

Chapter 6

Request for Comments

6.1.1 Request for Comment - Proposed OSC Rule 62-503 Financing of Take-over Bids and Issuer Bids

PROPOSED ONTARIO SECURITIES COMMISSION RULE 62-503 - FINANCING OF TAKE-OVER BIDS AND ISSUER BIDS

Substance and Purpose of Proposed Rule

The Commission is publishing for comment proposed Rule 62-503 – *Financing of Take-over Bids and Issuer Bids*.

Section 96 of the *Securities Act* (Ontario) (the "Act") provides as follows:

96. Financing of bid – Where a take-over bid or issuer bid provides that the consideration for the securities deposited pursuant to the bid is to be paid in cash or partly in cash, the offeror shall make adequate arrangements prior to the bid to ensure that the required funds are available to effect payment in full for all securities that the offeror has offered to acquire.

The judgment of the Ontario Superior Court of Justice earlier this year in *BNY Capital Corp. v. Katotakis*, reported at [2005] O.J. No. 813, has created some uncertainty regarding the scope of the financing requirement under section 96. The court's judgment included the following statement (at para. 5):

"Adequate arrangements" has been interpreted to mean that there must be accurate, clear and unequivocal assurance that the financing is in place in the sense that a public shareholder contemplating tendering his or her shares to the bid can be unequivocally assured that the funds are available to complete the purchase.

Staff of the Commission has previously taken the position that some conditionality in bid financing arrangements is acceptable, provided that the conditions are customary and minimal. While staff continues to hold this view, a rule is considered necessary to clarify the law in this area in light of the *BNY* judgment.

The proposed rule provides that the financing arrangements may be subject to conditions if, at the time the bid is commenced, the offeror reasonably believes the possibility to be remote that the offeror will be unable to pay for securities deposited under the bid solely due to a financing condition not being satisfied.

In the Commission's view, the proposed rule reflects the general understanding in the legal community as to how section 96 of the Act has been applied in practice. The Commission considered whether to accompany the rule with a companion policy listing the types of financing conditions that likely would be or not be acceptable. The Commission decided against this approach because conditions that may comply with the rule in one factual context may not be suitable in others. The rule is intended to enable the policy objectives of section 96 to be met in a flexible manner, as bidders and lenders will be able to tailor their conditions to the specific circumstances of the transaction.

Authority for the Proposed Rule

Subsection 143(1) of the Act provides the Commission with the authority to make rules regulating take-over bids and issuer bids. Clause 143(1)(iii) explicitly authorizes the making of rules to vary the requirements set out in section 96 of the Act, although the Commission considers the proposed rule to be primarily a clarification of an existing requirement.

Unpublished Materials

In proposing the rule, the Commission has not relied on any significant unpublished study, report or other materials.

Anticipated Costs and Benefits

The Commission believes that market participants, including bidders, lenders and target security holders, will benefit from the removal of the current uncertainty in the area of bid financing. Greater efficiencies will be achieved through reduced transaction costs, including potential costs associated with applications for exemptive relief and legal challenges to bids.

Comments

Interested parties are invited to make written submissions with respect to the proposed rule. Submissions received by October 3, 2005 will be considered.

Submissions should be made to:

John Stevenson, Secretary
Ontario Securities Commission
20 Queen Street West
Suite 1900, Box 55
Toronto, Ontario M5H 3S8
jstevenson@osc.gov.on.ca

A diskette containing the submission in Word format 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:

Naizam Kanji
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416-593-8060

or

Ralph Shay
Director, Take-over/Issuer Bids, Mergers & Acquisitions
416-593-2345

Text of the Proposed Rule

The text of the proposed rule follows.

July 1, 2005

**ONTARIO SECURITIES COMMISSION RULE 62-503 –
FINANCING OF TAKE-OVER BIDS AND ISSUER BIDS**

- 1.1 Financing of Bid** - For the purposes of section 96 of the Act, the financing arrangements required to be made by the offeror prior to a bid may be subject to conditions if, at the time the bid is commenced, the offeror reasonably believes the possibility to be remote that the offeror will be unable to pay for securities deposited under the bid solely due to a financing condition not being satisfied.