CSA/ACVM Canadian Securities Administrators Autorités canadiennes en valeurs mobilières

CSA Staff Notice 61-303 and Request for Comment
Soliciting Dealer Arrangements

April 12, 2018

Introduction

This notice outlines certain issues that staff of the Canadian Securities Administrators (**CSA**) have identified with respect to the use of soliciting dealer arrangements. Staff are publishing this notice for a 60-day comment period to better understand these arrangements to aid the CSA in assessing whether any additional guidance or rules in respect of those arrangements would be appropriate. In addition to any general comments, we also invite comments on the specific questions set out at the end of the notice.

Substance and Purpose

(a) Soliciting dealer arrangements

"Soliciting dealer arrangements" generally refer to agreements entered into between issuers and one or more registered investment dealers under which the issuer agrees to pay to the dealers 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. These arrangements may also be 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.

The fees for soliciting dealer arrangements are typically subject to a minimum or maximum. In a number of cases, the payment of any fee is contingent on "success" and/or only if a securityholder votes in a particular manner (e.g., only "for" or only "against" a transaction).

(b) Use of soliciting dealer arrangements

Recently, there have been instances of soliciting dealer arrangements in connection with contested director elections, the most prominent examples being 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 each of those proxy contests, the issuer made payments to soliciting dealers only for votes cast in favour of the election of its own incumbent nominee directors and the soliciting dealer fees would only be paid if the incumbent slate was elected.

We understand that the use of soliciting dealer arrangements is not uncommon in take-over bids and plan of arrangement transactions. In a take-over bid transaction, the bidder may retain a dealer manager to form a group of soliciting dealers who receive compensation for soliciting

securityholders to tender to the bid. In a plan of arrangement, either the target or the purchaser may pay the soliciting dealers a fee per security for securities voted in favour of the transaction.

One rationale that issuers have given for entering into soliciting dealer arrangements is that it may be difficult to reach out to, and communicate directly with, retail investors who are objecting beneficial owners (**OBOs**) under National Instrument 54-101 *Communication with Beneficial Owners of Securities of a Reporting Issuer* (**NI 54-101**). While proxy solicitation firms retained by an issuer may be able to communicate with non-objecting beneficial owners, and may have insights with respect to holdings by significant holders, they are not able to contact retail OBOs.

(c) IIROC rules

Rule 42 *Conflicts of Interest* (**Rule 42**) of the Investment Industry Regulatory Organization of Canada (**IIROC**) imposes obligations on each "Approved Person" and each "Dealer Member", in the event an existing or potential material conflict of interest has been identified. While IIROC indicates that its rules do not create a fiduciary standard, its rules do require that any material conflict be considered and addressed in a "fair, equitable and transparent manner, and consistent with the best interest of the client or clients". If the material conflict of interest cannot be addressed in this manner, Rule 42 provides that the conflict must be avoided. Where a conflict has not been avoided, it must be disclosed to the client in all cases where a reasonable client would expect to be informed. However, IIROC guidance indicates disclosure alone does not resolve a conflict.

(d) Canadian proxy solicitation rules

National Instrument 51-102 *Continuous Disclosure Obligations* (**NI 51-102**) prohibits any person or company from engaging in proxy solicitation without mailing to securityholders a proxy circular containing prescribed information. "Solicit" is defined broadly to include "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".

NI 51-102 provides certain exclusions from the definition of "solicit", such as

- performing ministerial or professional services on behalf of a person or company soliciting a proxy;

- sending, by an intermediary as defined in NI 54-101, the documents referred to in NI 54-101; and

- communicating, *provided that the communication is not a solicitation by or on behalf of management of the reporting issuer* [emphasis added], with securityholders as clients, by a person or company who gives financial, corporate governance or proxy voting advice in the ordinary course of business, provided that

- the person or company discloses to the securityholder any significant relationship with the reporting issuer and any material interests the person or company has in relation to a matter on which advice is given,
- the person or company only receives a special commission or remuneration from the recipients of the advice, and
- the advice is not given by or on behalf of any person or company soliciting proxies.

(e) Regulatory issues with soliciting dealer arrangements

Soliciting dealer arrangements raise certain securities regulatory issues. From the perspective of the dealer, they raise issues respecting appropriate management of conflicts of interest as well as risks associated with potential solicitations of proxies. From the perspective of the issuer, soliciting dealer arrangements raise public interest-related questions as to whether those arrangements affect the integrity of the tendering process or securityholder vote, including by potentially being used to entrench the board and management.

