

## Corporate Securities

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### Financing Conditions in Canadian Take-Over Bids

In contrast to many other jurisdictions, Canadian securities legislation requires a bidder to have made “adequate arrangements” before launching a take-over bid “to ensure the required funds are available to effect payment” for the securities subject to the bid. There has been considerable debate, and little learning, as to what are “adequate arrangements”.

Staff of the Ontario Securities Commission has noted that, at one extreme, there is the view that “as long as the financing conditions match the bid conditions, the financing requirement has been met”. At the other extreme is the view that “the financing requirement has not been met unless the lender is prepared to ‘write the cheque’ before the bid commences and that financing subject to due diligence is inadequate”.

Although the question has not come before the Canadian securities regulators in a formal proceeding, staff of the Alberta, British, Ontario and Quebec Securities Commissions have considered the matter in the context of at least one unsolicited take-over bid, which ultimately was supplanted by a bid by a “white knight”. In that context, staff apparently concluded that they would have been satisfied with the bidder’s financing arrangements if those arrangements were:

- not subject to lender due diligence,
- the subject of a binding commitment letter setting out all material terms, notwithstanding that the letter would have to be converted into formal documentation,
- subject to the minimum tender conditions being satisfied, and
- subject to a material adverse change condition and a “market out”.

While staff of the OSC have recommended that the current statutory provisions relating to financing conditions be reviewed, pending that review staff’s informal views likely will remain the only useful guidance as to the regulatory position on financing arrangements in the context of a cash bid.

While alternative transaction structures, including plans of arrangement, have been used to implement transactions where there is greater “conditionality” to financing, staff of the Quebec Commission have suggested that they may have some concerns about the use of such structures and are of the view that the statutory requirements applicable to bids also should apply to other transactions with similar effect. (*See our Update, “CVMQ Staff Position on Take-Over Bids, Arrangements, Amalgamations and Similar Transactions”, October 16, 2000.*)

Please contact any of our lawyers listed below should you wish to discuss the implications of the foregoing for bids in Canada.

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