MERGERS AND ACQUISITIONS IN CANADA

The Basics of Mergers and Acquisitions in Canada

Securities laws in Canada as they pertain to public company M&A transactions can be complex. In order to provide the reader with a basic starting point, this article will summarize the methods used to acquire a public company in Canada.

Regulation

Trading in securities, which includes M&A transactions, is regulated in Canada by securities laws enacted by each of the provinces and territories. These laws are created and enforced by provincial and territorial securities commissions. From time to time, the securities commissions will create multilateral instruments so that certain aspects of securities laws in Canada are effectively harmonized. For example, the securities commissions have substantively harmonized the law governing takeover bids.

Takeover Bid

The vast majority of M&A transactions pertaining to public companies proceed by way of a takeover bid or plan of arrangement. Generally speaking, a takeover bid is a transaction that involves the acquirer making an offer directly to the target company's shareholders to acquire their shares. From a securities law perspective, a takeover bid is any acquisition of, or obtaining control or direction over, securities that would result in the acquirer holding 20 per cent or more of the voting or equity securities of any class of a Canadian public issuer. Once a transaction is a takeover bid, a host of highly technical securities rules and regulations must be observed. Arguably, the most important of these rules is that if an offer is a takeover bid it must be made to all of the security holders of the class on the same terms and conditions. The offer, however, may be for less than all of the securities and, in that case, each security holder has the right to a *pro-rata* take up of their shares. An exemption from the takeover bid rules is available in certain circumstances. The most common is the "private agreement" exemption, whereby purchases may be made by way of private agreement with 5 or fewer vendors if the purchase price (including brokerage fees and commissions) does not exceed 115 per cent of the market price of the securities. The takeover bid rules provide that the offeror may not enter into any collateral agreement, commitment or understanding with any holder or beneficial owner of securities of the target which effectively increases the consideration paid to them. However, in certain circumstances, the rules permit employment and severance arrangements for management and other employees of the target who are also securities holders.

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There are numerous additional detailed rules that apply to takeover bids. These include a requirement that the offeror prepare and mail to the shareholders a circular that must set out prescribed information relating to the transaction and the terms and conditions of the offer. The takeover bid must be filed with the securities commissions but is not subject to a preclearance review.

Conditions

Takeover bids are commonly subject to a number of conditions, including attaining a minimum level of acceptance, frequently 66.6% (the threshold approval for certain fundamental corporate transactions) or 90% (the level that generally gives the purchaser the right to acquire the balance of the securities – commonly referred to as the "compulsory acquisition" or "second stage squeeze out"). Another typical condition requires the buyer to have obtained the necessary regulatory approval. For example, if certain thresholds are met, a pre-merger notification or merger review may be required under Canada's antitrust law set out in the *Competition Act*. Also, the transaction may be subject to review under the *Investment Canada Act* if a foreign purchaser seeks to acquire control of a Canadian business with assets over a specified monetary threshold.

Plan of Arrangement

A friendly acquisition is often effected in Canada by way of a plan of arrangement rather than a takeover bid. A plan of arrangement is a court-approved process that is available under the corporate law that governs the target company. Generally speaking, an arrangement allows the parties to take a broad scope of corporate steps, including the amalgamation of two or more companies, the division of businesses carried on by a corporation, a transfer of property from one body corporate to another, the exchange of securities between companies, the liquidation of a corporation, and any combination of the foregoing. The process is initiated by an arrangement agreement that sets out the basis for the business combination. After the arrangement agreement has been signed, an application is made to court for approval of the process. The court order will require the calling of a shareholder's meeting and specify the shareholder approval thresholds (which are typically two-thirds of the votes cast) and dissent rights. A detailed meeting circular is then sent to the shareholders. The meeting circular provides disclosure equivalent to that set out in a takeover bid circular.

Arrangements are generally considered to offer enhanced flexibility in M&A transactions compared to takeover bids because they are less rule-driven and allow the parties to achieve their corporate goals in a variety of ways.

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