

NATIONAL POLICY STATEMENT No. 38

TAKE-OVER BIDS - DEFENSIVE TACTICS

1. The Canadian securities administrators 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 may take one or more of the following actions in response to a bid that it opposes:
 - (i) attempt to persuade the shareholders to reject the offer;
 - (ii) take action to maximize the return to shareholders including soliciting a higher offer from a third party; or
 - (iii) take other defensive measures to defeat the bid.
2. The primary objective of take-over bid 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 rules should favour neither the offeror nor the management of the target company, but should leave the shareholders of the offeree company free to make a fully informed decision. The administrators are concerned that certain defensive measures taken by management 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 administrators have determined that it is inappropriate at this time 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 rules that might be insufficient in some cases and excessive in others. However, the administrators 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 prior to a bid if the board of directors has reason to believe that an offer might be imminent, include:
 - (i) 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;

- (ii) the sale or acquisition, or granting of an option on, or agreeing to sell or acquire, assets of a material amount; and
 - (iii) 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 administrators consider that unrestricted auctions produce the most desirable results in take-over bids and is reluctant to intervene in contested bids. However, the administrators will take appropriate action where 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 administrators appreciate that defensive tactics, including those that may consist of some of the actions listed in paragraph 4, may be taken by a board of directors in genuine search of a better offer. It is only those tactics that are likely to deny or severely limit the ability of shareholders to respond to a take-over bid or a competing bid, that may result in action by the administrators.
- 7. As a general rule, the administrators or their staffs 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.