

**NOTICE OF PROPOSED RULE 62-501
UNDER THE SECURITIES ACT AND AMENDMENT TO
ONTARIO SECURITIES COMMISSION POLICY 62-601**

**PROHIBITED STOCK MARKET PURCHASES
OF THE OFFEREE'S SECURITIES BY THE OFFEROR
DURING A TAKE-OVER BID**

Substance and Purpose of Proposed Rule

Proposed Rule 62-501 (the "Proposed Rule") would restrict the circumstances under which an offeror making a take-over bid is permitted, during the course of the bid, to acquire securities of the class for which the bid is made otherwise than pursuant to the bid itself. The Rule would vary the current conditions under which the acquisitions are permitted, as set out in subsection 94(3) of the *Securities Act* (Ontario) (the "Act"), so as to make them similar to the conditions applicable to pre-bid and post-bid purchases as prescribed in subsection 94(7) of the Act.

Part XX of the Act, which regulates take-over bids and issuer bids, contains a number of provisions intended to ensure equal treatment of offeree security holders during a formal take-over bid. Subsection 97(1) of the Act is a general provision which provides that:

"Subject to the regulations, where a take-over bid or issuer bid is made, all holders of the same class of securities shall be offered identical consideration."

As a specific application of this principle, subsection 94(2) prohibits an offeror from offering to acquire or agreeing to acquire securities of any class that are subject to a take-over bid otherwise than pursuant to the bid on and from the date of the announcement of the offeror's intention to make the bid until the bid's expiry. Subsection 94(3) provides a limited exemption from this prohibition by allowing an offeror to purchase up to five percent of the offeree's outstanding securities of the class subject to the bid if the intent to make such purchases is set out in the take-over bid circular and the purchases are made through the facilities of a recognized stock exchange. Where all offeree shareholders have an equal opportunity to sell to the offeror on a stock exchange, reliance on the exemption in subsection 94(3) is consistent with the equal treatment principle in subsection 97(1).

The purpose of the Proposed Rule is to ensure that the equal treatment principle is not violated in the context of purchases made pursuant to the exemption in subsection 94(3). The Proposed Rule would vary the application of subsection 94(3) so that it would apply only to normal course stock exchange trades and would not apply to trades that are arranged privately and subsequently completed or "crossed" on a stock exchange. The Proposed Rule is consistent with the view expressed by the Commission in Part A of OSC Policy 62-601 (formerly OSC Policy 9.3) that pre-arranged acquisitions by a take-over bidder during the course of a bid are, prima facie, private agreements that violate the equal treatment principle and should not be permitted.

The Commission published an earlier version of the Proposed Rule for comment on October 20, 1995 (19 OSCB 4915) (the "1995 Proposal"). The 1995 Proposal was substantially identical to the Proposed Rule contained in this Notice, except that it addressed the additional topic of trades in the offeror's securities during the course of a securities exchange take-over bid. That topic is now being addressed by the Commission separately. The list of commenters on the 1995 Proposal is contained in Appendix A of this Notice and a summary of their comments regarding the subject matter of this Notice, together with the Commission's response to those comments, are contained in Appendix B of this Notice.

Summary of Proposed Rule

The Proposed Rule restricts the application of subsection 94(3) of the Act to unsolicited trades in the normal course on a recognized stock exchange. The Proposed Rule is intended to confine an offeror's purchases during the course of a take-over bid to purchases in which all security holders have an equal opportunity to be the sellers, as in the bid itself.

Authority for the Proposed Rule

Paragraph 143(1)28 of the Act authorizes the Commission to make rules regulating take-over bids, including providing for exemptions from section 94 or removing any exemptions set out in that section.

Alternatives Considered

Since the publication of the 1995 Proposal, the Commission considered two other alternatives in addition to the Proposed Rule.

