



In that regard, the stated aim of the regulation is to ensure equitable treatment for majority and minority shareholders by ensuring their right to sell their shares in connection with a takeover of the company.

Where the acquirer receives acceptances from the target's shareholders amounting to 90% of the nominal value of those shares or of the shares of a particular class (excluding the acquirer's own shares), then the acquirer may effect a "compulsory acquisition" of all the remaining shares, subject to CMA and target shareholder approval.

As alluded to at the outset, this Part 1 is focused on the duties and obligations of certain key players in an M&A transaction under the new regulation. The regulation imposes a general set of duties and obligations (a code of conduct if you will), on all parties involved in M&A transactions. Additionally, there are other specific duties focused primarily on the board of directors of the target company, the acquirer itself, and the CMA licensed adviser representing the acquirer. We consider each in turn...

#### ➤ **Duties and obligations of all actors**

*The new regulation devotes a considerable amount of discussion to issues of transparency and fairness. In that regard a "code of conduct" is imposed on all persons involved in M&A transactions, irrespective of their role in the transaction; namely, all such persons must:*

- ✓ provide majority and minority shareholders alike fair and equal opportunity to assess the pros and cons of the transaction;
- ✓ provide fair and equal treatment to all of the target shareholders, in particular the minority shareholders;
- ✓ ensure that information is not furnished to the target shareholders on a selective basis, except where the information is furnished in confidence to a *bona fide* potential acquirer by the target or vice versa;<sup>v</sup>
- ✓ treat documents or advertisements addressed to target shareholders containing information, opinions or recommendations from the board of directors of the acquirer or target, or their respective advisers with the same standards of care as if such documents or advertisements were a prospectus; and
- ✓ prohibit the creation of false markets (i.e. price distortions) in the securities of any party with a stake in the transaction.

#### ➤ **Duties and obligations of the target company's board of directors**

Where a target company's board of directors has received a bona fide takeover offer or has reason to believe that such an offer is imminent, it must:

- ✓ safeguard the interests of the target as a whole;
- ✓ not take any action or make any decision without the approval of its shareholders (at a general meeting) or the CMA, which could result in:
  - any take-over offer being frustrated;<sup>vi</sup> or
  - the target shareholders being denied an opportunity to decide on the merits of the take-over offer;
- ✓ seek advice from advisers on the merits of the M&A transaction;
- ✓ within 10 days of the offer by the acquirer, provide its opinion/comments on the take-over offer (including with respect to the deal consideration offered by the acquirer), via a circular delivered to each target shareholder;
- ✓ disclose in its circular to the target shareholders all information<sup>vii</sup> known by the board or any expert appointed by it that the target shareholders (and their

advisers) would reasonably require and expect to find in such circular for the purpose of making an informed assessment as to the merits of accepting or rejecting the take-over offer and the extent of the risks involved in doing so; and

- ✓ Abstain from making any recommendation with regards to the take-over offer, if they have an actual or potential conflict of interest in the proposed transaction.

#### ➤ **Duties and obligations of the acquirer**

Under the proposed regulation, any person who intends or is obliged to make a take-over offer, effect an acquisition, undertake a compulsory acquisition or who intends to apply for an exemption from the provisions of the regulation must appoint and seek advice from an adviser who is an "Issue Manager" licensed by the CMA.<sup>viii</sup>

#### ➤ **Duties and obligations of the appointed adviser**

Because an "adviser" for purposes of the regulation must be a CMA licensed Issued Manager, such parties play a critical role in the transaction and have a heightened level of responsibility.

In addition to abiding by all of the pertinent provisions of the CML, an adviser giving advice in relation to an M&A transaction or any application for exemption must:

- ✓ provide objective and appropriate advice that would enable the persons concerned to make informed decisions;
- ✓ facilitate early consultation with and consideration by the CMA (if necessary) to enable prompt action by persons involved in an M&A transaction;
- ✓ ensure that the acquirer is able and will continue to be able to implement the take-over before the obligation to do so is triggered;



CMA's Board, which determine: (i) the persons included in such participation; (ii) the mechanism and procedures of acquisition; (iii) exceptions; (iv) minimum information to be disclosed; (v) guarantees to be provided before the execution of the purchasing process; (vi) methods of determining the purchase price; (vii) situations in which it is mandatory to buy all of the company's shares; (viii) situations in which the minority shareholders are obliged to sell their shares; and (ix) any other provisions."

<sup>v</sup> Note while the law does not stipulate specific requirements, it could be safely presumed (and prudence would dictate) that a formal confidentiality and non-disclosure agreement be entered into before any party makes a selective disclosure.

<sup>vi</sup> Note, this is a very sweeping prohibition against "poison pills" and similar such deal protection devices. Specifically, the regulation enumerates and prohibits a number of actions by the target board of directors that could be considered as "frustrating" the transaction, including: • the issuance of any authorized but unissued shares of the target; • the issuance or granting of options in respect of any unissued shares of the target company; • the creation or issuance or permitting the creation or subscription of any shares of the target company; • the sale, disposal of or acquisition or agreement to sell, dispose of or acquire assets of the target of a material amount; • the entering into a contract or allowing contracts for or on behalf of the target to be entered into otherwise than in the ordinary course of business of the target; • the disposal of assets or liabilities that is a condition to the take-over offer; • the selling of treasury shares into the market; or • any action which may cause the target or any subsidiary or associated company of the target to purchase or redeem shares in the target or provide any financial assistance for any such purchase or redemption.

<sup>vii</sup> Note that the plain language of the provision speaks to disclosure of "all information" – which is not qualified by materiality. However elsewhere in the regulation "material information" is the standard for disclosure, so it appears that there may be some potential for ambiguity. However, it is more likely that "all material

information" would be the standard adopted in the final release of the regulation. The regulation also imposes an affirmative due diligence obligation on the target's board of directors by imputing "knowledge" for information that would be able to obtain by the board (and its advisers) by making such "enquiries that were reasonable in the circumstances."

<sup>viii</sup> Under Article 13 of the Executive Regulations of the CML (Decision No. 1/2009), an "Issue Manager" has a broad scope of responsibilities and duties as relates to capital markets transactions, including, amongst others, to provide advice on capital restructurings, acquisitions and take-overs, to conduct professional due diligence investigations regarding the issuers of securities, to file the prospectus with the CMA, and to obtain the CMA's approval for marketing and promotional activities.

<sup>ix</sup> For the purpose of rebutting the presumption that two or more persons are acting in concert with one another, the CMA may take into consideration the following factors: • the pattern, volume, timing and prices of shares or rights purchased by such persons; • voting pattern of the shares or rights by such persons and any business activities in common or other ties; • any financial dependence between such persons; • animosity/hostility amongst the persons acting in concert; or • any other factors as may be determined by the CMA.

<sup>x</sup>The following persons are also considered to be persons acting in concert: • a company, the directors of the company, and the shareholders of the company where there is an agreement, arrangement or understanding between the company or directors of the company, and shareholder of the company which restricts the director or the shareholder from: (i) offering or accepting a take-over offer for the voting shares or voting rights of the company; or (ii) increasing or reducing his shareholdings in the company; and • a person who is a partner of a partnership (i.e. means two or more persons having a business arrangement and common interest in several companies between them)