Canadian Coalition for
GOOD GOVERNANCE
THE VOICE OF THE SHAREHOLDER

June 19, 2018

British Columbia Securities Commission
Alberta Securities Commission
Autorité des marchés financiers
Financial and Consumer Affairs Authority of Saskatchewan
Financial and Consumer Services Commission (New Brunswick)
Manitoba Securities Commission
Nova Scotia Securities Commission
Nunavut Securities Office
Office of the Superintendent of Securities, Newfoundland and Labrador
Office of the Superintendent of Securities, Northwest Territories
Office of the Yukon Superintendent of Securities
Ontario Securities Commission
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island

Christopher Peng
Legal Counsel, Corporate Finance
Alberta Securities Commission
Suite 600, 250 – 5th St5reet SW
Calgary, Alberta T2P 0R4
Christopher.pena@asc.ca

The Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor
Toronto, Ontario M5H 3S8
comments@osc.gov.on.ca

Me Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
800, rue du Square-Victoria, 22e étage
C.P. 246, tour de la Bourse
Montréal (Québec) H4Z 1G3
consultation-en-cours@lautorite.qc.ca

Dear Madam/Sir:

Re: CSA Staff Notice 61-303 and Request for Comment
Soliciting Dealer Arrangements

We have reviewed the CSA Staff Notice 61-303 and Request for Comment *Soliciting Dealer Arrangements* ("Request for Comment") released April 12, 2018 and we thank the Canadian Securities Administrators ("CSA") for the opportunity to provide you with our comments.

CCGG's members are Canadian institutional investors that together manage approximately $4 trillion in assets on behalf of pension funds, mutual fund unit holders, and other institutional and individual investors. CCGG promotes good governance practices in Canadian public companies in order to best align the interests of boards and management with those of their shareholders. We also seek to improve Canada's regulatory framework to promote the efficiency and effectiveness of the Canadian capital markets. A list of our members is attached to this submission.

Overview

CCGG is pleased that the CSA is undertaking a review of issues associated with soliciting dealer arrangements. When issuers pay dealers a fee for securities successfully solicited from shareholders in connection with a shareholder vote or tendering to a takeover bid, the arrangements can give rise from the perspective of issuers and, of course, their shareholders, to public interest-related concerns that the integrity of the shareholder vote or tendering process is affected. From the dealers' perspective, the arrangements can also give rise to conflict of interest issues.

CCGG has publicly condemned[1] the practice of soliciting dealer arrangements in the context of proxy contests where an issuer's board of directors has authorized the payment of fees to dealers contingent on shareholders voting their shares in a particular manner or on a specific outcome, namely, only if the shareholders vote in favour of the issuer's board nominees and/or only if the board nominees are successfully elected. CCGG views such 'vote -buying' arrangements as unethical and likely inconsistent with directors' fiduciary duty by using company resources to entrench themselves. Such arrangements are always unacceptable.

The Request for Comment also seeks comment on soliciting dealer arrangements more broadly: (i) regardless of whether the payment of fees is contingent on a particular vote or outcome, and

[1] "Agrium payments don't pass the 'smell test'", Globe and Mail, July 4, 2013 here

(ii) in contexts other than proxy contests such as take-over bids and merger or acquisition transactions. In this submission, we provide our views on the narrower issue of 'vote buying' in proxy contests as well as on the appropriateness of soliciting dealer arrangements in other circumstances. In addition to general comments, we provide responses to specific questions in the Request for Comment that we believe fall appropriately within CCGG's expertise and mandate.
Note that we follow the numbering found in the Request for Comment and do not answer every question.

The justification for soliciting dealer arrangements

Soliciting dealer arrangements are sometimes justified on the basis that without them it can be challenging for issuers to contact retail objecting beneficial owners to encourage them to vote and also to encourage shareholders to vote in order to meet quorum requirements: on that rationale, paying dealers to solicit shareholders' votes is a matter of ensuring that shareholders exercise their franchise, an uncontroversial benefit for both issuers and shareholders. Of course, this goal is furthered regardless of whether payment of soliciting dealer fees are contingent on the manner in which the franchise is exercised or the final vote outcome. Payments made to simply "get the vote out" – and that are not conditional on voting for a particular end (for the existing board of directors, for example) - avoid ethical issues around the integrity of the vote and potential conflicts of interest. Accordingly, CCGG has no objections to soliciting dealer arrangements where the sole purpose is to get shareholders to exercise their franchise and the arrangements are not structured in a way that is intended to influence the vote or tender. We suggest that adopting this standard is a simple and straightforward way to avoid the ethical issues associated with soliciting dealer arrangements, from the perspectives of issuers, shareholders and dealers, while meeting the legitimate objectives of such arrangements.

