Share buybacks during COVID-19: Considerations for public companies

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The Canadian and global financial markets are witnessing unprecedented levels of sell-off and volatility in the face of the COVID-19 pandemic. As we reported in our earlier article, Canadian regulators and exchanges have introduced numerous measures to mitigate market disruptions, including reporting deadline extensions and raising limits on daily trading volume. As Canadian public companies approach their first cycle of quarterly blackout periods, they will need to consider a number of issues relating to implementing share buybacks. In some cases, issuers have elected to either implement a share buyback program or, where such a program already exists, accelerate their purchases in light of depressed share prices. In other cases, issuers have opted to suspend or terminate their existing programs to preserve capital in light of the tremendous market volatility and economic uncertainty introduced by the COVID-19 pandemic. This article addresses some of the principal legal considerations associated with initiating or changing the scope of a share buyback program in Canada, including:

- Normal course issuer bids & purchase limitations
- Constraints imposed by being in possession of material undisclosed information
- Automatic securities purchase plans
- Amendments and suspensions
- Corporate law considerations

Normal course issuer bids & purchase limitations

Under applicable securities laws in Canada, issuers seeking to buy back their previously issued shares are generally subject to the requirements of National Instrument 62-104 – *Take-over Bids and Issuer Bids* (NI 62-104). However, NI 62-104 provides for an exemption from the more onerous issuer bid requirements prescribed under the instrument for share buybacks made in the normal course (normal course issuer bids or NCIBs), subject to the rules, by-laws, regulations, and policies of a designated exchange or published market such as the Toronto Stock Exchange (TSX), NEO Exchange or the TSX Venture Exchange.

Although the applicable stock exchange rules for effecting share buybacks under the NCIB regime are far more streamlined than what is otherwise required under NI 62-104 for issuer bids, the TSX and other designated exchanges do enforce volume limitations

on the aggregate amount that may be purchased by issuers under their NCIB programs which can make this form of share buyback less palatable for companies looking to buy back more shares than what the applicable stock exchange rules permit. The TSX Company Manual, for example, only permits corporate issuers to purchase, on any trading day during the term of an NCIB, up to the greater of (i) 25 per cent of the average daily trading volume of the securities of that class; and (ii) 1,000 securities per day (the Daily Limitation), subject to the use of the block trade exception which may only be relied upon by an issuer once per calendar week. The rules also restrict listed issuers from purchasing more than the greater of (y) 5 per cent of their issued and outstanding securities of a class, or (z) 10 per cent of their public float, over the 12-month term of the NCIB program (the Annual Limitation).

In response to COVID-19, the TSX recently issued temporary relief for the period between March 23, 2020 and June 30, 2020, increasing the Daily Limitation to permit purchases of up to 50 per cent of the average daily trading volume of the listed securities of that class on any given trading day. This relief applies to both existing NCIBs and those that are renewed or launched during this period. The temporary relief granted by the TSX did not, however, modify the Annual Limitation and so issuers looking to take advantage of the depressed stock prices to purchase a greater number of shares than what is otherwise permitted under the rules of the applicable stock exchange will need to instead explore undertaking a substantial issuer bid pursuant to the more onerous requirements provided for under NI 62-104.

Constraints imposed by being in possession of material undisclosed information

While stock exchanges have different rules applicable to NCIBs, issuers are generally prohibited from launching an NCIB program or making purchases while in possession of material undisclosed information. The TSX Company Manual, for example, expressly prohibits listed issuers from purchasing any of their securities under an NCIB program when and if they are in possession of material information that has not been publicly disseminated. As a result, in times of market uncertainty, issuers looking to initiate or make use of an existing NCIB program should carefully first evaluate whether they are in possession of material undisclosed information. In the current circumstances, however, the assessment of materiality may be especially challenging for many issuers as the ultimate impact of COVID-19 is unknown and the directives issued by government officials are rapidly changing, which may have adverse and unexpected impacts on the business and operations of an issuer. In addition, issuers relying on the Canadian Securities Administrators' recently published temporary relief to delay the requirement of filing annual or interim financial statements, related MD&A and annual information forms, will be exposed to greater risk for coming into possession of material undisclosed information in advance of a traditional blackout window, which could prevent the initiation or operation of an NCIB other than through the use of an automatic securities purchase plan.

Automatic securities purchase plans

To overcome the challenges associated with being prohibited from launching or effecting purchases under an NCIB program when in possession of material undisclosed information, issuers typically enter into an automatic securities purchase plan (ASPP) at the time of initiating the program in order to be able to purchase shares during traditional and self-imposed blackout periods. ASPPs provide protection against anti-manipulation liability relating to the manner, timing, price or volume of a company's repurchases of shares. To implement an ASPP, the issuer and the buying broker must enter into a formal agreement, which must be pre-cleared by the applicable stock exchange. The ASPP is also required to comply with OSC Staff Notice 55-701 – *Automatic Securities Disposition Plans and Automatic Securities Purchase Plans*.

