

Notice

Regulation 62-104 respecting Take-Over Bids and Issuer Bids

Regulation to amend *Regulation 62-103 respecting the Early Warning System and Related Take-Over Bid and Insider Reporting Issues*

Introduction

We, the Canadian Securities Administrators (CSA), are adopting *Regulation 62-104 respecting Take-Over Bids and Issuer Bids* (the Regulation), including the Forms. The Regulation harmonizes and consolidates take-over and issuer bid regimes across the CSA Jurisdictions, other than Ontario.

In Ontario, the government is seeking to achieve the same harmonization and streamlining effect as the Regulation through proposed amendments to Part XX - Take-Over Bids and Issuer Bids of the *Securities Act* (Ontario) (Revised Part XX) introduced in Schedule 38 to Bill 187 *Budget Measures and Interim Appropriation Act, 2007*, and by adoption of Ontario Securities Commission (OSC) Rule 62-504 *Take-Over Bids and Issuer Bids* (Rule 62-504).

We are also adopting *Policy Statement 62-203 respecting Take-Over Bids and Issuer Bids* (the Policy Statement), which provides guidance about the Regulation, as well as guidance about the Revised Part XX and OSC Rule 62-504.

In addition to the Regulation and the Policy Statement, we are making consequential amendments (the Consequential Amendments) to *Regulation 62-103 respecting the Early Warning System and Related Take-Over Bid and Insider Reporting Issues* (Regulation 62-103).

The Regulation has been made or is expected to be made by each member of the CSA except Ontario. The Consequential Amendments have been made or are expected to be made by each member of the CSA including Ontario. We also expect the Policy will be adopted in all jurisdictions including Ontario.

In Québec, the Regulation and the Consequential Amendments are regulations made under section 331.1 of the Quebec Securities Act and the Regulations must be approved, with or without amendment, by the Minister of Finance. The regulations will come into force on the date of their publication in the *Gazette officielle du Québec* or on any later date specified in the regulation. They must also be published in the Bulletin.

Provided all necessary ministerial approvals are obtained, the Regulation and the Consequential Amendments will come into force on February 1, 2008. The Policy Statement will also come into effect on February 1, 2008.

Subject to all necessary approvals, the OSC has requested that the Revised Part XX be proclaimed into force on February 1, 2008 and that Rule 62-504 come into force the same date.

Background

We first published the Regulation for comment on April 28, 2006 (the 2006 Draft Regulation). The comment period expired in August 2006. After considering the comments, we revised the Regulation and the Policy Statement and are publishing the final version today.

Changes to Regulation 62-104 since the publication of the 2006 Draft Regulation

The Regulation contains several non-material changes to the 2006 Draft Regulation. The following are the most significant changes to the Regulation.

Acting jointly or in concert

The 2006 Draft Regulation deemed all persons acting together with an offeror to either acquire or vote shares to be acting jointly and in concert. The Regulation was amended, so that affiliates and those persons acquiring shares in concert with an offeror are deemed to be acting jointly and in concert with the offeror, while associates and those voting shares with the offeror will continue to be subject to a rebuttable presumption. There is also a carve-out for registered dealers acting solely in an agency capacity for the offeror.

Restrictions on varying bids

The 2006 Draft Regulation added several restrictions to bid variations. We removed these restrictions from the Regulation, and instead we clarified in the Policy Statement that the CSA will rely upon its public interest mandate to investigate any apparent abuse of the bid process through variations that negatively impact security-holders.

Collateral benefits

The 2006 Draft Regulation excluded employment arrangements from the prohibition against collateral benefit where the security holder receiving the benefit owned less than 1% of the relevant class of outstanding securities, or if the value of the benefit, as determined by an independent committee of the target, was less than 5% of the consideration that the holder would receive from the offeror. We have now revised the Regulation to add an additional exemption for "value for value" transactions, and have included information about determining value in the Policy Statement.

Private agreement exemption

In order to address ambiguities in interpretation of the private agreement exemption in existing securities legislation, the 2006 Draft Regulation added additional requirements for offerors. Based on the comments received, we agreed that amendments to the exemption should not be made without further research and analysis.

