Goodmans LLP Update

Corporate Securities Law

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Hostile Bid for Canadian Oil Sands Foreshadows Tactics Under Proposed Takeover Bid Regime

In the spring of 2015, Canadian Oil Sands Limited (COS) was approached by Suncor Energy Inc. ("**Suncor**") with an expression of interest in a transaction. COS rejected Suncor's initial advance. In early October of 2015, Suncor announced that it was making an unsolicited takeover bid for all of COS's common shares.

The recent response of COS's directors to Suncor's unsolicited offer may foreshadow one of the tactics that is expected to prevail in most takeover bids once proposed amendments to the Canadian takeover bid regime (the "**Takeover Amendments**") come into force (see our September 12, 2014 Update, *CSA Propose Different Direction for Take-Over Bid Regime*). The Takeover Amendments are expected to come into force in early 2016.

The Suncor Bid and COS Response

The response from COS's directors is largely a product of a singular set of facts. At the time of Suncor's unsolicited offer, COS already had in place a shareholder rights plan, or "poison pill", a common defensive tactic implemented by boards to protect against hostile takeover bids. Suncor's offer was structured as a "permitted bid" under COS's rights plan (i.e. the offer will remain open for 60 days rather than the statutorily mandated 35 days and requires a majority of the shareholders to tender to the Suncor bid).

In response to Suncor's unsolicited offer, COS implemented a second shareholder rights plan. The second rights plan includes an enhanced "permitted bid" exemption, requiring that in order to qualify as a "permitted bid", and therefore not trigger the dilution inherent in the rights plan, an offer for COS's shares must remain open for at least 120 days. In effect, by implementing the second rights plan, COS negated the "permitted bid" status of Suncor's bid.

The COS directors' circular also represents an aggressive response. The board advised COS's shareholders that it has been working to "consider and evaluate its existing business plan and developments and plans relating to Syncrude which could result in a material increase in the cash flows and profitability of Syncrude and, as a result, Canadian Oil Sands." (Syncrude is an oil sands joint venture in which COS holds a 36.74% interest.) The board defended the 120-day tender period in the second rights plan on the basis that additional time is necessary to ensure shareholders will receive Syncrude's budget and outlook and that the 120-day period is consistent with the Takeover Amendments.

Elements of Interest

The M&A bar will be watching two elements of Suncor's bid closely: first, the reaction of the Alberta Securities Commission (ASC), the principal regulator of COS, if Suncor does not amend its bid to conform with the "permitted bid" requirements of the second rights plan, and second, the parties' tactics.

Reaction of the Securities Regulator

If Suncor is not willing to revise its bid to conform to the "permitted bid" requirements of COS's second rights plan, it will likely apply to the ASC to "cease trade" the second rights plan. Canadian securities regulators have generally "cease traded" a rights plan after what they have determined to be a reasonable time period. That time period has been approximately 60 days, depending on the factual circumstances, on the basis that in 60 days a board should have had sufficient opportunity to consider the offer and seek a superior alternative.

With Suncor's bid open for 60 days and the second rights plan requiring a 120-day tender period, the ASC could be forced to choose between conforming to current practice, which has evolved under the current takeover bid regime, and adapting to the imminent changes reflected in the Takeover Amendments that, although not in force, represent the collective view of the Canadian Securities Administrators. Where the law is on the verge of change, and particularly in a context where determinations are not bound by precedent, it is difficult to foresee how the ASC would react to a "cease trade" application from Suncor.

Tactics of the Parties

The Takeover Amendments will require all takeover bids to be structured similarly to what would be a "permitted bid" under COS's second rights plan. With COS effectively requiring any bid to comply with the proposed new takeover bid regime, the next steps taken by Suncor and COS could foreshadow how parties will conduct themselves in the context of hostile take-over bids when the Takeover Amendments come into force.

The adoption of these "permitted bid" requirements in the Takeover Amendments is a fundamental shift in the landscape of hostile take-over bids. Under the proposed rules, shareholders of a target can wait to see if a majority of shareholders "approve" the hostile bid without being coerced into tendering for fear of being left in a minority, illiquid position. The new landscape closely aligns with the shareholder approval requirement found in friendly M&A transactions. If the COS board can convince a majority of the shareholders to not tender to the Suncor offer, then the Suncor offer will fail. The aggressive response from the COS board in its circular is likely the beginning of a public relations campaign against what it claims is an "opportunistic" bid by Suncor, and more generally a process that could resemble a traditional "proxy contest" for control.

Please contact any member of our Corporate Securities Group to discuss the proposed amendments to the takeover bid regime, shareholder rights plans or defensive tactics generally.