In order to enter into an ASPP at the time of initiating an NCIB program or during its term, the issuer must not be in possession of material undisclosed information relating to it or its material subsidiaries. Similar restrictions apply for making amendments to the ASPP or terminating it. The ASPP will include trading parameters and other instructions at the time of its establishment that place restrictions on the ability of the issuer to vary, suspend or terminate the plan and that have the effect of ensuring that the issuer cannot profit from material undisclosed information through a decision to vary, suspend or terminate the plan.

Certain ASPPs contain trading parameters applicable to the entire 12-month term of the NCIB program, whereas others are only triggered during quarterly and self-imposed blackout periods for the issuer, leaving management with discretion to direct trades during traditional trading windows. Each type of plan presents its unique set of challenges to navigate during a pandemic when issuers are more susceptible to coming into possession of material undisclosed information earlier than in the ordinary course. In the case of plans which vest the broker with discretionary trading authority throughout the entire term of the NCIB program, an issuer will be unable to stop or accelerate any purchases under the plan when in possession of material information that hasn't been disseminated to the public. Where the ASPP is designed to apply only during blackout periods, the issuer will not be able to effect any trades under the NCIB when in possession of material undisclosed information.

Amendments and suspensions

Given the current economic climate, certain issuers have amended the terms of their NCIBs and related ASPPs to, for example, increase or decrease the number of securities that may be purchased under the programs (while not exceeding the maximum percentages discussed earlier). Others have elected to suspend purchases under their plans entirely.

Under the TSX Company Manual, in cases where an issuer is looking to amend the terms of its NCIB to increase the number of securities sought to be purchased under the program, it may simply file an amended form of notice with the exchange provided that in so doing it does exceed the Annual Limitation and at the time of making such an amendment is not in possession of material undisclosed information. Amendments to increase the Annual Limitation and Daily Limitation are also possible if the number of issued and outstanding securities which are the subject of the NCIB has increased by more than 25 per cent from the number that was issued and outstanding as at the date of the initial notice filed with the exchange. In this case, issuers may simply amend their

Annual Limitation and Daily Limitation based on the number of issued and outstanding securities at the time of filing the amended notice.

With respect to amending ASPPs to accelerate or suspend purchases, TSX Staff Notice 2016-0001 provides that an issuer is only required to issue a press release announcing the change when the amendment to the ASPP is material. The TSX considers a termination or suspension of an ASPP to be material information triggering the requirement to issue a press release. Changing the trading parameters of an ASPP is not, however, viewed by the TSX as being material unless the parameters were disclosed in the press release announcing the commencement of the NCIB - which is not standard market practice for these programs. Accordingly, issuers seeking to alter the trading parameters set forth in their ASPPs may do so without triggering any public disclosure requirement.

Where an issuer retains trading authority under its ASPP outside of blackout periods, it can effectively suspend purchases under the NCIB by simply withholding trading instructions to the broker. Where, however, the ASPP provides the broker with trading authority throughout the term of the NCIB, issuers are generally required to issue a press release announcing the suspension of termination of the ASPP.

Lastly, and as discussed earlier, an issuer may not amend the terms of or terminate an ASPP if in possession of material undisclosed information. This may become a significant concern for certain issuers going forward in the face of unexpected or prolonged blackout periods introduced by the complexities associated with the COVID-19 pandemic and will require proactive steps by management to ensure the board of directors' intentions with respect to an active share buyback program are appropriately provided for under the issuer's existing plans in advance of management coming into possession of material undisclosed information.

Corporate law considerations

Issuers should be aware that Canadian corporate legislation typically prohibit buybacks of equity securities if there are reasonable grounds for an issuer to believe that:

- the corporation is, or would after the payment be, unable to pay its liabilities as they become due; and
- the realizable value of the corporation's assets would after the payment be less than the aggregate of its liabilities and stated capital of all classes.

This means if the directors of an issuer approve the purchase of its securities in breach of these solvency tests, such directors may be personally liable. Given the current global economic turmoil, issuers should be mindful of the corporate solvency requirements relating to their NCIB programs as the effects of the COVID-19 pandemic on their business and the global economy more generally continue to unfold.

Next steps

In light of the numerous legal and regulatory implications associated with share buyback programs in Canada, you are encouraged to discuss your options with legal counsel before proceeding to initiate or make amendments to an existing program. To find out

how BLG can help, please contact the authors or a member of BLG's Capital Markets Group.

BLG has also created a COVID-19 Resource Centre to assist businesses on a variety of topics, including investment management, labour and employment, contractual risks, public disclosure requirements, education and criminal law.

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