Filing agreements

The 2006 Draft Regulation created new filing requirements for an offeror. To address concerns that the offeror would not be able to ensure filing of all relevant offeree documents, the Regulation now includes a similar filing obligation for offeree issuers, and has added a right of redaction, so confidential portions of material agreements may be blacked out before filing.

Restrictions on acquisitions during take-over bid

Section 2.2 of Regulation 62-104 clarifies that an offeror wishing to rely on the exception to the restriction on acquisitions during a take-over bid must have, on the date of the bid, an intention to make purchases during the bid and must state that intention in the bid circular. We have further amended paragraph 2.2(3)(a) to provide a process for an offeror who does not have, on the date of the bid, an intention to make purchases, to later change its intention and make purchases.

Foreign take-over bid and issuer bid exemption

We have revised the disclosure required to rely on the foreign take-over bid or foreign issuer bid exemption to require that non-English bid materials that are sent to Canadian security holders must be accompanied by a brief summary of the key terms of the bid prepared in English, and in Quebec in French or French and English. Further, where bid materials are not sent to security holders generally but a notice or advertisement of the bid is published in the jurisdiction where the offeree issuer is incorporated or organized, paragraphs 4.4(g) and 4.10(g) of Regulation 62-104 require that an advertisement be published in the relevant jurisdiction of Canada in at least one major daily newspaper specifying where and how security holders may obtain a copy of, or access to, the bid documents.

Summary of Written Comments Received by the CSA

During the comment period, and shortly after the expiry of the comment period, we received submissions from 13 commenters on the Regulation. We have considered the comments received and thank all the commenters. The names of the 13 commenters and a summary of the comments on the Regulation, together with our responses, are contained in Appendix A to this Notice.

After considering the comments, we have made amendments to the Regulation and the Policy Statement. However, as these changes are not material, we are not republishing the Regulation or the Policy Statement for a further comment period.

Consequential amendments***National Amendments***

Regulation to amend *Regulation 62-103 respecting the Early Warning System and Related Take-Over Bid and Insider Reporting Issues* is published along with this Notice.

Local Amendments

We are amending or repealing elements of local securities legislation and securities directions, in conjunction with implementing the Regulation. The provincial and territorial securities regulatory authorities may publish, or may have published, these local changes in their local jurisdictions.

Questions

Please refer your questions to any of:

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Appendix A

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Summary of Comments and CSA Responses

Part I List of Commenters

1. Global Financial Group Inc on behalf of e-globe x-change inc.
2. Market Regulation Services Inc.
3. Canadian Advocacy Committee of the CFA Societies of Canada
4. Davies Ward Phillips & Vineberg LLP
5. Fasken Martineau DuMoulin LLP
6. Fraser Milner Casgrain LLP
7. McCarthy Tétrault LLP
8. Ogilvy Renault LLP
9. Ontario Bar Association - Securities Law Subsection
10. Osler, Hoskin & Harcourt LLP
11. Torys LLP
12. Ontario Teachers' Pension Plan Board
13. Stikeman Elliott LLP

In this summary of comments and responses, we grouped similar comments together and have provided a single response. We categorized these comments into broad themes and described these themes in the headings to the comments. Following our description of these themes, we set out the comments we received on our specific questions, together with our responses. The CSA received a number of favourable comments and drafting suggestions that are not specifically addressed in this summary of comments and responses. The CSA appreciates these comments as they have greatly assisted in redrafting the Regulation and, where applicable, many of the drafting suggestions are included in the Regulation.

1. Overall support for the Regulation

Commenters supported the CSA in its efforts to harmonize and consolidate take-over and issuer bid regimes.

Response

The CSA acknowledges these expressions of support for this initiative.

2. Definitions

A number of comments were made regarding general drafting revisions throughout Part 1 "Definitions and Interpretations".

