

5.1.3 Notice of Rule 62-503 - Financing of Take-Over Bids and Issuer Bids

NOTICE OF RULE 62-503 - FINANCING OF TAKE-OVER BIDS AND ISSUER BIDS

Introduction

On October 18, 2005, the Commission made Rule 62-503 – *Financing of Take-over Bids and Issuer Bids* (the “Rule”) under section 143 of the *Securities Act* (the “Act”).

The Rule and the other material required by the Act to be delivered to the Minister of Government Services (the “Minister”) were delivered on October 20, 2005. If the Minister approves the Rule, the Rule will come into force 15 days after it is approved. If the Minister does not approve or reject the Rule, or return it to the Commission for further consideration, the Rule will come into force on January 3, 2006.

Substance and Purpose of the Rule

Section 96 of 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 Rule provides that financing arrangements under section 96 may be subject to conditions if, at the time the bid is commenced, the offeror reasonably believes the possibility to be remote that, if the conditions of the bid are satisfied or waived, the offeror will be unable to pay for securities deposited under the bid due to a financing condition not being satisfied.

The Rule enables 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. The Rule also addresses the uncertainty regarding the scope of section 96 that resulted from the judgment of the Ontario Superior Court of Justice in *BNY Capital Corp. v. Katotakis*, reported at [2005] O.J. No. 813.

The Rule was published for a 90-day comment period on July 1, 2005 at (2005), 28 OSCB 5689. The names of the commenters, a summary of those comments and the Commission’s responses are contained in Appendix A of this Notice. Following review of the comments, the Commission has made minor changes to the Rule for purposes of clarification, as described in Appendix A. The Commission does not consider the changes to be material.

Authority for the Rule

Paragraph 143(1)28 of the Act provides the Commission with the authority to make rules regulating take-over bids and issuer bids. Subparagraph 143(1)28(iii) explicitly authorizes the making of rules to vary the requirements set out in section 96 of the Act, although the Commission considers the Rule to be primarily a clarification of an existing requirement.

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.

Text of the Rule

The text of the Rule follows after Appendix A.

October 21, 2005.

APPENDIX A

SUMMARY OF WRITTEN COMMENTS RECEIVED AND RESPONSES OF THE COMMISSION

The Commission received submissions from Osler, Hoskin & Harcourt LLP and Paul G. Findlay. The Commission thanks the commenters for taking the time to express their views.

Comment: One commenter agreed that the *BNY Capital Corp.* decision has created some uncertainty regarding the scope of the financing requirement under section 96 of the Act, and that it is helpful for the Commission to provide clarification that some conditionality in bid financing arrangements is acceptable.

Response: This comment reflects the informal feedback Commission staff has received generally from the legal community.

Comment: Both commenters were concerned that the remoteness test would prohibit certain bid conditions that were also financing conditions, such as a condition that a minimum number of securities be tendered to the bid. To address this concern, one commenter recommended that the remoteness test apply only to financing conditions that do not mirror bid conditions. The other commenter suggested inserting the words "if the conditions to the bid are satisfied" after "remote that".

Response: To provide clarification that the Rule is only concerned with the circumstance where a bid could fail because of the existence of a financing condition that is not satisfied, the Commission has substantially adopted the second commenter's suggestion and inserted the words "if the conditions of the bid are satisfied or waived" after "remote that". In light of this change, the word "solely" has been removed as not being necessary. The Commission is reluctant to confine the application of the Rule in the manner suggested by the first commenter. Where a financing condition mirrors a bid condition, the possibility exists that the condition could be waived as a bid condition but not as a financing condition. Although this scenario can be prevented in the financing agreement, it should not escape the ambit of the Rule.

Comment: One commenter said that financing arrangements that are in place when a bid is made are typically based on a commitment letter from the lender which contemplates the entering into of a more formal, binding credit agreement that will not be finalized until after the bid is launched. The commenter suggested that the Rule include a statement to the effect that such a commitment letter constitutes "adequate arrangements" for the purposes of section 96 of the Act.

Response: The Commission would not consider a commitment letter to constitute "adequate arrangements" unless, when the bid is launched, the bidder is reasonably confident that the bid will not fail for lack of financing. This is the case presently and would continue to be the case after the Rule comes into effect. The Commission does not believe that the Rule as proposed would interfere with the current practice regarding commitment letters.

Comment: One commenter was concerned that the Rule as drafted seemed to suggest that there could be conditions in the financing arrangements that are not reflected as conditions of the bid, "so long as they are remote". It was not clear to the commenter why that should be allowed, unless the conditions were entirely within the control of the bidder.

Response: The Commission does not wish to place restrictions on financing conditions, as long as there is compliance with the Rule. Financing conditions that are not bid conditions may include, for example, finalization of financing documentation.

**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, if the conditions of the bid are satisfied or waived, the offeror will be unable to pay for securities deposited under the bid due to a financing condition not being satisfied.