

# Goodmans<sup>LLP</sup> Update

## Canadian Securities Regulators Publish Guidance on Automatic Securities Disposition Plans

Canadian Securities Administrators (CSA) recently published [Staff Notice 55-317 – Automatic Securities Disposition Plans](#) (“**Staff Notice 55-317**”), which provides guidance to issuers and insiders on automatic securities disposition plans (ASDPs). The guidance focuses on adequate oversight by issuers, meaningful restrictions on adopting, amending, suspending or terminating an ASDP, and enhanced disclosure. Staff Notice 55-317 follows the CSA’s review of ASDPs announced in October 2019, as described in our October 30, 2019 Update, [Canadian Securities Regulators Announce Review of Automatic Securities Disposition Plans](#).

Staff Notice 55-317 supersedes the guidance with respect to ASDPs previously provided in [OSC Staff Notice 55-701 – Automatic Securities Disposition Plans and Automatic Securities Purchase Plans](#) (“**OSC Staff Notice 55-701**”). OSC Staff Notice 55-701, however, will continue to remain relevant for issuers and insiders that establish automatic securities *purchase* plans under Ontario securities law.

### Background on ASDPs

Under Canadian securities law, insiders are generally prohibited from trading in an issuer’s securities with knowledge of material non-public information (MNPI). However, Canadian securities laws provide an exemption from this rule where the trade in securities is made under an “automatic plan” entered into before the insider acquired MNPI.

ASDPs are designed to afford insiders the benefit of this exemption by permitting sales of securities by a third party broker on behalf of an insider pursuant to pre-determined instructions that are not subject to the insider’s exercise of discretion. ASDPs can be particularly helpful for insiders of issuers that find themselves subject to extended trading blackouts due to frequent transactional or other activities that can impact the issuer’s share price.

Although ASDPs offer insiders trading flexibility, concerns have been raised regarding the ability of insiders to control the timing of the adoption of, and to amend, suspend or terminate, ASDPs and the more lenient “alternative reporting” rules that have historically applied to trading under ASDPs.

### Establishment of ASDPs

Staff Notice 55-317 notes that an ASDP should be entered into by an insider in good faith and when the insider does not possess MNPI. An insider that enters into an ASDP while in possession of MNPI will not have the benefit of the “automatic plan exemption” from insider trading liability.

The CSA also recommends issuers oversee the establishment and use of ASDPs by insiders, including by:

- either establishing the plan itself or reviewing the terms and conditions of the plan established by the insider; and

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- certifying to the dealer administering the plan that, to the best of the issuer's knowledge, the insider does not possess MNPI when entering into the plan, and that the plan is entered into in accordance with the issuer's insider trading policy.

The CSA also recommends that issuers and insiders ensure any ASDP complies with securities legislation and any insider trading policy of an issuer, and that issuers consider amending their insider trading policies to include a specific restriction against entering into ASDPs during a blackout.

## Administration of ASDPs

The CSA recommends that an ASDP include certain features to minimize any potential influence by the insider on trading pursuant to the plan and/or appearance of trading to benefit from MNPI, including:

- *Clear Trading Parameters* – The plan should establish clear trading parameters and other instructions. Specifically, the plan should include either a formula or number of securities to be sold, and set out any minimum trade price and any date or frequency of sales. The plan should also expressly prohibit consultation between the dealer and insider regarding trades under the plan.
- *Minimum Term* – The term of an ASDP should be sufficiently long to avoid any potential use of MNPI (e.g., 12 months or longer) and trading should be reasonably spread out over the course of the term to avoid the concentration of trades at a certain point in time (which may lead to a market perception that the trades were timed to benefit from MNPI or that information was withheld from the market to benefit insiders).
- *Waiting Period* – First trades under a newly established ASDP should be delayed at least until the issuer's next interim or annual financial statements have been filed. The CSA considers this to be key to the legitimacy of an ASDP.
- *Restrictions on Amendments, Suspensions and Termination* – ASDPs should include meaningful restrictions on an insider's ability to amend, suspend or terminate an ASDP. These restrictions may include imposing a limit on the number or nature of permitted amendments, prohibiting any amendment, suspension or termination during trading blackouts under the issuer's insider trading policy, requiring representations from the insider and issuer, imposing a waiting period, requiring public disclosure and obtaining board approval of the issuer.

Additionally, the CSA recommends issuers continue to oversee ASDPs following the establishment of these plans. In particular, the CSA suggests issuers:

- take reasonable steps to periodically confirm the insider is complying with the ASDP and any relevant internal policies (Staff Notice 55-317 does not provide guidance on what these steps may entail); and
- monitor the use of ASDPs upon the occurrence of significant events (such as acquisitions, offerings and other material changes in an issuer's business before public disclosure of these events) to ensure that any amendment, suspension or termination of the plan is appropriate during a period in which the insider may possess MNPI.

## Disclosure

### *ASDP Terms*

To further the CSA's goal to enhance market transparency, it recommends issuers or insiders disclose by press release filed on SEDAR, the establishment of an ASDP, detailing the plan and its principal terms and conditions, such as the parties to the plan, its term, the waiting period before trading may commence, and restrictions on the insider's ability to amend, suspend or terminate the plan. Similar disclosure should be made when an ASDP is amended, suspended or terminated.

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Notably, the CSA also recommends that a press release disclosing an ASDP indicate the number of securities to be sold under the ASDP and the minimum price at which the securities can be sold (if specified in the ASDP). Ultimately, the nature and content of any disclosure regarding an ASDP will depend on the particular circumstances.

## *Insider Reports*

Insiders that are “reporting insiders” as defined in National Instrument 55-104 – *Insider Reporting Requirements and Exemptions* (“**NI 55-104**”) are required to file an insider report each time there is a trade in securities of the issuer by or on behalf of the insider under an ASDP. The more lenient historical “alternative reporting” exemptive relief orders for reporting sales under an ASDP mentioned above permitted insiders to report trades made through ASDPs annually. The CSA indicated it is unlikely to recommend insider reporting relief for trades under ASDPs going forward, meaning that all sales under an ASDP will have to be reported within five days of the trade.

The CSA also notes that the transfer of an insider’s securities to a dealer or plan administrator for the purpose of an ASDP is a transfer that should be reported in accordance with section 3.3 of NI 55-104, which requires an insider to file a report disclosing all transfers of control over the securities they hold in the issuer.

Finally, when filing insider reports, the CSA recommends an insider specify in the comment section that the trades were made under an ASDP.

Issuers and insiders should clearly understand their respective responsibilities and work together to ensure ASDPs are fairly administered and the appropriate disclosure is made.

For further information on how the CSA’s guidance may impact your company and its insiders, please contact any member of our [Corporate Finance and Securities Group](#).

All Updates are available at [www.goodmans.ca](http://www.goodmans.ca). This Update is intended as a general summary for educational purposes only and should not be relied upon as legal advice with respect to any particular set of circumstances. If you require advice as to your circumstances, please contact any member of our Corporate Finance and Securities Group.

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