

Ontario Securities Commission

National Policy 62-202

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**NATIONAL POLICY 62-202
*TAKE-OVER BIDS - DEFENSIVE TACTICS***

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PART 1 DEFENSIVE TACTICS

Defensive Tactics

1.1 (1) The Canadian securities regulatory authorities recognize that take-over bids play an important role in the economy by acting as a discipline on corporate management and as a means of reallocating economic resources to their best uses. In considering the merits of a take-over bid, there is a possibility that the interests of management of the target company will differ from those of its shareholders. Management of a target company may take one or more of the following actions in response to a bid that it opposes:

1. Attempt to persuade shareholders to reject the bid.
2. Take action to maximize the return to shareholders including soliciting a higher bid from a third party.
3. Take other defensive measures to defeat the bid.

(2) The primary objective of the take-over bid provisions of Canadian securities legislation is the protection of the bona fide interests of the shareholders of the target company. A secondary objective is to provide a regulatory framework within which take-over bids may proceed in an open and even-handed environment. The take-over bid provisions should favour neither the offeror nor the management of the target company, and should leave the shareholders of the target company free to make a fully informed decision. The Canadian securities regulatory authorities are concerned that certain defensive measures taken by management of a target company may have the effect of denying to shareholders the ability to make such a decision and of frustrating an open take-over bid process.

(3) The Canadian securities regulatory authorities have determined that it is inappropriate to specify a code of conduct for directors of a target company, in addition to the fiduciary standard required by corporate law. Any fixed code of conduct runs the risk of containing provisions that might be insufficient in some cases and excessive in others. However, the Canadian securities regulatory authorities wish to advise participants in the capital markets that they are prepared to examine target company tactics in specific cases to determine whether they are abusive of shareholder rights. Prior shareholder approval of corporate action would, in appropriate cases, allay such concerns.

(4) Without limiting the foregoing, defensive tactics that may come under scrutiny if undertaken during the course of a bid, or immediately before a bid, if the board of directors has reason to believe that a bid might be imminent, include

- (a) the issuance, or the granting of an option on, or the purchase of, securities representing a significant percentage of the outstanding securities of the target company,
- (b) the sale or acquisition, or granting of an option on, or agreeing to sell or acquire, assets of a material amount, and

(c) entering into a contract other than in the normal course of business or taking corporate action other than in the normal course of business.

(5) The Canadian securities regulatory authorities consider that unrestricted auctions produce the most desirable results in take-over bids and they are reluctant to intervene in contested bids. However, they will take appropriate action if they become aware of defensive tactics that will likely result in shareholders being deprived of the ability to respond to a take-over bid or to a competing bid.

(6) The Canadian securities regulatory authorities appreciate that defensive tactics, including those that may consist of some of the actions listed in subsection(4), may be taken by a board of directors of a target company in a genuine attempt to obtain a better bid. Tactics that are likely to deny or limit severely the ability of the shareholders to respond to a take-over bid or a competing bid may result in action by the Canadian securities regulatory authorities.

(7) As a general rule, the Canadian securities regulatory authorities will not advise parties as to the propriety of proposed action in a particular case except in the context of a meeting or proceeding of which interested parties have been given notice.

PART 2 EFFECTIVE DATE

Effective Date

2.1 This National Policy comes into force on August 4, 1997.