Goodmans LLP Update

IIROC Provides Guidance on Soliciting Dealer Arrangements and Limits the Use of "Vote Buying" in Contested Director Elections

The Investment Industry Regulatory Organization of Canada (IIROC) and the Canadian Securities Administrators (CSA) recently issued IIROC Notice 19-0092 *Managing Conflicts of Interest arising from Soliciting Dealer Arrangements* (the "**Notice**").

The Notice addresses key considerations that have arisen from the use by boards and others of soliciting dealer arrangements. In recent years, certain boards involved in contested director elections (also known as "proxy fights") have been severely criticized for engaging in entrenchment tactics characterized by market participants as "vote buying" arrangements. The use of company resources to attempt to influence the outcome of a proxy fight – by paying for votes in favour of management's slate of directors – was used by the board of EnerCare Inc. in 2012, the board of Agrium Inc. in 2013 and, most recently, by the board of Liquor Stores N.A. Ltd. in 2017. It was this last campaign that led the CSA and a number of market participants to collectively take action toward ensuring the integrity of the Canadian capital markets is no longer called into question as a result of this practice.

IIROC's press release announcing the Notice states:

> Soliciting dealer arrangements are agreements that incentivize Dealers to encourage securityholders of an issuer to vote their securities or take action in connection with an acquisition or other transaction involving the issuer. For instance, an issuer may agree to pay a Dealer a fee for each vote solicited from securityholders in respect of a securityholder meeting. These arrangements can raise regulatory concerns about the ability of a participating Dealer to comply with IIROC's conflicts rule and related guidance.

Rather than banning soliciting dealer arrangements altogether, the Notice provides guidance for how IIROC Dealer Members ("**Dealers**") can avoid or manage conflicts of interest arising from such arrangements.

The Notice provides clarity on the type of conflicts in contested director elections that cannot be managed and must be avoided. The Notice states that in contested director elections involving fees that are paid only for votes in favour of one side and/or only if a particular side is successful, "it is unlikely that the Dealer would be able to provide objective advice in light of the fee arrangement and the nature of the information made available in a contested director situation." Accordingly, those conflicts must be avoided.

The Notice differentiates contested director elections from other corporate events involving a shareholder vote, such as a plan of arrangement. There is no absolute prohibition on one-sided and/or contingent arrangements in situations outside contested director elections. Rather, the Notice provides that those situations "can be very fact and context specific, and so Dealers must consider whether they can adequately address the material conflicts of interest". The Notice provides guidance for how to address them and makes clear that disclosure alone is a generally inadequate mechanism. In addition to disclosure, a Dealer should also identify how it has addressed the conflict in the client's best interest.

For further information on this development, please contact any member of our Securities Group or Litigation Group.

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