Goodmans LLP Update

Corporate Securities Law

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Amendments to Takeover Bid Rules Alter Canada's M&A Landscape

The Canadian Securities Administrators (CSA) have published the final form of the much-discussed amendments to Canada's takeover bid regime (the "**Takeover Amendments**"). The Takeover Amendments are substantially similar to the draft published in March of last year, though they include some important changes. The main elements of the Takeover Amendments that will affect takeover bids for Canadian companies are:

- *Minimum Tender Condition*. All non-exempt takeover bids will be required to achieve a minimum tender requirement of more than 50% of the outstanding securities that are subject to the bid and held by disinterested securityholders. This requirement applies equally to partial bids, making them more challenging for bidders.
- *Minimum Bid Period*. The minimum deposit period for bids will be 105 days. This period appears to reflect a compromise between certain jurisdictions that preferred a 90-day period and others that preferred a 120-day period. Shorter minimum periods are permitted, to as low as 35 days - the minimum bid period in the former regime - either at the discretion of the target's board or if the target enters into an alternative transaction, such as a plan of arrangement.
- *Mandatory Extension*. The minimum deposit period must be extended by a minimum of 10 days after the minimum tender requirement and all other conditions are met or waived.

These changes are expected to have a significant impact on the M&A landscape in Canada. The Takeover Amendments will come into force on May 9, 2016, except in Ontario, where they will come into force on the later of May 9, 2016, and the day on which the relevant legislation is proclaimed into force.

The Impact on Canada's M&A Landscape

Canada has generally been a "bidder friendly" jurisdiction compared to others, including the United States; that reality, due in significant measure to the inability of a Canadian target's board to "just say no" to hostile bids, will endure. However, the Takeover Amendments, and in particular the requirements for a longer bid period and majority tender, will make hostile bids more challenging for bidders. There will likely be increased completion risk, which could be exacerbated where the bidder offers shares, and target boards will have more time to seek alternatives. Holders of large blocks of shares may be reluctant to sign lock-ups that extend for such a long period, and acquisition financing could become more expensive.

The Takeover Amendments may also significantly affect the manner in which all parties deal with takeover bids. Among other things, as a result of the mandatory majority tender requirement hostile bids could begin to resemble proxy contests, with bidders and targets launching public relations campaigns to capture the hearts and minds of shareholders. Target boards may continue to use shareholder rights plans (commonly known as "poison pills") in limited circumstances, and certainly to prevent "creeping bids", but the CSA are not expected to be tolerant of rights plans affecting hostile bids beyond the extended 105-day minimum deposit period.

Other defensive tactics, however, could become more prevalent. Private placements into friendly hands, which as discussed in our December 1, 2015 Update - *BCSC Permits Private Placement in Face of a Hostile Bid*, may have a powerful impact given the majority tender requirement, and the longer bid period will allow more time for issuers to undertake such transactions. It is unclear whether the regulators will change the way they approach these kinds of tactics in light of the enhanced protections the Takeover Amendments already provide target companies and their boards.

A Fine Balance, a Potential Re-Balancing

The Takeover Amendments are expected to profoundly change the manner in which takeover bids are conducted, and the securities regulators' role in those transactions. They rebalance the playing field, barring the most coercive elements of hostile bids under the current regime and providing target boards ample time to explore all potential alternatives to a hostile bid, without varying the principle that a target board cannot indefinitely "just say no." As noted, this may result in takeover bids more closely resembling proxy contests, and possibly more proxy contests as alternatives to conventional bids.

The new rules are also expected to result in a decrease in the number of securities regulatory "poison pill hearings," a typical feature of the historical M&A landscape in Canada. Whether this affects the role of securities regulators in Canada in policing the conduct of target issuer boards more broadly remains to be seen. There has been a longstanding debate as to whether securities regulators are best positioned to determine issues involving the fiduciary duties of target boards, in part on the basis of jurisdiction and expertise, but also given the limited array and blunt nature of remedies available to them. Predictably, the Takeover Amendments do leave open some questions that may draw in the securities regulators as M&A parties deal with the new rules. Still, the Takeover Amendments could represent a meaningful step in a larger re-examination of the regulators' role in corporate contests for control.

Please contact any member of our Corporate Securities Group to discuss the Takeover Amendments, defensive tactics or other matters relating to public M&A generally.

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