105-Day Take-over Bids — What Impact On Take-Over Defenses?

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The long awaited amendments to the Canadian take-over bid regime and the early warning reporting regime have been introduced. With a 105-day deposit period and a de facto "shareholder vote" on a take-over bid, how has the landscape for take-over defences changed?

The Canadian Securities Administrators (CSA) published on February 25, 2016 a harmonized take-over bid regime for non-exempt take-over bids and amendments to the early warning reporting requirements.

The new take-over bid regime is substantially the same as the original 2015 proposal except that the minimum deposit period has been set at 105 days (as opposed to the current 35 days and the 120 days in the 2015 proposal). The key principles of the new take-over bid regime are:

- 50% Minimum Tender Condition: The new regime will require that a minimum of more than 50% of all outstanding target securities owned or held by persons other than the bidder and its joint actors be tendered and not withdrawn before the bidder can take up any securities under the bid. This requirement allows for collective action by security holders – in effect a "shareholder vote" on the bid (i.e., a majority of security holders must show they are in favour of the bid by tendering).
- 10-Day Extension Period: If the minimum tender condition is met, and all other terms and conditions of the bid have been complied with or waived, the bid must be extended for an additional 10 days. The extension requirement allows other shareholders to tender once they know that a majority of security holders are in favour of the bid. It also alleviates the concern of regulators that security holders may otherwise have felt "pressure to tender" to a bid for fear of being "left behind" if the bidder received sufficient tenders from other security holders.
- 105-Day Deposit Period: The minimum period that a take-over bid must remain open is 105 days, provided that:
    - the target company may, by news release, reduce the minimum period to as little as 35 days, in which case the reduced period will apply to all outstanding bids (if the bidder files a notice of variation) and all subsequent bids; and

- if the target company, by news release, announces that it will effect an "alternative transaction" (generally a transaction that requires a vote of security holders, such as a plan of arrangement) the minimum period for all outstanding bids (if the bidder files a notice of variation) and subsequent bids will be 35 days.

The deposit period was reduced to 105 days from the originally proposed 120 days to allow bidders to effect "compulsory acquisitions" under certain Canadian corporate statutes. These compulsory acquisition provisions state that if a take-over bid is completed within 120 days of being launched and under the bid the offeror acquires more than 90% of the shares subject to the bid, the offeror can compulsorily acquire the remaining shares. A 105-day bid period together with a 10-day extension period, will allow bidders to complete bids within the required 120-day period.

The 50% minimum tender condition and the 10-Day extension period are intended to allow security holders to make "voluntary, informed and co-ordinated tender decisions" and the lengthy deposit period is intended to provide target boards more time to consider and respond to take-over bids – effectively giving boards much more bargaining power in dealing with prospective bidders.

The traditional defensive tactic most commonly adopted by target boards, either "tactically" in response to an unsolicited take-over bid, or "strategically" as a shareholder-approved general defence, was a shareholder rights plan or a "poison pill". Poison pills were designed to allow more time for boards to consider and respond to bids. The usual sequence of events in a hostile bid was that, after an appropriate amount of time (in the range of 60 days), a bidder would apply to a securities commission to have the poison pill cease traded on the basis that the target board had been afforded sufficient time to respond to the bid. Part of the CSA's rationale for implementing a longer bid period was to create a statutory regime which allowed target boards considerable time to react, thereby reducing or eliminating the need for poison pills and rendering poison pill hearings unnecessary.

So where do the new rules leave poison pills and defensive tactics more generally? In response to the original 2015 proposal, a number of commenters had suggested that the CSA should provide more guidance on the continued use of poison pills and that the CSA undertake a broader review of its National Policy 62-202 – *Defensive Tactics*. The CSA chose not to do either of these things; instead it reminded capital markets participants that NP 62-202 continues to apply and that "securities regulatory authorities will be prepared to examine the actions of offeree boards in specific cases, and in light of the amended bid regime, to determine whether they are abusive of security holder rights".

That the CSA took this route may simply be evidence of how difficult it was to achieve consensus on the package of rule changes now enacted without the additional burden of trying to go even further. At the same time, however, the door is left open for continued use of poison pills in the context of, for example, "creeping take-over bids" whereby parties may accumulate significant positions through various exempt purchases without making a bid for all shares. There may also be limited scope for the adoption of a tactical pill toward the end of the new 105-day bid period, although in light of the CSA's statement above, it is expected that a bidder would likely be successful in having a securities commission quickly cease trade such a pill absent exceptional circumstances.

As for other defensive tactics, such as issuances of securities into friendly hands, or asset sales, they are still available in the proper circumstances, although subject to review under NP 62-202, including a possible hearing in front of a securities commission (such as occurred with the BC Securities Commission hearing regarding a private placement by CB Gold in the face of a bid by Red Eagle Mining in late 2015). Given the extended time frame during which hostile bids will now play out, it is possible that recourse may be had to the courts more often than has been the case in the past.

Issuers whose strategic rights plans are coming up for renewal will have to consider whether there is any continued utility to keeping one in place. It will be interesting to see what position the proxy advisory firms ISS and Glass Lewis take regarding such renewals, since their recommendations may be important for certain issuers. Issuers with no immediate need to submit a strategic rights plan to shareholders for renewal may determine not to do anything immediately, but if they see continued utility in maintaining a plan they may decide to amend their plans before the renewal date, so as to be consistent with the new take-over bid regime. For issuers facing a hostile bid, a decision on what to do with their plan can be made in the circumstances of what their boards decide to do in responding to the bid.

New Early Warning Requirements

Concurrently with the new take-over bid regime, the CSA introduced amendments to the early warning reporting regime. The early warning reporting regime generally requires disclosure of security holdings of a reporting issuer when the ownership threshold of a security holder exceeds 10%. The highlights of the amended early warning reporting regime are as follows:

- Retention of the 10% reporting threshold (rather than reducing the threshold to 5% as once proposed).
- Disclosure of decreases in ownership of, or control or direction over, 2% or more (previously only increases of 2% or more and a change in a material fact contained in a previous report needed to be disclosed).
- Disclosure when ownership, control or direction falls below the 10% threshold.
- Eligible Institutional Investors who rely on the Alternative Monthly Reporting (AMR) system (rather than the early warning reporting system) will become ineligible to use the AMR if they "solicit" proxies in order to contest director elections, reorganizations, amalgamations mergers, arrangements or similar corporate actions. The term "solicit" will not include certain traditionally exempted activities such as publicly announcing how a security holder intends to vote and communications with security holders concerning the business and affairs of the issuer where no proxy is sent.
- Enhanced disclosure regarding the intentions of the acquiror, the purpose of the acquisition, any securities lending arrangements and the investor’s economic exposure to the securities of the class of securities to which the report relates.
- A certification and execution of the early warning report.
- A requirement that a news release in relation to the transaction that is the subject of the early warning reporting requirement be issued no later than the opening of

trading on the next business day (rather than the previous requirement to issue it "promptly").

The new take-over bid regime and the early warning requirement are expected to come into force on or about May 9, 2016.

To discuss any aspect of the proposals please contact the authors.

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