

Amendments to Canadian take-over bid and early warning regimes now in force

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Amendments to the [Canadian take-over bid](#) and [early warning regimes](#) came into force on May 9, 2016. The amended take-over bid regime is set out in National Instrument 62-104 *Take-Over Bids and Issuer Bids* (NI 62-104), which has been adopted by all provinces, including Ontario. Under the amended regime, all non-exempt take-over bids (including partial bids) will be subject to the following requirements:

- 50% Minimum Tender Requirement – Bids will be subject to a mandatory minimum tender requirement of more than 50% of the outstanding securities of the class that are subject to the bid, excluding those beneficially owned, or over which control or direction is exercised, by the bidder and its joint actors.
- 10-Day Extension Requirement – Following the satisfaction of the Minimum Tender Requirement and the satisfaction or waiver of all other terms and conditions, bids will be required to be extended for at least an additional 10-day period.
- 105-Day Bid Period – Bids will be required to remain open for a minimum of 105 days, subject to two exceptions. First, the target issuer's board of directors may issue a "deposit period news release" in respect of a proposed or commenced take-over bid providing for an initial bid period that is shorter than 105 days but not less than 35 days. If so, any other outstanding or subsequent bids will also be entitled to the shorter minimum deposit period counted from the date that other bid is made. Second, if an issuer issues a news release that it has entered into an "alternative transaction" – effectively a friendly change of control transaction that is not a bid, such as an arrangement – then any other outstanding or subsequent bids will be entitled to a minimum 35-day deposit period counted from the date that other bid was or is made.

Any bids commenced prior to May 9, 2016, will be governed by the old rules. The old rules will also govern any bids commenced after May 9, 2016 in respect of a target issuer that: (a) is subject to a bid that was commenced prior to May 9, 2016; or (b) issued a news release prior to May 9, 2016 announcing that it intends to effect an alternative transaction. In these circumstances, the old rules will govern prior to the expiry of such bid or to the completion or abandonment of such alternative transaction, as applicable.

One practical issue that public companies with rights plans should consider is what changes, if any, they should make to their existing rights plans in light of the amended regime. We would generally suggest that issuers should defer amending their rights plans until such

time as the leading proxy advisory firms (e.g. ISS and Glass Lewis) have published revised rights plan policies (or otherwise indicated the changes to rights plans that they will support in light of the amended regime). We note that the current proxy season has already seen proxy advisory firms issue recommendations that shareholders vote in favour of the renewal of rights plans without any amendments to address the changes to the take-over bid rules.

Osler has published an updated guide to Canadian public company mergers & acquisitions reflecting the amendments to the take-over bid regime, which is available [here](#).

The changes to the early warning regime are more incremental than fundamental. They are intended to enhance the quality and integrity of the early warning reporting regime by:

- requiring disclosure when a security holder's ownership decreases by 2% or falls below the 10% reporting threshold;
- making the alternative monthly reporting system unavailable to eligible institutional investors that solicit proxies in certain circumstances;
- exempting lenders from including securities lent or transferred for purposes of determining whether they have an early warning reporting obligation for a loan (disposition) if they lend securities pursuant to a "specified securities lending arrangement";
- exempting borrowers that engage in short selling from including securities borrowed for the purposes of determining whether they have reached an early warning threshold in certain circumstances;
- enhancing the disclosure requirements in the early warning report, including with respect to the purpose and intentions of the investor and in respect of disclosure of "related financial instruments" such as equity derivatives, securities lending arrangements and other agreements, arrangements or understandings that have the effect of altering, directly or indirectly, the investor's economic exposure to the securities of the issuer to which the report relates;
- requiring the early warning report to be certified and signed;
- clarifying the timeframe to issue and file a news release and file an early warning report; and
- further streamlining the information required in a news release filed in connection with the early warning requirements.

The amended early warning rules are reflected in NI 62-104, National Instrument 62-103 *Early Warning System and Related Take-Over Bid and Insider Reporting Issues* and National Policy 62-203 *Take-Over Bids and Issuer Bids*.