Response

We agree with many of the comments, and have made the corresponding revisions to the definitions and interpretive provisions. For example,

(i) we have added a new definition of "designated exchange" in subsection 4.8(1) that contemplates local designation of exchanges in the future and replaces the previous definition of "recognized exchange", and

(ii) we have added a new subsection to the definition of "beneficial ownership" to clarify that a person is not the beneficial owner of securities solely because that person had agreed to deposit securities under a lock-up or support agreement.

3. *Acting jointly or in concert*

A number of commenters opposed the change from the rebuttable presumption that persons acting together with an offeror to vote shares, as well as affiliates and associates of an offeror, were acting jointly or in concert with the offeror, to a deeming provision. Other commenters felt that a specific carve-out for lock-up agreements between the offeror and security holders of the offeree issuer should be included.

Response

We have revised the definition to provide that a person will continue to be presumed, rather than deemed, to be acting jointly and in concert if that person has entered into a voting agreement with the offeror. We have also included a carve-out for security holders who agree to sell their securities to the offeror pursuant to a lock-up agreement.

4. *Integration Rules*

One commenter suggested that section 2.2(3) of the Regulation should be amended to restrict its use to situations where (a) the offeror, including joint actors, will own an aggregate of not more than 20% of the shares of the target company and (b) the offeror pays no more for the shares than the bid price. Several commenters asked for clarification on several points in this subsection regarding the marketplaces on which trading would be allowed, the time frame for purchases, the date at which the intention for such purchases is to be determined and the application of the restrictions in paragraphs 2.2(3) (e), (f) and (g) to take-over bids.

Response

We have decided against restricting the use of the exemption to acquisitions that would give the offeror an aggregate of more than 20% of the shares of the offeree issuer. We believe that this is an issue that is better addressed on a case-by-case basis and not through a broad policy change. We believe that the current public interest mandate of the CSA is broad enough to deal with any instances of abuse that may arise.

Exempt normal-course acquisitions may be made through the facilities of a published market. The time frames for purchases have been clarified to only apply to purchases made during the currency of the bid. The intention to acquire securities is required to be a current intention and is determined as of the date of the take-over bid circular or notice of change. We have further amended paragraph 2.2(3)(a) to provide a process for an offeror who does not have, on the date of the bid, an intention to make purchases, to later change its intention and make purchases. The restrictions in paragraphs 2.2(3)(e), (f) and (g) are not new and incorporate requirements currently imposed in Ontario under Rule 62-501.

5. *Communication with security holders*

Commenters suggested making use of *Regulation 54-101 respecting Communication With Beneficial Owners of Securities of a Reporting Issuer* (Regulation 54-101) by requiring both offerors and offeree issuers to deliver bid documents to both registered and beneficial shareholders.

Response

Offerors have an interest in ensuring that both registered and beneficial shareholders receive bid document and therefore, the CSA does not propose to amend Regulation 54-101 to require its application to a bid.

6. *Variation of terms*

A commenter suggested that subsection 2.10(6) be deleted and the requirement to issue and file a news release announcing a waiver of a condition should be included in subsection 2.10(4).

Response

We agree with the comment and have made the suggested change.

7. *Information in bid circular*

A commenter suggested that the information in the bid circular should only be required to be current as of 3 business days prior to the commencement of the bid to allow for the printing and mailing of the bid circular.

Response

We disagree. The information in the bid circular must be current as of the date that the bid is mailed and it is the offeror's obligation to ensure this. We do not propose any changes at this time.

8. *Restrictions on Varying Bids*

Most commenters were opposed to the new restrictions on varying bids after the commencement of a take-over bid. The commenters pointed out that many of the prohibited changes may, under certain circumstances, actually be necessary.

Response

We have removed the prohibition against varying the terms of a bid from the Regulation, but indicated in the Policy Statement circumstances where a variation of the terms of a bid may be so significant that a notice of variation would not provide security holders of the offeree issuer sufficient time or disclosure. Depending on the circumstances, we reserve the right to exercise our public interest mandate to ensure that offeree security holders are not prejudiced.

9. *Collateral Agreements*

Commenters made various suggestions regarding clarifications in the drafting, which have been addressed.