Request for Comments

We welcome your comments and feedback on the use of soliciting dealer arrangements. In addition to any general comments you may have, we also invite comments on the following specific questions.

General

1. In what circumstances are soliciting dealer arrangements most typically used?

2. What are the principal reasons for entering into soliciting dealer arrangements?

3. 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?

4. Are soliciting dealer arrangements important to the ability of issuers to contact retail OBOs?

Investment dealers and dealing representatives

5. Do you think that the potential conflict of interest on the part of an investment dealer or a dealing representative can be effectively managed?

    a. If so, what steps should an investment dealer take to appropriately manage or avoid the conflict of interest? What steps should a dealing representative take, beyond disclosure, to appropriately manage or avoid the conflict of interest?

b. Does the answer differ depending on whether the transaction is
    i. a take-over bid tender,
    ii. a securityholder vote in relation to a merger or acquisition transaction,
    iii. a securityholder vote to amend the terms of a security, or
    iv. a securityholder vote in the context of a proxy contest?

c. In the context of a securityholder vote in relation to a merger and acquisition transaction, does the answer to #5 differ depending on whether the fee is contingent on the securityholder voting in favour of the transaction and/or the transaction being approved?

d. In the context of a proxy contest, does the answer to #5 differ if the fee is contingent on the securityholder voting in favour of management's nominees and/or management's nominees being elected?

e. What type of communication and disclosure by investment dealers and dealing representatives should be made to the securityholder respecting the existence of a soliciting dealer arrangement?

6. Do you think that there are circumstances in which it would never be appropriate for an investment dealer to enter into a soliciting dealer arrangement? If so, please discuss what such circumstances would be.

7. Are soliciting dealer fees paid to investment dealers and/or dealing representatives in connection with securities held in managed accounts? If so, in what circumstances?

8. How can investment dealers and dealing representatives participating in a soliciting dealer arrangement in respect of a proxy contest ensure compliance with the proxy solicitation rules?

9. Are investment dealers and/or dealing representatives involved in proxy contests where a proxy solicitation firm has been retained?

10. Do you believe that an investment dealer or a dealing representative has a responsibility to encourage its client to respond to proxy solicitations, rights offerings, take-over bids or other corporate transactions such as conversion of convertible securities?

Issuers

11. 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
    a. enter into a soliciting dealer arrangement?
    b. retain a proxy solicitation firm?

    If so, please discuss what such circumstances would be.

12. 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?

13. Are there particular transactions which give rise to more or less concern with respect to the use of soliciting dealer arrangements, e.g.,
    a. a take-over bid tender,
    b. a securityholder vote in relation to a merger and acquisition transaction,
    c. a securityholder vote in relation to a merger and acquisition transaction, where the fee is contingent on the securityholder voting in favour of the transaction and/or the transaction being approved,
    d. a securityholder vote in the context of a proxy contest, or
    e. a proxy contest, where the fee is contingent on the securityholder voting in favour of management's nominees and/or management's nominees being elected.

14. What type of communication and disclosure should an issuer make to securityholders respecting the existence of a soliciting dealer arrangement?

Please submit your comments in writing on or before June 11, 2018. If you are not sending your comments by email, please send a CD containing the submissions (in Microsoft Word format).

Address your submission to all members of the CSA as follows:

Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Financial and Consumer Services Commission (New Brunswick)
Manitoba Securities Commission
Nova Scotia Securities Commission
Nunavut Securities Office
Office of the Superintendent of Securities, Newfoundland and Labrador
Office of the Superintendent of Securities, Northwest Territories
Office of the Yukon Superintendent of Securities
Ontario Securities Commission
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island

Please deliver your comments *only* to the addresses below. Your comments will be distributed to the other participating members of the CSA.

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consultation-en-cours@lautorite.qc.ca

We cannot keep submissions confidential because securities legislation in certain provinces requires publication of the written comments received during the comment period. All comments received will be posted on the websites of each of the Alberta Securities Commission at www.albertasecurities.com, the Ontario Securities Commission at www.osc.gov.on.ca and the Autorité des marchés financiers (www.lautorite.qc.ca). Therefore, if you do not want it published, you should not include personal information directly in your comments. It is important that you state on whose behalf you are making the submission.

Questions

Please refer your questions to any of the following:

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