

A NEWSLETTER FROM
MANNHEIMER SWARTLING

JANUARY 2015

Swedish Takeovers – Legal Update



CONTACT

If you have any questions about this Legal Update, please contact any of the following members of Mannheimer Swartling's Public M&A and Equity Capital Markets Group:

STOCKHOLM

Eva Hägg, eva@msa.se
+46 709 777 460

Thomas Wallinder, tw@msa.se
+46 709 777 413

Patrik Marcelius, pam@msa.se
+46 709 777 339

Nina Svensson, nsv@msa.se
+46 709 777 471

Emil Boström, emb@msa.se
+46 709 777 112

MALMÖ

Hans Petersson, hpe@msa.se
+46 709 777 866

Madeleine Rydberger, mry@msa.se
+46 709 777 870

HELSINGBORG

Åsa Hansdotter, ask@msa.se
+46 709 777 209

GÖTEBORG

Johan Ljungberg, jljg@msa.se
+46 709 777 631

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Revised Swedish takeover rules

INTRODUCTION

The Swedish Corporate Governance Board has recently published revised Takeover Rules. The revised rules will enter into force on 1 February 2015. This alert summarises certain proposed key changes.

OFFER-RELATED ARRANGEMENTS

Under the revised rules the target company will be prohibited from entering into offer-related arrangements without a dispensation from the Swedish Securities Council. Similar to the UK takeover regime, such arrangements include any arrangement between the bidder and the target that imposes an obligation on the target. Typical examples of prohibited arrangements would include no-shop provisions, break fees and matching rights. However, commitments to maintain confidentiality and commitments not to solicit the bidder's employees, customers or suppliers are not captured by this prohibition. Possible grounds for waiver of the prohibition include combination agreements that impose reciprocal obligations on the parties, arrangements with a competing bidder where the target is subject to an unrecommended bid, and arrangements with a bidder whose bid the target decides to recommend following a sale process initiated by the target.

FIRM STATEMENTS

The revised rules provide that if a bidder has made a public statement as to any course of action that it will or will not take in relation to the offer, it will be bound by such statement if it is likely to have been relied upon by market participants. This requirement is targeted at no increase statements, no extension statements and no waiver statements. If the bidder has made specific reservations to the relevant statement, the statement may be set aside in accordance with such reservations.



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OFFERS TO HOLDERS OF WARRANTS AND CONVERTIBLES

The Takeover Rules generally require offers to holders of warrants and convertibles to be “fair”. The revised rules include additional guidance on what is considered a fair offer to holders of warrants and convertibles. An offer that reflects the see-through value of the relevant securities will normally be considered fair. The see-through value of a warrant is calculated as the absolute value of the difference between the offer price for the underlying share and the strike price of the warrant. However, where the theoretical market value of each warrant, calculated on the basis of the circumstances immediately prior to the announcement of the bid (i.e. not on the basis of the offer value) is higher than the see-through value, the bidder would normally be required to offer at least the theoretical market value. In order to be fair, an offer reflecting the theoretical market value of the relevant securities may need to be made at a premium determined in light of the premium reflected in the offer for the underlying shares.

CALCULATION OF THE HIGHEST PRICE PAID FOR ACQUISITIONS OF TARGET SHARES OUTSIDE THE OFFER

The Takeover Rules provide that an offer price must not be less than the highest price paid by the bidder for shares in the target during the six months prior to the announcement of the offer or during the course of an offer. Similarly, for a period of six months from the commencement of payment of the consideration in a public offer, the bidder may not acquire shares in the target at a price higher than the offer price, unless the bidder pays additional consideration to the shareholders who accepted the original offer to make up for the price difference.

The revised rules include additional guidance on the calculation of the highest price paid. Where the consideration for an acquisition of target shares outside the offer consists of shares, the value of such shares will normally be calculated on the basis of the volume-weighted average price paid during the last complete trading day prior to the acquisition. Similarly, where the consideration for an acquisition of target shares outside the offer consists of cash and the offer is an exchange offer, the value of the offer is normally calculated on the basis of the volume-weighted average price paid for the offer shares during the last complete trading day prior to the announcement of the offer.

RECOGNITION OF CHINESE WALLS

The revised rules overturn the practice of the Swedish Securities Council and recognize that Chinese walls may be put in place in order to prevent parties from being deemed to be acting in concert for the purposes of acquisitions of target shares outside the offer (and the impact such acquisition may have on the offer consideration). As to requirements regarding the adequacy and effectiveness of Chinese walls, the revised rules refer to Article 9.1 of Regulation (EU) No 596/2014 of the European Parliament and of the Council (MAR). The internal arrangements and procedures therefore need to ensure that neither the natural person who made the decision to acquire target shares, nor any other person who may have had an influence on that decision, was aware of the potential bid, and that the natural person was not encouraged or induced to acquire target shares.

PERIOD FOR EXERCISING WITHDRAWAL RIGHTS

The revised rules extend the period for exercising the right to withdraw acceptances following the announcement of a supplement to the offer document. The revised rules introduce gold-plating by extending this period from two to five business days.

REQUIREMENT FOR TARGET AUDITOR REVIEW ABOLISHED

The revised rules abolish the requirement for target auditor review of the offer document. The requirement for the bidder’s auditor to review the bidder’s historical financial information and any pro forma financials set out in exchange offer documents (prospectuses or equivalent documents) remain unchanged.

OTHER RECENT RULE CHANGES

During the first half of 2014 amendments to the Takeover Rules were adopted to increase target shareholder protection on statutory mergers and merger-like acquisitions, including amalgamations. The amendments require: (i) resolutions by the general meeting of a target company to approve a merger to be adopted by two-thirds majority; and (ii) any target shares held by the surviving entity to be disenfranchised for the purposes of the shareholder vote. The amendments reflect changes to the Swedish Companies Act that were introduced in 2009 and are targeted at non-Swedish targets where the laws of the jurisdiction in which the target is incorporated would otherwise enable a major shareholder of the target to squeeze out the other shareholders by a shareholder vote. The scope of the revised rules has also been extended to cover statutory mergers and merger-like acquisitions, except for certain rules that are less relevant to mergers, such as the rules relating to the acceptance period and withdrawal rights.

Mannheimer Swartling is the leading business law firm in the Nordic region. Our public M&A and equity capital markets practitioners are widely recognized for their high level of expertise and extensive experience. We advise bidders, targets and financial advisers on all aspects of public M&A deals. Our work covers the full range of equity capital market transactions, including IPOs, rights issues, issuances of convertibles and exchangeable securities and other form of placings. We advise a broad range of market participants, including

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