

1.1.3 CSA Staff Notice 55-317 – Automatic Securities Disposition Plans



Canadian Securities
Administrators

Autorités canadiennes
en valeurs mobilières

CSA Staff Notice 55-317 *Automatic Securities Disposition Plans*

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1. Introduction

The purpose of this notice is to set out practices recommended by staff (**Staff or we**) of the Canadian Securities Administrators (**CSA**) for issuers and insiders in relation to the establishment, administration and disclosure of Automatic Securities Disposition Plans (**ASDPs** or **plans**). Typically, an ASDP is an arrangement between an insider and a dealer or a plan administrator that involves the sale of securities of an issuer over a predetermined period and in accordance with a predetermined set of instructions.

Important concerns with respect to ASDPs have recently been raised, both in terms of good corporate governance and public confidence in the fairness of our capital markets. Insiders generally control the timing of the adoption of ASDPs, which can raise questions about whether the plans are made in good faith and whether insiders are in possession of material non-public information (**MNPI**) at the time the plans are adopted. Insiders may also generally amend, suspend or terminate plans, which could make it possible to misuse plans.

Staff is providing guidance relating to ASDPs to reduce the potential for improper insider trades under these plans. This guidance can also assist issuers and insiders in managing market perception of insider trades under ASDPs.

This notice does not modify any existing legal requirements or create new ones. Staff notes that there is an insider trading defense or exemption available under securities legislation, where the trade in securities is made under an “automatic plan” entered into prior to the insider acquiring knowledge of MNPI (**Legal Defense**). Some of the recommended practices outlined in this guidance may be relevant for insiders when considering whether they can rely on the Legal Defense. In addition, in the view of Staff, the processes outlined in this guidance are consistent with the principles of good corporate governance and transparency in connection with the establishment and use of ASDPs and the reporting of trades under the plans.

2. Background

Under securities legislation, insiders are generally prohibited from trading in an issuer’s securities with knowledge of MNPI. However, insiders may rely on the Legal Defense when their trades are made under an “automatic plan” referred to in securities legislation. 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 in accordance with NI 55-104.

We note that executive officers and directors are increasingly being encouraged to build and hold a significant level of securities ownership in the issuers that they manage or oversee in order to align their interests with other security holders. While the issuer’s securities may form an important part of compensation, the insider trading prohibition under securities legislation and regular exposure to MNPI may limit the ability of insiders to sell the securities they receive as part of their compensation arrangements and often results in insiders being unable to trade securities for extended periods of time.

We recognize that a well-designed and well-administered ASDP can be a legitimate mechanism for trading by insiders. However, it is important to ensure that ASDPs contain meaningful conditions and restrictions to ensure that insiders are not able to benefit from MNPI with respect to the issuer and that ASDPs are automatic in substance.

3. Guidance on the establishment and administration of ASDPs

We encourage issuers and insiders to consider the following guidance when establishing and using ASDPs and reporting trades under the plans. Following the recommendations presented in this notice is not a substitute for a legal determination regarding the availability of the Legal Defense to protect insiders from insider trading liability. As such, insiders should perform their own analysis to determine whether the Legal Defense has been satisfied.

3.1 Establishment of the plan

Entering into the plan by insider

To address concerns that a plan may be contrary to the public interest, ASDPs should be entered into by an insider in good faith, and not for the purpose of evading the insider trading prohibition. In addition, the Legal Defense will not be available if the plan is entered into when the insider is in possession of MNPI with respect to the issuer.

We note that many issuers have adopted an insider trading policy that imposes trading blackouts at certain times¹. This is intended to prevent trading at times when there is a heightened risk that insiders have MNPI. Trading blackouts are also intended to prevent the appearance of questionable trading, and to protect the reputation of the issuer. Insiders should review and comply with the issuer's insider trading policy, including any stipulations on when plans may be entered into. In the absence of such stipulations, we recommend that issuers consider amending their insider trading policies to include a specific restriction against entering into ASDPs during trading blackouts.

Oversight by issuer

We recommend that the issuer oversee the establishment and use of ASDPs by its insiders to ensure that the plans and the insiders comply with securities legislation and any insider trading policy or other relevant internal policies that the issuer may have adopted².

Oversight of ASDPs by an issuer contributes to their legitimacy and the issuer and its insiders would, in Staff's view, benefit from the involvement of the issuer. This involvement could reduce reputational exposure for the issuer and litigation risks potentially linked to the improper use of ASDPs by the insider. If the ASDP is not established by the issuer, then we encourage insiders to notify the issuer of their intent to enter into an ASDP in order to enable the issuer to provide guidance and oversight of the ASDP to the insider.

As part of its oversight and to minimize its risks, we recommend that the issuer review the terms and conditions of ASDPs to assess whether they are automatic in substance and contain protections against inappropriate trading activities by insiders. In addition, we recommend that the insider request that the issuer certify to the dealer that, to the best of the issuer's knowledge, the insider is not in possession of MNPI when entering into the ASDP and that the ASDP is entered into in accordance with any insider trading policy or other relevant internal policies of the issuer.

As part of its risk mitigation, we recommend that the issuer 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.

