

Focus BUSINESS LAW

Firms in regulatory purgatory over takeover changes

Uncertainty in finalizing proposed poison pill, bid period rules may hurt capital markets



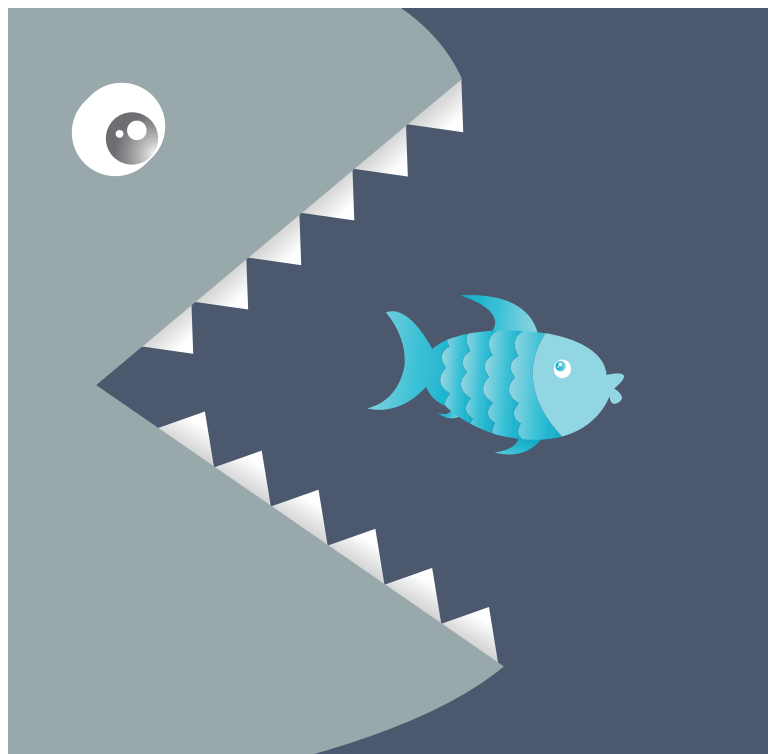
Gordon Raman
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Although we are a country blessed with the vastness of our natural beauty, the vastness of our securities regulatory system over 13 provinces and territories has not generally been considered a structure that promotes regulatory efficiency. Consequently, over time there have been various attempts to bring harmonization to securities rules across these jurisdictions. Sometimes, the period between proposing a change to securities rules and such rules being finalized can lead to the greatest period of uncertainty—a period of regulatory purgatory.

One recent attempt to create harmonization has been in the area of takeover bids—a method by which an acquirer makes an offer directly to shareholders of a public company in order to take over the company. The takeover regime is triggered where a buyer makes an offer to acquire more than 20 per cent of the shares of the public company. In this event, the acquirer is required to make that offer to all shareholders of the company and to leave the offer open for a period of 35 days. The 35-day period is intended to allow the board of the company and its shareholders time to make an informed decision on how to react to the bid.

Over the past few years, securities regulators in Canada have been concerned that the current takeover bid regime is too acquirer friendly and that target company boards do not have sufficient time to react to bids with a view to acting in shareholders' best interests. To address this concern, two separate and distinct proposals were put forth by Canadian securities regulators (collectively known as the Canadian Securities Administrators or CSA).

The CSA proposed changes to how regulators would address a certain type of defensive tactic, called poison pills, adopted by boards in the face of a takeover bid. A poison pill involves the issuance of rights to all shareholders of a company that allows shareholders to acquire shares of the company at a discounted price. The catch is that these rights are exercisable by all shareholders other than the acquirer



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unless the acquirer's bid meets certain requirements. The proposal put forth by the CSA essentially stated that if shareholders of the company approved a poison pill, the regulators would not become involved in regulating poison pills.

The Autorité des Marchés Financiers (the regulator in Quebec) at the same time proposed to introduce a rule that would recognize the fiduciary duty of directors and restrict regulatory intervention in takeover bids to certain limited situations.

