

Canadian securities regulators publish guidance on automatic securities disposition plans

By Jessica Brown and Leslie-Anne Bowyer

On December 10, 2020, the Canadian Securities Administrators (**CSA**) published Staff Notice 55-317 (the **Notice**). The Notice provides guidance to issuers and insiders on automatic securities disposition plans (**ASDPs** or **plans**), which are typically arrangements between insiders and dealers or plan administrators that involve the sale of securities of an issuer over a predetermined period in accordance with predetermined instructions.

Important concerns with respect to ASDPs have been raised in terms of good corporate governance and public confidence in the fairness of the capital markets in Canada. Specifically, the CSA notes that, as insiders generally control the timing of the adoption of plans, questions can be raised about whether insiders are in possession of material non-public information (**MNPI**) when adopting such plans. The CSA's guidance is provided to, amongst other reasons, reduce the potential for improper trades under plans and to assist issuers and insiders in managing market perception of trades under plans.

The Notice is further to the CSA's review of ASDPs as announced on October 24, 2019. The Notice does not modify existing legal requirements and it does not create new legal requirements.

Background and current legal requirements

Generally, insiders are prohibited from trading securities with the knowledge of MNPI. However, under Canadian securities laws, there is an exemption to this rule where a trade in securities is made under an "automatic plan" that was entered into prior to the insider acquiring the knowledge of MNPI (the **Exemption**). The Exemption will not be available if a plan is entered into when an insider is in possession of issuer related MNPI.

As ASDPs are administered by third-party brokers in accordance with predetermined instructions over a defined period, and as they cannot be amended or terminated during blackout periods or when insiders are in possession of undisclosed MNPI, ASDPs can provide insiders with the benefit of the Exemption. The CSA notes that some of the recommended practices outlined in the Notice may be relevant when considering if an insider can rely on the Exemption.

Recommendations from the CSA

The Notice includes guidance on: (i) the establishment and administration of ASDPs, including the trading parameters, minimum term, and waiting period provisions of plans; (ii) amendments, suspension and termination provisions of plans; (iii) disclosure of ASDP terms; and (iv) disclosure regarding insider reports. Noteworthy recommendations from the CSA include the following:

Establishment and administration of ASDPs

- ASDPs should be entered into in good faith and not for the purpose of evading insider trading prohibitions under securities laws.

- Insiders should comply with issuers' insider trading policies, including stipulations on when plans may be entered into. If an insider trading policy does not already contain such stipulations, the policy should be amended to include a specific restriction against entering into an ASDP during trading blackouts.
- Issuers should oversee the establishment and use of ASDPs to ensure that insiders comply with securities laws, as well as any other applicable trading policies. Issuers should review the plans to ensure that they are automatic in substance and contain protections against inappropriate insider trading activities.
- If an insider intends to enter into an ASDP and an issuer has not yet established such, the insider should notify the issuer of its intention to enter into an ASDP. Insiders are also encouraged to request that an issuer certify to the dealer that the insider, when entering into an ASDP, is not in possession of any MNPI.
- An issuer should monitor the use of ASDPs when significant events occur in the life of the issuer (such as mergers, acquisitions or divestitures, or material changes affecting the business, capital or operation of an issuer) before such events are publicly disclosed. Such monitoring is *particularly recommended* by the CSA.
- An insider should provide clear trading parameters and other instructions to the dealer or plan administrator when entering into an ASDP. Plans should either include a formula or should specify the number of securities to be sold, as well as setting out any minimum trade price and any date or frequency of sales.
- A plan should prohibit a dealer from consulting with an insider on sales under a plan. A plan should also prohibit insiders from disclosing information concerning an issuer that may influence the execution of a plan to a dealer.
- The term of an ASDP should be sufficiently long (e.g. 12 months) to avoid potential use of MNPI. Additionally, concentrating trades at the beginning of the term of a plan should be avoided.
- Trades under an ASDP should not start before the issuer's next interim financial report or annual financial statements have been filed.

Amendments, suspension and termination provisions of ASDPs

- ASDPs should contain meaningful restrictions on the ability of insiders to amend, suspend or terminate. Some of the CSA's recommended restrictions include: (i) imposing a limit on the number or nature of permitted amendments; (ii) prohibiting any amendment, suspension or termination during trading blackout periods; (iii) requiring that the issuer or insider file a news release on SEDAR that discloses, amongst other things, the circumstances that led to the amendment, suspension or termination; and (iv) requiring that the issuer's board of directors approves any amendment, suspension or termination.

Disclosure of ASDP terms

- An issuer or insider should publically disclose, by way of a news release filed on SEDAR, relevant information regarding an ASDP—specifically, the establishment of the plan, the

principle terms and conditions of the plan, the number of securities to be sold under the plan and the minimum price at which such securities can be sold, if applicable.

Insider reports and disclosure

- 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. When filing an insiders report, an insider should specify that the trades were made under an ASDP.
- The CSA reminds insiders that a 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 the filing of a report disclosing all transfers of control over the securities that the insider holds in the issuer.

This bulletin does not provide a comprehensive overview of all of the guidance provided by the CSA in the Notice. Interested parties are encouraged to review the Notice [here](#). Please contact any member of our [Business Law Group](#) with questions.