We also particularly recommend that the issuer monitor the use of the ASDP upon the occurrence of significant events in the life of the issuer before those significant events are publicly disclosed. Examples of significant events include transactions such as a merger, an acquisition or a divestiture, or a material change affecting an issuer's business, operations or capital. Staff is of the view that monitoring the use of the plan when a significant event occurs in this manner would also assist the issuer in considering whether any amendment, suspension or termination of the plan is appropriate during a period in which the insider may be in possession of MNPI.

3.2 Administration of the plan

Trading parameters and other instructions

We recommend that the insider provide clear trading parameters and other instructions in writing to the dealer or plan administrator at the time of entering into the ASDP. The plan should either include a formula or specify the number of securities to be sold, and set out any minimum trade price and any date or frequency of sales. Providing pre-determined trading parameters or other instructions when entering into the plan would reduce the risk of the insider attempting to make discrete investment decisions, such as influencing the timing of trades or the number of securities to be sold.

We also recommend that the plan prohibit the dealer from consulting with the insider regarding any sales under the plan and prohibit the insider from disclosing to the dealer any information concerning the issuer that might influence the execution of the plan.

¹ We note that section 6.10 of National Policy 51-201 *Disclosure Standards* contains guidance as to insider trading policies and trading blackout periods.

² In Quebec, contrary to what is provided under securities legislation in other provinces and territories, an automatic plan must be established by an issuer in order to be used for the purposes of the Legal Defense.

Minimum term

While the term of an ASDP is generally set to meet the needs of the insider, we recommend that the term be sufficiently long to avoid any potential use of MNPI (for example, 12 months).

Although we recognize that it may be the result of legitimate trading parameters and other instructions, we recommend avoiding concentrating trades at the beginning of the term of a plan to help insiders manage the perception in the market that trades were timed to benefit from MNPI or that information was withheld to the market to benefit insiders.

Waiting period

We recommend that trades under an ASDP do not start before the issuer's next interim financial report or annual financial statements, as the case may be, have been filed.

We are of the view that the waiting period, which is the period between the establishment of an ASDP and the first transaction made under the plan, is key to the legitimacy of ASDPs. The longer the waiting period, the more likely any insider's MNPI will be obsolete or publicly disclosed prior to the commencement of trading under the plan.

Amendments, suspension and termination

We recommend that an ASDP contain meaningful restrictions on the ability of the insider to amend, suspend or terminate the plan that have the effect of ensuring that the insider cannot benefit from MNPI.

Amendments to the terms and conditions of an ASDP, such as its trading parameters and other instructions, as well as the suspension or termination of an ASDP by an insider, may give rise to a perception that the change to the plan is motivated by MNPI possessed by the insider and could call into question the automatic nature of the plan. However, we recognize that a plan may need to be amended, suspended or terminated for legitimate reasons in certain circumstances. In addition, we recognize that the ASDP may provide for pre-established automatic suspension or termination events (such as the death of the insider, the bankruptcy of the issuer, the entering into takeover bids, arrangements, mergers, acquisitions or other transactions affecting the securities of the issuer).

We therefore recommend imposing the following meaningful restrictions on an insider's ability to amend, suspend or terminate an ASDP, among other restrictions which may be considered appropriate:

- 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 that the insider 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 SEDAR³ 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;
- obtaining the approval of the board of directors of the issuer for any amendment, suspension or termination.

To help manage perception in the market, we also recommend that an insider consider whether changing the number of the issuer's securities sold under the plan through discrete investment decisions to sell the securities outside the ASDP, or establishing overlapping plans, could be considered an indirect amendment to the plan.

³ References to SEDAR in this notice mean the System for Electronic Document Analysis and Retrieval as at the date of this notice, and also include any successor to that system.

4. Guidance on disclosure of ASDPs

Disclosure regarding the ASDP

In order to enhance transparency of trading by insiders in the market, we recommend that the issuer or the insider disclose relevant information regarding the ASDP by way of a news release filed on SEDAR.

Specifically, we recommend that the issuer or the insider publicly disclose the establishment of the plan and the plan's principal terms and conditions, such as the parties to the plan, its term, the waiting period before the trades can start under the plan and the restrictions on the ability of the insider to amend, suspend or terminate the plan. Such disclosure would also benefit issuers as it would help them manage market perception of the sale of securities by insiders.

In addition, we recommend that the news release indicate the number of securities to be sold under the ASDP and the minimum price at which these securities can be sold, if such a minimum price is specified in the trading parameters provided in the ASDP. This disclosure could provide valuable information for the market as to the insider's views of the issuer's prospects.

As already discussed in this notice, we also recommend that the market be made aware by way of a news release of any special circumstances occurring in connection with the plan, such as its amendment, suspension or termination.

Disclosure in insider reports

When filing insider reports, we recommend that an insider specify in the comment section that the trades were made under an ASDP.

This disclosure would enable the market to understand that the information provided under each subsequent report does not reflect discrete investment decisions made by the insider but is instead related to a previously announced ASDP. We also remind insiders that the transfer of an insider's securities to the 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.

Questions

Please refer your questions to any of the following:

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