

Goodmans^{LLP} Update

OSC Issues Reasons for Decision to Dismiss Application for Exemption from Minimum Tender Requirement Under Proposed Optiva Bid

The Ontario Securities Commission (OSC) recently released reasons for its decision¹ to dismiss the application of ESW Capital, LLC (ESW) for exemptive relief from the minimum tender requirement under Canada's securities bid regulations in connection with ESW's proposed take-over bid of subordinate voting shares of Optiva Inc. (Optiva). Notably, this is the first instance where a Canadian securities regulator considered an exemption from the now mandatory minimum tender requirement adopted under Canada's amended take-over bid regime. The decision to dismiss the application underscores the regulator's commitment to the integrity of the re-calibrated control dynamics and key policy objectives of shareholder choice and predictability underlying the new bid rules.

Background

Optiva, a telecommunications software solutions company, has had three control block shareholders since 2018: ESW, holding approximately 28% of the subordinate voting shares, Maple Rock Capital Partners Inc. (Maple Rock), holding approximately 22.4%, and EdgePoint Investment Group Inc. (EdgePoint), holding approximately 18.1%. The control block shareholders had a history of disagreement over the strategic direction and governance of Optiva, which culminated in a preliminary proposed bid by ESW.

On July 27, 2020, ESW announced its intention to proceed with an all-cash offer to acquire all subordinate voting shares of Optiva for \$60 per share (the "**Proposed Offer**") conditional upon, among other things, obtaining exemptive relief from the OSC from the mandatory minimum tender requirement under National Instrument 62-104 - *Take-Over Bids and Issuer Bids*. The Proposed Offer represented a significant premium to the trading price of the subordinate voting shares. ESW did not commence a formal take-over bid, pending the result of its application.

Canadian securities regulators amended the take-over bid regime in 2016 in an effort to level the playing field and strike a fair balance among the interests of bidders, targets and shareholders. The amendments adopted a mandatory minimum tender requirement, in addition to a mandatory 10-day bid extension and 105-day bid period, to address coercion concerns under the prior regime and facilitate voluntary, informed and co-ordinated shareholder choice. Under the new minimum tender requirement, at least 50% of the target shares not owned by the bidder and its joint actors must be tendered to the bid before the bidder can proceed to take-up shares. Once the minimum tender condition is satisfied, non-tendering shareholders are granted another 10 days to tender into the bid. Both Maple Rock and EdgePoint announced their intention not to tender to the Proposed Offer. Accordingly, given their significant control block positions (together totaling over 40% of the subordinate voting shares), the Proposed Offer could not proceed without an exemption from the rule.

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¹ ESW Capital, LLC (Re), 2021 ONSEC 7.

On the same day as the Proposed Offer, Optiva adopted a tactical shareholder rights plan with a 30% threshold intended to prevent the Proposed Offer from proceeding even if an exemption from the minimum tender condition was granted by imposing significant dilution and increased costs on ESW as the bidder. The shareholder rights plan was later ratified by Optiva's shareholders.²

On August 6, 2020, ESW filed an application with the OSC requesting an order granting exemptive relief from the mandatory minimum tender requirement with respect to the Proposed Offer. The application was dismissed by the OSC pursuant to an order released on September 14, 2020.

OSC Reasons

The OSC may grant an exemption from any requirement under Ontario's *Securities Act* if it is satisfied it would not be prejudicial to the public interest. In considering the public interest, the OSC focused on the legal and factual considerations of the matter through the lens of the underlying policy objectives of the amended regime, including the nature and circumstances of the bid, the control dynamics, the impact of a grant or denial of the exemptive relief on shareholders, and the conduct of the control block holders, target, board and bidder.

In upholding the primary objective of protecting shareholder choice, the OSC found no exceptional circumstances or abusive or improper conduct on the part of Maple Rock, EdgePoint or Optiva that undermined minority shareholder choice and warranted intervention. Optiva's control block shareholder dynamics pre-dated the Proposed Offer and the necessary support of at least two of the control block shareholders for a potential bid would have been evident to Optiva's remaining minority shareholders when those shareholders acquired or held their positions. The OSC acknowledged that all shareholders, including those holding a significant control block, are entitled to their own choice and, absent abuse, may engage in co-ordinated efforts to pursue their own separate financial interests, as was evident in Maple Rock's and EdgePoint's reasons for not supporting the Proposed Offer.

In a key aspect of the decision, the OSC noted that, at the time the regime was amended, Canadian securities regulators explicitly recognized the potential for enhanced leverage of control block shareholders as a result of the mandatory minimum tender requirement. Such leverage could result in shareholders being deprived of the ability to respond to a bid, as was a possibility if the Proposed Bid was blocked, but regulators determined that exemptive relief could adequately address improper leverage where appropriate. The OSC's decision suggests that the historical Optiva control dynamics and the nature and genuine use of Maple Rock's and EdgePoint's leverage to effectively block the Proposed Offer was appropriate and an acceptable consequence of the intentionally re-calibrated regime. The OSC emphasized the predictability of the take-over bid regulations to ensure shareholders and market participants have reasonable certainty as to what rules govern a bid environment.

Ultimately, the OSC found that the risk of the requested relief resulting in unfair pressure on the minority shareholders to tender to the Proposed Offer outweighed the risk that a denial of the relief would unfairly deny shareholder choice to participate in the Proposed Offer. The requested exemption may have led to a 50%+ blocking position by ESW, potentially coercing minority shareholders to tender to the bid to avoid enhanced control by ESW and reduced liquidity of the subordinate voting shares – precisely the kind of coercion the mandatory minimum tender requirement was implemented to address.

² The OSC was not asked to provide any relief or make any finding regarding whether the shareholder rights plan Optiva adopted amounted to an improper defensive tactic. One of the key drivers leading to the amendments to the take-over bid regime was an effort to eliminate the standard playbook of a board adopting a "tactical poison pill" in response to a bid, followed by a hearing with a determination that "there is a time that the pill must go." The new 105-day bid period was designed to give a target board the time it needs to find an alternative to a bid, but not to prevent shareholders from making the ultimate decision on whether to tender to the bid. While market participants expect this practice to be curtailed significantly under the new rules, there still may be occasions where a "pill hearing" will be appropriate.

Conclusion

The OSC's decision, though novel in its consideration of the minimum tender requirement, does not necessarily reflect an unwillingness of regulators to grant exemptions in the take-over bid context under the amended regime. Exemption applications are considered by Canadian securities regulators on a case-by-case basis, with the factual matrix of each case playing a key role in a determination as to whether the regime's integrity has been undermined and warrants intervention. However, the decision indicates the OSC may be cautious in granting exemptive relief from the take-over bid rules where doing so alters the intentionally re-calibrated control dynamics amongst a bidder, target and control block shareholders, and absent exceptional circumstances of abusive or improper conduct or compelling public interest considerations.

For more information regarding the OSC's decision, please contact any member of our [Corporate Finance and Securities Group](#).