

SECURITIES REGULATORS LOOKING FOR MARKET COMMENTARY ON SOLICITING DEALER AGREEMENTS

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On April 12, 2018, the Canadian Securities Administrators (the “**CSA**”) published CSA Staff Notice 61-303 and Request for Comment *Soliciting Dealer Arrangements* (the “**Staff Notice**”). The Staff Notice reflects the CSA’s wish to deepen its understanding of the use of soliciting dealer arrangements and the commentary solicited in the Staff Notice will assist the CSA in determining whether additional guidance or regulations with respect to such arrangements are appropriate.

What Are Soliciting Dealer Arrangements?

Soliciting dealer arrangements generally refer to agreements entered into between issuers and one or more registered investment dealers pursuant to which the issuer agrees to pay to the dealer a fee for each security successfully solicited from securityholders to: (i) vote in connection with a matter requiring securityholder approval; or (ii) tender securities in connection with a take-over bid. Such arrangements have also been used to incentivize dealers to contact securityholders to participate in a rights offering or exercise rights to redeem or convert securities, or otherwise in connection with corporate transactions to attain the requisite quorum for amendments to documents affecting the rights of securityholders.

In recent years, these types of arrangements have drawn increased market attention as a result of the use of such arrangements in connection with proxy fights and contested director elections, including the 2013 proxy contest initiated by JANA Partners LLC for Agrium Inc. and the 2017 proxy contest initiated by PointNorth Capital Inc. for Liquor Stores N.S. Ltd. In these two instances, the reporting issuer made payments to soliciting dealers on a success basis, specifically, for votes cast in favour of the election of the issuer’s incumbent nominee directors. Ordinarily, the fees for soliciting arrangements are subject to a minimum or a maximum.

Overall Challenges with Soliciting Dealer Arrangements

Soliciting dealer arrangements raise a number of securities regulatory issues and corporate law concerns. From the perspective of the dealer, they raise issues respecting appropriate disclosure and management of conflicts of interest with respect to the solicitation of their clients as well as certain risks associated with the rules governing solicitations of proxies. In particular, with respect to the solicitation of proxies, National Instrument

51-102 – *Continuous Disclosure Obligations* provides that no person or company shall engage in proxy solicitation without mailing to securityholders a proxy circular containing prescribed information. Subject to certain exceptions, “solicitation” includes “requesting a securityholder to execute or not execute a form of proxy” and “sending other communication to a securityholder under circumstances that to a reasonable person will likely result in the giving, withholding or revocation of a proxy”.

From the perspective of the issuer, these arrangements may raise public interest concerns regarding the integrity of the bid tendering process in a take-over bid transaction or securityholder vote in other corporate transactions. The use of such arrangements in proxy contests also trigger corporate law concerns surrounding fiduciary duties of directors.

CSA Questions for Comment

The CSA is requesting both general feedback on the use of soliciting dealer arrangements and feedback to a number of specific questions. A sampling of such questions is set forth below with the full list of questions available [here](#).

1. Are soliciting dealer arrangement fees typically only paid in respect of votes “for” management’s recommendations? Is that appropriate in all circumstances? Is there a reason to distinguish proxy contests in this regard?
2. Do you think that the potential conflict of interest on the part of an investment dealer or a dealing representative can be effectively managed? Does the answer depend on the type of transaction at hand?
3. Are there circumstances in which you think it would be contrary to the public interest or inconsistent with a board of directors’ fiduciary duties for an issuer to enter into a soliciting dealer arrangement or retain a proxy solicitation firm?
4. Can a board of directors comply with its fiduciary duties if it pays soliciting dealer fees for all votes, including votes that are contrary to the board’s recommendation as to what is in the best interests of the corporation?

Are there particular transactions which give rise to more or less concern with respect to the use of soliciting dealer arrangements?

The CSA has also invited market participants for their view on the type of communication and/or disclosure to be made by issuers on the one hand, and investment dealers and their registered representatives, on the other hand, in connection with these types of arrangements including disclosure as to their mere existence.

In addition, the CSA is requesting confirmation from market participants on whether the commonly tendered rationale for the use of such arrangements remains true, namely, whether they are important to the ability of

issuers to contact retail investors.

Deadline for Submission of Comments to Staff Notice

The comment period for submitting feedback to the Staff Notice ends on June 11, 2018.

by Leila Rafi and Josh Freedman

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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