These divergent proposals existed for almost two years until the entire CSA made a new proposal in March 2015 to amend the takeover bid regime. The most significant change under the proposal would involve extending the bid period to 120 days from the current 35. The longer period is intended to provide directors with more time to potentially find other interested acquirers or negotiate with the acquirer. Since the time of its proposal, market participants have been waiting for the final takeover bid rules to be enacted.

In the midst of this waiting period, acquirers, target company boards and securities regulators have been attempting to navigate their way through takeover bids and poison pills. The best example of this has been Suncor Energy Inc.'s October 2015 bid for the shares of Canadian Oil Sands Limited (COS). At the time of making the bid, COS had a poison pill in place that provided that the pill would not be triggered if, among other things, a bid had a deposit period of 60 days.

Although Suncor complied with this requirement, the COS board adopted a new poison pill which increased the 60-day requirement to 120 days—effectively matching the bid period under the proposed takeover bid rules.

Suncor applied to the Alberta Securities Commission asking that the new COS poison pill be

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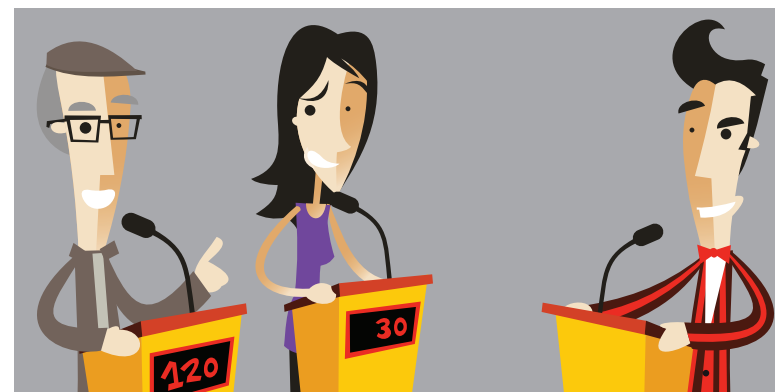
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“cease traded” (rendered ineffective) after a 60-day period as per the original poison pill. COS argued that the original poison pill had been adopted at a different time, and that the 120-day period in its new pill was appropriate in the circumstances and in any event was consistent with the period in the proposed take-

over bid rules. In the end, rather than agreeing with Suncor or COS, the ASC allowed the pill to be effective for 90 days. (Suncor and COS eventually reached mutual agreement on a transaction in January 2016.) The CSA recently released its final version of the new take-over bid regime, which provides for a bid period of 105 days.

While it is important for regulatory changes to be carefully considered, market participants can find themselves in an uncertain regulatory purgatory until some certainty is achieved. Certainty drives the efficient operation of our capital markets. Although some certainty with respect to the new take-over bid regime has been achieved with the CSA's recent announcement, our capital markets are poised for further change with the Cooperative Capital Market Regulatory System (CCMRS) which is to become operational this year. Once again, market participants will eagerly await the finalization of the changes relating to the new system so that their time in regulatory purgatory is at a minimum.

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What is unfair to Canadians, Alex?

Our privacy laws are important but some fans of a popular U.S. game show may think they have gone too far. The Toronto Star reports that on the website of Jeopardy!, Canadians are singled out as ineligible. Producers say they cannot accept Canadians taking the online test that all contestants must undergo. “As international laws governing how information is shared over the Internet are ever-changing and complex, we are currently investigating how we can accept registrations from potential Canadian contestants,” explained spokeswoman Alison Shapiro. Pointing to Canada's Anti-Spam Legislation, McMillan LLP lawyer Ryan Black said the decision could have been triggered by a new feature on the website, or the producers could have just gotten nervous as fines can be up to \$10 million. The show's Canadian host, Alex Trebek, offered some hope. “We have had many Canadians as contestants throughout the history of the show,” he said. “We look forward to having more try out as soon as we are sure we can comply with all Canadian online privacy laws.” — **STAFF**