

APRIL 13, 2018

CSA Reviewing and Seeking Comments on Soliciting Dealer Arrangements in Proxy Contests and Corporate Transactions

Authors: [Gilles R. Comeau](#), Steven M. Harris and Jennifer F. Longhurst

On April 12, 2018, the Canadian Securities Administrators (CSA) published Staff Notice 61-303 and Request for Comment – *Soliciting Dealer Arrangements* (the Notice) outlining issues identified by staff in respect of the use of soliciting dealer arrangements in proxy contests and corporate transactions. The CSA is requesting comments generally, and in respect of specific questions set out in the Notice, to help the CSA better understand soliciting dealer arrangements and assess whether additional guidance or rules would be appropriate.

Background on Soliciting Dealer Arrangements

Soliciting dealer arrangements generally refer to agreements entered into with one or more registered investment dealers pursuant to which dealers are paid a fee for each security successfully solicited to: (i) vote in connection with a matter requiring securityholder approval, or (ii) be tendered to a takeover bid. These arrangements may also be used to incentivize dealers to contact securityholders to encourage them to participate in a rights offering or exercise rights to redeem or convert their securities, or otherwise in connection with corporate transactions to attain the requisite quorum for amendments to documents affecting securityholders' rights.

Historically, the use of soliciting dealer arrangements has been fairly common, and relatively uncontroversial, in merger and acquisition transactions structured by way of takeover bid or plan of arrangement. In these circumstances, the soliciting dealers are typically paid a commission by the acquirer for each security that is tendered to the bid or voted in favour of the arrangement.

Soliciting dealer arrangements received significant attention when Agrium Inc. employed the controversial strategy of paying fees to dealers to help elect its slate of director nominees in defence of a proxy contest launched by JANA Partners LLC in 2013. In that contest, Agrium agreed to pay the soliciting dealers a commission for each share voted in favour of its nominees, subject to specified minimums and maximums, and conditional on Agrium's entire incumbent slate being elected. Agrium was heavily criticized by institutional shareholders, corporate governance watchdogs and the media for the use of this tactic.

After the fallout from the Agrium proxy contest, it was expected that the practice of paying soliciting dealers to secure votes "for" management nominees in contested director elections would be abandoned. However, in 2017, the strategy was revived by Liquor Stores N.A. Ltd. in the proxy contest launched by PointNorth Capital Inc. Liquor Stores had a large retail shareholder base consisting of objecting beneficial owners (OBOs) that could not be reached by its proxy solicitors. Purportedly in an effort to reach these shareholders and in the name of "shareholder democracy," as well as to convince investors to support Liquor Stores' management nominees, Liquor Stores agreed to pay soliciting dealers a commission for each share voted in favour of its nominees, conditional on the entire slate being elected. PointNorth applied to the Alberta Securities Commission (ASC) seeking an order to halt these arrangements, arguing, among other things, that using company money to buy votes for the incumbent nominees' re-election was a violation of the Liquor Stores board's fiduciary duties. Following a hearing, the ASC declined to intervene on the basis that soliciting dealer arrangements were not expressly prohibited under applicable laws and the practice was not clearly abusive to capital markets. Despite this, objections to Liquor Stores' soliciting dealer arrangements weakened the support of proxy advisory firms and institutional shareholders for Liquor Stores' nominees, and PointNorth was ultimately successful in electing all six of its nominees to the Liquor Stores board.

CSA Notice, Issues and Questions

In the Notice, CSA staff notes that soliciting dealer arrangements raise securities regulatory issues from the perspective of both issuers implementing these arrangements and dealers participating in them. More specifically, soliciting dealer arrangements raise public interest questions relating to the integrity of the tendering process and the securityholder voting system, including by potentially being used by an issuer to entrench its board or management.

In addition, soliciting dealer arrangements raise concerns under Investment Industry Regulatory Organization of Canada (IIROC) rules regarding the ability of dealers to effectively manage potential conflicts of interest that arise as a result of them receiving commissions for soliciting votes or tenders. Dealers participating in soliciting dealer arrangements must also ensure they do not breach the proxy solicitation rules under securities laws, which generally prohibit the solicitation of proxies without mailing a proxy circular, subject to certain exemptions, containing strict requirements that must be adhered to in order to be relied upon.

In addition to soliciting general feedback on soliciting dealer arrangements, CSA staff also invites comments on specific questions set out in the Notice, including on the following topics:

- the typical circumstances in which soliciting dealer arrangements are used, and the principal reasons for using them
- particular transactions that give rise to more or less concern with respect to soliciting dealer arrangements (i.e., takeover bids, other M&A transactions, proxy contests, etc.)
- the appropriateness of soliciting dealer arrangement fees being paid only in respect of votes cast “for” management’s recommendations, and whether to distinguish proxy contests from other transactions
- whether and how investment dealers’ potential conflicts of interest can be effectively managed in these arrangements
- how dealers participating in soliciting dealer arrangements can ensure compliance with the proxy solicitation rules
- circumstances in which it would be contrary to the public interest or inconsistent with directors’ fiduciary duties to enter into a soliciting dealer arrangement or retain a proxy solicitation firm
- communications and disclosure to be made to securityholders in respect of soliciting dealer arrangements.

Comments in response to the Notice are due by June 11, 2018.

Key Contacts: [Gilles R. Comeau](#), [Franziska Ruf](#) and [Olivier Désilets](#)