First, the Commission considered rescinding subsection 94(3) of the Act altogether, thereby prohibiting the offeror from making any purchases of the offeree securities other than as part of the formal bid. However, the Commission is of the view that the offeror's presence as a normal course market purchaser will increase liquidity in the offeree's securities and provide offeree security holders with a greater opportunity to sell their securities prior to the conclusion of any take-over bid if they so choose.

Second, the Commission considered limiting the exemption in subsection 94(3) to cash bids for all the securities of the class for which the offer is made. This would prevent the scenario where, for example, some security holders could sell their entire holdings to the bidder for cash in the open market while others would only be able to sell part of their holdings by tendering to a partial bid. However, the Commission has determined that implementation of the Proposed Rule will provide offeree security holders with adequate protection in the context of a partial take-over bid or securities exchange take-over bid. As purchases by the offeror under the Proposed Rule would have to be made in the normal course through the market, all offeree security holders would have an equal opportunity to be sellers.

Unpublished Materials

In proposing this amendment, the Commission has not relied on any significant unpublished study, report, decision or other unwritten materials.

Anticipated Costs and Benefits

Offeree security holders will benefit under the Proposed Rule as it is designed to provide equal treatment of offeree security holders during a take-over bid. Offeree security holders will also benefit from the enhanced market liquidity in the class of target securities during the bid, as the offeror will have to make all of its purchases by way of normal course purchases and not pre-arranged block trades. The Proposed Rule may impose costs on an offeror by making it more difficult or costly to make large purchases under subsection 94(3). The Proposed Rule may also impose costs on persons wishing to sell large blocks of target securities during a bid, as block trades done by way of pre-arranged trades will be prohibited. The Commission is of the view that the benefits to security holders and the importance of the principle of equal treatment outweigh the costs.

Regulations Revoked or Amended

The Proposed Rule does not require any regulations to be revoked or amended.

Amendment to Policy 62-601

The Commission also proposes to amend OSC Policy 62-601 to revoke Parts A and B as a housekeeping matter. Part A deals with subject matter that is covered by subsection 94(2) and 94(3) of the Act, and is no longer necessary. Similarly, the subject matter of Part B is covered by subsection 94(5) and 94(7) of the Act regarding pre-bid integration.

Comments

Interested parties are invited to make written submissions with respect to the Proposed Rule. Submissions received by March 15, 2002 will be considered.

Submissions should be sent to:

John Stevenson, Secretary
Ontario Securities Commission
20 Queen Street West
Suite 800, Box 55
Toronto, Ontario M5H 3S8
jstevenson@osc.gov.on.ca

A diskette containing the submissions (in DOS or Windows format, preferably WordPerfect) should also be submitted. As the Act requires that a summary of written comments received during the comment period be published, confidentiality of submissions cannot be maintained.

Questions may be referred to:

Ralph Shay
Director, Take-over/Issuer Bids, Mergers & Acquisitions
Ontario Securities Commission
(416) 593-2345

Proposed Rule

The text of the Proposed Rule and the amendment to OSC Policy 62-601 follow:

December 14, 2001.

APPENDIX A

LIST OF COMMENTERS ON ISSUES RELATING TO STOCK MARKET PURCHASES OF THE OFFEREE'S SECURITIES BY THE OFFEROR DURING A TAKE-OVER BID

1. The Toronto Stock Exchange
2. Lang Michener

APPENDIX B

SUMMARY OF WRITTEN COMMENTS RECEIVED ON ISSUES RELATING TO STOCK MARKET PURCHASES OF THE OFFEREE'S SECURITIES BY THE OFFEROR DURING A TAKE-OVER BID AND RESPONSES OF THE COMMISSION

The Commission received two submissions on those provisions of the 1995 Proposal that related to purchases by an offeror of target securities during the course of the bid. The Commission considered these submissions and thanks both commenters for providing them.

The following is a summary of the comments received together with the Commission's responses.

