where less than 10% of the securities of the offeree issuer are held by security holders with an address in Canada and the offeror reasonably believes that the security holders in Canada beneficially own less than 10% of the outstanding securities of the class that is subject to the take-over bid. The exemption is also subject to certain supplementary and cumulative conditions that must equally be met.

f) Varying terms of take-over bids

The Policy Statement in connection with MI 62-104 stipulates that where the offeror varies the terms of its bid once the bid has been commenced, the variation may have an unfavorable effect leading the securities regulatory bodies to intervene. Thus, in certain circumstances such as where the offeror has either: (1) lowered the consideration offered under the bid; (2) changed the form of consideration; (3) lowered the proportion of outstanding securities for which the bid is made; or (4) adds new conditions, and where the variations are deemed "*fundamental*", the securities regulatory authorities may decide to intervene on the grounds of their public interest mandate and consequently, the CSA may either cease trade the bid, require an extension of the deposit period or even request that the offeror commence a new bid with the varying terms and conditions.

2. **Harmonization of Ontario and Quebec's rules in connection with the protection of minority shareholders: Multilateral Instrument 61-101**

As noted in the introduction, concurrent with the CSA's adoption of MI 61-104, the Ontario Securities Commission ("**OSC**") and the Quebec Autorité des marchés financiers ("**Authority**"), the provincial bodies responsible for securities regulations in Ontario and Québec respectively, have also announced the adoption of *Multilateral Instrument 61-101 - Protection of Minority Security Holders in Special Transactions* ("**MI 61-101**"). MI 61-101 essentially aims to harmonizing the regulations of both provinces in connection with the protection of minority shareholders in special transactions. In Québec, MI 61-101 will replace the requirements currently in force under *Regulation Q-27 - Respecting Protection of Minority Security holders* ("**Q-27**").

The effective date for MI 61-101 has also been set for February 1, 2008. Given that the intention of MI 61-101 is essentially the standardization and harmonization of the regulations in the two provinces, the instrument is quite similar to the existing Q-27 as well as Ontario's *Rule 61-501 - Insider Bids, Issuer Bids, Business Combinations and Related Party Transactions*. Thus, the majority of the changes under MI 61-101 are consequential amendments that are necessary pursuant to the adoption and implementation of MI 62-104.

One noteworthy amendment that will be introduced by MI 61-101 includes a prohibition to the effect that independent directors who are members of a special committee created for the purposes of a take-over bid may not receive any payment or other benefit that is conditional

upon the completion of the transaction. The OSC and the Authority are of the view that compensation of special committee members should be determined when the committee is created and should be based on fixed sum payments.

This update is intended to provide general comment only and should not be relied upon as legal advice.

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