Two commenters suggested that we include a definition of "independence" or "independent committee". In addition, some commenters were concerned about the ability of the independent committee to value a benefit, or to give the required approval in the face of a hostile bid.

One commenter felt that the de minimis tests were not appropriate; another commenter suggested that we add an additional exemption for non-employment related benefits, and provide an "equivalent value" exemption.

Finally, two commenters noted that, while the new exemption is an improvement on existing law, it does not address the fundamental interpretation problem that exists in the use of the phrase "consideration of greater value".

Response

We have provided additional guidance in the Policy Statement as to the meaning of "independence" and "independent committee". In the case of a hostile bid, the bidder may need to apply for exemptive relief.

We believe that the de minimis test is appropriate even in the context of a bid, as it allows for benefits that are minor, either in absolute terms or in relation to the consideration paid to the shareholder receiving the benefit. We are not prepared to expand the exemption beyond employment benefits at this time, however, we have added the concept of an “equivalent value” exemption, where the independent committee determines that equivalent value is being provided in exchange for the benefit and have provided information on determining whether an equivalent value transaction exists.

We believe that the interpretation of the phrase “consideration of greater value” is better addressed through its application to specific facts.

10. *Proportionate take up and payment*

Two commenters asked for clarification of section 2.23(2) (now section 2.26(2)) of the 2006 Draft Regulation, and one felt that section 2.23(3) (now section 2.26(3)) should not completely remove the requirement to take up proportionately in a modified Dutch auction bid. Two commenters also suggested that there was some uncertainty as to the effect of subsection (4) on the pro-ration factor for a partial bid and the ability of the seller in the pre-bid transaction to participate in the bid.

Response

We have amended both sections 2.26(2) and (3) for greater clarification. The purpose of subsection (4) is to ensure that a security holder who sells securities under a pre-bid transaction does not sell a greater total proportion of its shares by tendering additional shares under the offer. A seller can participate to the extent that the partial bid is for a greater percentage of securities than the percentage previously bought from the seller.

11. *Withdrawal*

One commenter asked for clarification of the relationship between withdrawal rights and the ability of an offeror to take up securities deposited under the bid. Another commenter suggested that the section is unclear as to whether a variation that consists of an increase in the consideration of a cash bid together with a waiver of conditions would extend withdrawal rights.

Response

We believe that no changes are necessary, as security holders are adequately protected by withdrawal rights and no issues have arisen in the past regarding this section. The section has been amended to clarify that an increase in consideration of a cash bid combined with a waiver of conditions would not extend withdrawal rights.

12. *Take up and payment for deposited securities*

One commenter notes there is an inconsistency between subsection 2.10(3) and subsection 2.29(4) (now 2.30(4)) and suggests adding “notwithstanding s. 2.29(4)” to subsection 2.10(3) and “subject to subsection 2.10(3)” to subsection 2.29(4) (now 2.30(4)).

Response

We don't believe there is an inconsistency between these two sections as one relates to the deposit period and the other to take up. Under section 2.29 (now 2.30) an offeror must first take up the deposited securities before extending, but is still required to extend the deposit period by 10 days, unless an exception applies under section 2.10

13. Filing Agreements

Three commenters supported the requirement for filing of agreements by the offeror but suggested that there should be a corresponding obligation on offerees. Other commenters suggested that the offeror should have a right to redact potential prejudicial or confidential information. And one commenter asked for guidance in the Policy Statement as to what agreements are to be filed.

Response

We have created an obligation for offeree issuers to file agreements which mirrors the filing requirements in 12.1(1)(c) and 12.3 of *Regulation 51-102 respecting Continuous Disclosure Requirements*, and added a right of redaction to all filed agreements.

14. Private Agreement Exemption

One commenter noted that the proposed exemption provides needed clarity to the exemption and aligns the exemption with its originally intended purpose. This commenter suggests, as an alternative, to eliminate the 15% premium and restrict the use of the exemption to once every two years. Four commenters suggested that in lieu of adopting the proposed changes to the exemption, interpretive guidance as to the availability of the private agreement exemption should be included in the policy statement. In addition, the guidance should address times when serial reliance on the private agreement exemption would be found to be abusive and on limiting reliance on the exemption in those circumstances.