1. Regulation of Purchases by Offerors During Bids - General

Comment

One commenter supported the provisions of the proposed Rule 62-501 requiring secondary market purchases by an offeror during the course of a take-over bid pursuant to the exemption in subsection 94(3) of the Act to be made in the normal course through the facilities of a stock exchange. In this commenter's view, the principle of equal treatment of security holders of the target issuer demands no less. If a security holder chooses to sell into the market, it should be a matter of pure chance that the offeror is on the other side. If the offeror is bidding on the stock exchange, that bid is available to any security holder who chooses to sell at that time, and the market activity may legitimately be characterized as a general offer to all security holders of the class.

Response

The Commission agrees with the commenter's view that the Proposed Rule is consistent with the principle of equal treatment of security holders in the context of a formal bid.

2. Brokers' Services and Compensation - Clause 2.1(b)

As set out in the 1995 Proposal, clause 2.1(b) of the Proposed Rule would prohibit the use of the exemption in subsection 94(3) of the Act for purchases by an offeror during a take-over bid unless, among other things, the offeror's broker did not, in connection with the purchases, perform services beyond the customary broker's functions and did not receive more than the usual fees or commissions charged for comparable services performed by the broker in the normal course. One commenter submitted that these conditions would be unduly restrictive for offerors which, for example, retain an investment dealer to provide advice in connection with a take-over bid and which also retain the same dealer to provide brokerage services in connection with the bid. In this commenter's view, it was arguable that all services provided to the offeror by the dealer in this circumstance were in connection with purchases of target securities during the bid and would result in the dealer performing services beyond the customary broker's functions, as well as receiving more than the usual brokerage fees or commissions. The commenter recommended that the provision be deleted as the other provisions of the Proposed Rule were sufficient to attain the policy objective of the Rule.

Response

The Commission considers the condition regarding the broker's services and compensation as desirable for the purpose of reinforcing the concept that only trades in the normal course are to be permitted under subsection 94(3) of the Act. To address the commenter's concern, the wording of clause 2.1(b) has been changed so as to refer to services and compensation "in regard to" the stock exchange purchases, instead of "in connection with" the purchases.

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PART 1 DEFINITIONS

1.1 Definitions - Offeror

In this Rule, "offeror" has the meaning set out in subsection 94(1) of the Act.

PART 2 PROHIBITED STOCK MARKET PURCHASES OF OFFEREE'S SECURITIES

2.1 Prohibited Stock Market Purchases of Offeree's Securities

Despite subsection 94(3) of the Act, an offeror may not make purchases allowed under that subsection unless

- (a) the purchases are made in the normal course on a stock exchange described in subsection 94(3) of the Act;
- (b) any broker acting for the offeror does not, in regard to the purchases, perform services beyond the customary broker's functions and does not receive more than the usual fees or commissions charged for comparable services performed by the broker in the normal course;
- (c) neither the offeror nor any person or company acting for the offeror solicits or arranges for the solicitation of offers to sell securities of the class subject to the bid, except for the solicitation by the offeror or members of the soliciting dealer group pursuant to the take-over bid; and
- (d) the seller or any person or company acting for the seller does not, to the knowledge of the offeror, solicit or arrange for the solicitation of offers to buy securities of the class subject to the bid.

PART 3 EXEMPTION

3.1 Exemption

The Director or the Commission may grant an exemption to this Rule, in whole or in part, subject to such conditions or restrictions as the Director or Commission may impose.

PART 4 EFFECTIVE DATE

4.1 Effective Date

This Rule comes into force on ! .

AMENDMENT TO ONTARIO SECURITIES COMMISSION POLICY 62-601

Ontario Securities Commission Policy 62-601 is amended by:

1. changing the title of the Policy to “Securities Exchange Take-over Bids -- Trades in the Offeror’s Securities”;
2. deleting Parts A and B; and
3. deleting the heading “**C. Securities Exchange Take-over Bids – Market “Support, Maintenance or Stabilization” vs. Market Balancing Transactions in Accordance with Stock Exchange Rules**”.