

## Mergers and Acquisitions and Competition Law

October 12, 2011

### Recent Developments of Importance

Anti-trust regulators' review of the competitive impact of proposed business transactions can be significantly complicated by the unique dynamics of an unsolicited or "hostile" takeover bid (a "**hostile transaction**"). Among other things, parties can seek to use the process to obtain useful information and/or timing advantages to support its strategic objectives, and considerations about confidentiality take on a different dimension in the context of hostile transactions.

Mindful of these factors, on July 21, 2011, the Commissioner of Competition (the "**Commissioner**") issued two new interpretation guidelines outlining certain procedural considerations relating to hostile transactions.

#### *Background*

The Competition Act (the "**Act**") requires that, where a proposed transaction exceeds certain monetary thresholds (a "**Notifiable Transaction**"), notice with prescribed information must be given to the Commissioner, and a waiting period is imposed before the Notifiable Transaction can be completed.

The Act generally requires the Competition Bureau (the "**Bureau**") to keep confidential any information that has been provided to or obtained by it in the course of the administration or the enforcement of the Act, subject to certain exceptions. In the context of a Notifiable Transaction that is a share acquisition (including a hostile transaction), the Act requires the Commissioner to immediately notify the target corpora-

tion that it has received information from the acquirer, and within ten days of being so notified, the target corporation must itself supply the Commissioner with certain prescribed information.

#### **Highlights of the New Guidelines**

##### *Hostile Transactions Interpretation Guideline 1: Bureau Policy on Disclosure of Information*

In the case of a Notifiable Transaction that is a non-hostile transaction, the Bureau is generally prepared to speak with counsel for both parties, separately or together (as may be requested by the purchasing party), on the progress of its review.

The guideline on disclosure of information emphasizes the Bureau's discretion in the sharing of information concerning hostile transactions, having regard to the complexities of those deals. In respect of a hostile transaction, the Bureau has determined that where it shares certain pertinent information (i.e., its complexity designation, the anticipated timing of its review, the date upon which the other party has certified completeness of any supplementary information request (an "**SIR**") response, the Bureau's preliminary and final views on market definitions and relevant factors, as developed, and its preliminary and final conclusions regarding a potential prevention or lessening of competition) with one party to the transaction, it will "strive" to communicate such pertinent information "equitably" with the other party, subject to its confidentiality obligations under the Act. As a practical matter, this highlights the need, when engaged in discussions with the Bureau concerning a hostile transaction, to consider the strategic implications of regulatory disclosure and to address disclosure considerations with the Bureau.

##### *Hostile Transactions Interpretation Guideline 2: Bureau Policy on Running of Subsection 123(1) Waiting Periods*

The Act imposes a 30-day waiting period before parties may complete a Notifiable Transaction, and provides for a further 30-day waiting period if an SIR is made. The initial waiting period generally begins on the day after which all prescribed information has been

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received by the Commissioner from both the acquiror and the target, and any SIR-related waiting period generally commences after both parties have certified the completeness of their responses, provided that the Commissioner has not challenged the completeness of the responses.

The Act prescribes a different framework for hostile transactions to ensure that a target corporation of a hostile transaction is not able to influence the timing of the commencement of the relevant waiting periods. In the context of a hostile transaction, the Act provides that any waiting period will begin without reference to the day on which prescribed information or supplementary information (if so requested) is received by the Commissioner from the target corporation. In other words, the initial 30-day waiting period will begin after the Commissioner receives the prescribed information from the bidder and similarly, where the Commissioner has issued an SIR, the subsequent 30-day waiting period will begin after the Commissioner has received such supplementary information from the bidder and the bidder has certified that its response is correct and complete in all material respects, provided that the Commissioner has not challenged the completeness of the responses.

Interpretation Guideline #2 clarifies how the rules will be applied where transactions that started as hostile transactions become friendly. In essence, if during a

waiting period a hostile transaction becomes friendly, that waiting period will not be affected.

In net effect:

- In a hostile transaction, the initial waiting period will commence on the date the bidder submits its notice with prescribed information, and that timing will not be affected if the transaction becomes friendly during that period.
- If the Bureau issues an SIR and the transaction is still hostile at the time that the bidder certifies the completeness of its response and the Commissioner is so satisfied, then the period will commence at the time of that certification even if the transaction subsequently becomes friendly.
- Conversely, if prior to the initial submission by a bidder (or, in the case of an issuance of an SIR, if prior to the certification of its response by the bidder) the transaction becomes friendly, the waiting period will commence when *both* parties have filed (and certified and the Commissioner has not challenged the response, as applicable).

Please contact any member of the Goodmans Mergers and Acquisitions Group, or the Competition Law Group to discuss the implications of these new guidelines.