

Legal update

CSA Staff Notice 55-317: Automatic Securities Disposition Plans (ASDPs)

December 30, 2020

Corporate, M&A and securities

On December 10, 2020, the Canadian Securities Administrators (CSA) published CSA Staff Notice 55-317 – *Automatic Securities Disposition Plans* (Staff Notice 55-317) available [here](#). Staff Notice 55-317 provides guidance for issuers and insiders on the establishment, use and administration of ASDPs.

Staff Notice 55-317 supersedes the prior guidance with respect to ASDPs set out in OSC Staff Notice 55-701 – *Automatic Securities Disposition Plans and Automatic Securities Purchase Plans* (OSC Staff Notice 55-701), which was issued in 2006.

What is an ASDP?

Under Canadian securities laws, persons in a “special relationship” with an issuer, including insiders, are generally restricted from trading in the issuer’s securities while in possession of material non-public information (MNPI). Insiders may be further limited in their ability to trade as a result of trading blackouts and other trading restrictions contained in a reporting issuer’s insider trading policies.

An ASDP allows a person who is subject to such restrictions to implement a program for the automatic sale of their securities in accordance with a pre-arranged set of instructions. The purpose of entering into an ASDP is to be exempt from the prohibition from trading while in possession of MNPI. This is generally permissible so long as certain safeguards are put in place, largely to ensure that: (i) at the time of entry into the ASDP, the insider is not in possession of MNPI, and (ii) the ASDP is truly automatic in nature (i.e. the insider has no ability to affect how the trades are made outside of the trading parameters provided at the outset). By establishing the criteria for the sale and contractually removing the discretion of the person who is in a special relationship to direct trades, the person is generally able to rely on an insider trading defense or exemption available under securities legislation.

Key Recommendations

Staff Notice 55-317 does not modify existing legal requirements or create new ones; however, it provides helpful clarification and insight into the CSA’s interpretation of existing legal requirements and provides issuers with guidance on how to ensure they are acting in a manner that is consistent with the principles of good corporate governance.

Staff Notice 55-317 provides the following six key recommendations:

Issuer Involvement

Issuers should oversee the establishment and use of ASDPs by their insiders in order ensure compliance with securities legislation and all applicable policies adopted by the issuer.

At the time that an ASDP is established, issuers should review the terms and conditions of the ASDPs, provide a certification to the dealer and/or the plan administrator that, to the issuer's knowledge, the insider is not in possession of MNPI and that the plan complies with securities legislation and any insider trading policy or other relevant internal policies. By taking these proactive steps to assess the ASDP and to ensure compliance with securities laws and the issuer's policies, an issuer will be provided with an opportunity to avoid potential reputational harm associated with an inadvertent breach of securities laws.

Once the ASDP has been implemented, issuers are encouraged to take reasonable steps to periodically confirm that the insider continues to comply with the terms and conditions of the ASDP and any insider trading policy or other relevant internal policies adopted by the issuer.

Clear Parameters

With respect to the administration of the ASDP, insiders should provide clear trading parameters and other instructions in writing to the dealer and/or plan administrator at the time of entering into the ASDP. These instructions should specify the number of securities to be sold (or include a formula to determine the number of securities to be sold), the minimum trading prices at which these securities can be sold and the dates or other fixed intervals for the sale of these securities.

The ASDP should be a self-contained instrument that the dealer and/or plan administrator is able to rely on and consult when conducting sales. The ASDP should also prohibit both: (i) the dealer and/or plan administrator from consulting with the insider regarding sales or sales parameters; and (ii) the insider from disclosing any information to the dealer and/or plan administrator that might influence the execution of the plan.

Minimum Term

When an ASDP is implemented it should be for a sufficiently long period (i.e. 12 months) to avoid any potential use of MNPI. In addition, the CSA recommends avoiding concentrating trades at the beginning of the term of a plan to avoid the perception that the trades are being made in reliance on MNPI.

Waiting Period

The CSA also recommends that ASDPs include a waiting period following implementation before trades commence under the ASDP. Trades in accordance with the ASDP should not commence before the issuer's next interim financial report or annual financial statements, as the case may be.

Amendments, Suspension and Termination

In order to comply with securities laws, ASDPs must contain meaningful restrictions on the insider's ability to amend, suspend or terminate the plan. If a plan allows for easy amendment or termination, a perception that an insider is making the amendment or terminating the plan in response to MNPI could be created.

In order to address perception and other risks, the CSA recommends that the following meaningful restrictions be imposed on an insider's ability to amend, suspend or terminate an ASDP:

- 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 the insider to represent to the dealer or plan administrator that the insider is not in possession of MNPI at the time of the amendment, suspension or termination;
- requiring the insider to request that the issuer certify to the dealer or plan administrator that, to the best of the issuer's knowledge, the insider is not in possession of MNPI when amending, suspending or terminating the ASDP;
- requiring the insider to request that the issuer certify to the dealer or plan administrator that the ASDP is amended, suspended or terminated in accordance with any insider trading policy or other relevant internal policies of the issuer;
- imposing the waiting period recommended above after any amendment or suspension;
- requiring that the issuer or the insider disclose in a news release filed on SEDAR the circumstances that led to the amendment, suspension or termination and, where applicable, the nature of the amendment, together with a representation by the insider that the insider was not in possession of any MNPI at the time of such amendment, suspension or termination; and
- obtaining the approval of the board of directors of the issuer for any amendment, suspension or termination.

Disclosure

The CSA has recommended that either the issuer or the insider disclose relevant information regarding the ASDP by way of a news release filed on SEDAR and disclosing the establishment of the plan.

The news release should also include the plan's principal terms and conditions (i.e. parties to the plan, its term, the waiting period before the trades can start under the plan and restrictions on the insider's ability to amend, suspend, or terminate the plan) as well as the number of securities to be sold under the ASDP and the minimum price at which these securities can be sold. Further disclosure is also recommended in connection with any special circumstances occurring in connection with the plan (i.e. suspension, termination or amendment).

In addition to the press release, the CSA has also recommended that when insiders file their corresponding insider reports on the System for Electronic Disclosure of Insiders, such reports should indicate in the comment section that the trades were made pursuant to an ASDP.

Conclusion

Staff Notice 55-317 provides useful and practical guidelines to both issuers and insiders to better establish and administer ASDPs and ensure compliance with applicable securities laws and appropriate governance practices. In its guidance, the CSA has clearly evidenced an expectation for issuers to be involved in the implementation and monitoring of ASDPs. As a result, issuers should carefully consider the implications of ASDPs in establishing internal insider trading policies and be cautious when allowing insiders to implement such plans. Once an ASDP is implemented, issuers should ensure they are kept apprised of and address any developments that could result in reputational harm to the issuer.

Please contact the authors to learn more about these recommendations and/or to explore the use and/or establishment of ASDPs.

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