Goodmans LLP Update

Canadian Securities Regulators Shine Spotlight on Soliciting Dealer Arrangements

On April 12, 2018, the Canadian Securities Administrators (CSA) published CSA Staff Notice 61-303 and Request for Comment – *Soliciting Dealer Arrangements*. The Staff Notice seeks broad feedback about if and when soliciting dealer arrangements should be permitted, following certain high profile situations in which these arrangements were used somewhat controversially. While no specific rule changes are being proposed at this time, it seems clear regulators are focused on how companies are using soliciting dealer arrangements and their impact on investors and our capital markets.

Soliciting Dealer Arrangements

Soliciting dealer arrangements are agreements entered into between issuers and one or more registered investment dealers (i.e., brokers) whereby the issuer pays the participating brokers a relatively small fee (usually subject to a minimum and maximum) for soliciting their clients to vote in favour of a transaction or other matter, or tender their shares to a take-over bid. One of the rationales companies often provide for adopting soliciting dealer arrangements is their inability to communicate with certain beneficial shareholders (referred to as "objecting beneficial owners") who can only be contacted by their broker and whose instructions are required to vote or tender their shares. While not specifically regulated by corporate or securities laws, soliciting dealer fees can raise a number of legal issues depending on the circumstances, including the duty of brokers to manage conflicts of interest, securities laws governing proxy solicitation, the fiduciary duties of boards and public interest issues.

Historically, soliciting dealer arrangements have primarily been used – relatively uncontroversially – in take-over bids and some M&A voting transactions (such as plans of arrangement). More recently, however, these arrangements have been used in proxy contests to solicit votes in favour of the incumbent board, including by the boards of EnerCare (in defending against the campaign by Octavian Advisors in 2012), Agrium (in response to the proxy contest initiated by JANA Partners in 2013) and more recently by Liquor Stores N.A. (in response to the campaign by PointNorth Capital in 2017). In each case, the target board paid brokers a fee only for votes in favour of the incumbent board's re-election, and only if the incumbent board was ultimately re-elected. The "one-sided" nature of these arrangements drew criticism from a number of sources, though the Alberta Securities Commission – in the first case in which soliciting dealer arrangements were challenged before a Canadian securities regulator – declined to intervene in the soliciting dealer arrangement adopted by Liquor Stores (see our August 14, 2017 Update, *Alberta Securities Commission Weighs In On Use of Soliciting Dealer Arrangement in Proxy Contest*).

In response, the CSA is now seeking input from market participants about the use of soliciting dealer arrangements in practice, as well as perspectives about the appropriateness of their terms and use in various situations. The CSA intends to evaluate feedback it receives and determine whether any further guidance or rules are necessary. The comment period is open until June 11, 2018.

It is premature to speculate about whether the CSA will impose any specific restrictions on the use of soliciting dealer arrangements. In the interim, the use of soliciting dealer fees – particularly in proxy contests – is likely to continue to be closely scrutinized.

For further information regarding these developments, please contact any member of our Corporate Securities Group.

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