In addition, we received several general comments expressing the opinion that the existing statutory requirements were workable and well established, and, absent a demonstrated abuse, did not require amendment. Some commenters also felt that both the 6-month purchase limitation and the one-time use limitation would be impracticable in application.

Response

We have considered all of the comments that we received and agree that a change to the private agreement exemption should not be made without further research and analysis. Accordingly, we have substantially reverted to the current requirements found in securities legislation, and intend to revisit this issue in the near future.

15. Foreign take-over bid and issuer bid exemptions

Commenters made several drafting suggestions, including a request for clarification that consideration not be required to be identical, and that an offeree issuer does not need to be a foreign issuer in order to qualify for either the foreign take-over bid exemption, or the foreign issuer-bid exemption.

One commenter suggested that an offeror should be able to rely exclusively on the list of registered shareholders of the target company as conclusive evidence of the number of outstanding voting securities that are owned, directly or indirectly, by Canadian residents.

One commenter suggested that persons that have entered into lock-up agreements with the offeror should not be included in the threshold calculations, as those persons have already made their investment decisions.

Response

We did not agree that the reference to consideration required clarification, as the subsection requires the consideration to be “at least as favourable”, but not identical in form. We also did not add a clarification to either the foreign take-over bid or the foreign

issuer bid exemptions, as the exemptions are available to any offeror that meets the requirements of the exemption. The reference in the title of the section to “foreign” is intended to refer to the bid as being made in compliance with the laws of a foreign jurisdiction, and not to the jurisdiction of the target issuer.

We have removed the guidance previously provided on determining beneficial ownership because we are of the view that it is up to the bidder to determine whether they have taken all necessary steps to determining whether it falls within the relevant exemption.

We disagree with the comment that security holders who have entered into lock-up agreements should not be included in threshold calculations. The purpose of the threshold is to determine the extent of Canadian ownership of the offeree issuer independent of any tendering decision.

16. *De minimis exemption*

One commenter suggested that an offeror should be able to presume that the exemption is available in local jurisdictions based on either publicly available information or, in the context of an unsolicited offer, where a friendly bidder with access to the offeror's books has relied on the same exemption.

Response

We have removed the guidance previously provided on determining beneficial ownership because we are of the view that it is up to the bidder to determine whether they have taken all necessary steps to determining whether it falls within the relevant exemption.

17. *Normal course issuer bid exemption*

One commenter suggested that this exemption be restricted to purchase orders that are entered on a marketplace at a price which is at or below the best ask price.

Another commenter suggested expanding the exemption to allow for 10% of public float to be repurchased, as is permitted by the TSX in a normal course issuer bid made under TSX rules.

Response

We have decided not to restrict the exemption, as there is no evidence that the exemption has been abused. We have also decided not to expand the exemption any further at this time.

We have clarified the exemption to indicate that an issuer bid made in the normal course through the facilities of a designated exchange is exempt from Part 2 if the bid is made in accordance with the bylaws, rules, regulations and policies of that exchange.

18. *Exchange take-over bid exemption*

One commenter notes that the exemption for take-over bids made through the facilities of a designated exchange found in existing take-over bid legislation has not been carried forward into the Regulation and encourages the CSA to set out the reasons for this exemption not being carried forward in a notice or otherwise.

Response

The CSA decided not to carry this exemption forward into the Regulation because both TSX and the TSX Venture Exchange have recently repealed their rules governing take-over bids. We have decided that only normal course issuer bids will be permitted through a designated exchange but all other bids, exempt or otherwise, will have to be made in compliance with the Regulation.

19. Additional exemptions and early warning requirements

One commenter suggested that the issuer bid exemption in Regulation 45-106 and the early warning requirements in Regulation 62-103 should be consolidated into this Regulation.

Response

We have determined that the issuer bid exemption in Regulation 45-106 is appropriately located in that Regulation, but we will consider consolidating the early warning requirements in Regulation 62-103 in the future.