Investment dealers and dealing representatives

Soliciting dealer arrangements in line with the standard set out above do not raise ethical issues for investment dealers and dealing representatives. It is our view, however, that when investment dealers and dealing representatives enter into soliciting dealer arrangements pursuant to which payment is contingent on eliciting a certain vote from the dealer's client, a potential conflict of interest is created between the dealers or representatives and the client. This conflict does not abate where different divisions of the same parent entity are involved in advising the client and soliciting their vote – the ultimate source of the dealer's access to the shareholder is the advisor/shareholder client relationship. The relationship is the reason that shareholders will listen to the dealer's voting recommendations in the first place. In that relationship, dealers have an obligation to work in the client's interests; in these circumstances, that means that any voting recommendation must be intended to enhance the value of the share to which the vote is attached. If compensation is tied to the recommendation, it becomes impossible for all practical purposes to confidently determine whether the recommendation is

untainted by potential conflict. Potential conflict is not resolved by a dealer's sincere belief that the voting recommendation offered is in fact the best option for enhancing share value. It is impossible to police or gauge that sincerity and far better to remove the potential conflict.

5. *Do you think that the potential conflict of interest on the part of an investment dealer or a dealing representative can be effectively managed?*

The only kind of disclosure that could approach sufficiently addressing this potential conflict of interest would be impractical and impossible to monitor. The dealers or representatives would have to disclose in every solicitation conversation the facts that they are being paid to encourage the client to vote in a certain way, who is paying them, the amount and any minimums or maximums and whether fees are contingent on how the client votes. Even if this high standard of disclosure is met, human nature being what it is, it is unlikely that the information being offered by the dealer can be entirely objective and free from being influenced by knowledge of the source of compensation. So, as stated above, CCGG believes that the simpler and better solution is to remove the conflict and prohibit one-sided soliciting dealer arrangements as the only way of effectively managing the potential conflict. In fact, we understand that the investment and broker arms of at least one of Canada's largest banks has already taken the step of forbidding such arrangements. We see no reason why this should not become the practice at all financial institutions by making this result a regulatory requirement. Importantly, regulation of this sort can in no way be viewed as increasing regulatory burden.

We have heard the argument that the amounts involved for investment dealers and representatives in soliciting dealer arrangements are so small that they are unlikely to influence them to go against their principles and try to solicit votes which they do not already think are the right way to go. We make two comments in connection with this argument: (i) if soliciting dealer arrangements do not work, common sense suggests that they would not exist and (ii) we have been told that while proxy solicitation fees (which are disclosed in the proxy circular and do not present the same potential conflicts of interest) average around $35,000, it costs approximately $150,000 to set up a soliciting dealer arrangement, which is not a negligible amount and too much to spend if issuers do not believe in their efficacy.

b. *Does the answer differ depending on whether the transaction is*
(i) a take-over bid tender,
(ii) a securityholder vote in relation to a merger or acquisition transaction,
(iii) a securityholder vote to amend the terms of a security or
(iv)a security holder vote in the context of a proxy context?

While CCGG prefers that a universal standard apply, CCGG is of the view that in cases of hostile takeover tenders both the bidder and the target company may be permitted to enter one-sided soliciting dealer arrangements provided that there is full and complete disclosure of the

payments by each side as described above. An argument can be made that hostile take-over bid tenders differ in relevant ways from other forms of transactions for purposes of assessing whether contingent payments are acceptable or pose ethical obstacles. In the case of hostile take over tenders, the bidder will have issued a dissident proxy circular which will be countered by management's circular so that access to the arguments and rationale of both sides is publicly available. Since the hostile bidder will typically enter into soliciting dealer arrangements in order to encourage the target shareholders to tender to the bid, it could be argued that the target company should be able to level the playing field by soliciting votes for its position.

However, in the situations referred to in (ii) to (iv) above, one-sided soliciting dealer arrangements should be prohibited.

> *(c) in the context of a securityholder vote in relation to a merger and acquisition transaction, does the answer to #5 differ depending on whether the fee is contingent on the securityholder voting in favour of the transaction and/or the transaction being approved?*

See above.

> *(d) in the context of a proxy contest, does the answer to #5 differ if the fee is contingent on the securityholder voting in favour of management's nominees and/or management's nominees being elected?*

See above

> *(e) What type of communication and disclosure by investment dealers and dealer representatives should be made to the securityholder respecting the existence of a soliciting dealer arrangement?*

See above

6. do you think that there are circumstances in which it would never be appropriate for an investment dealer to enter into a soliciting dealer arrangement? If so, please discuss what such circumstances would be?

As discussed above, it is never appropriate for an investment dealer to enter into a soliciting dealer arrangement where the fees paid are dependent on a particular vote or outcome, with the possible exception of hostile takeover bids and only then if full disclosure is made by the dealer in each individual solicitation.

10. do you believe that an investment dealer or a dealing representative has a responsibility to encourage its client to respond to proxy solicitations, rights offerings, take-over bids, or other corporate transactions such as conversion of convertible securities?

Investment dealers have a responsibility to protect and enhance their clients' investments. CCGG believes that the shareholder franchise is an important part of share value and thus the dealer should encourage shareholders to exercise that franchise as part of protecting that value.

Issuers

As discussed above under Overview, CCGG believes that, from the issuer's perspective as well as the shareholder's, the practice of issuers paying dealers for soliciting in proxy contests only when a vote or outcome is favourable to the issuer's director nominees is not ethical. Further, in other transactions (such as mergers and acquisitions or amending the terms of a security), because the position is being recommended by management and there will inevitably be benefits for management and the board to some extent over the path the issuer is not recommending, a conflict arises that is similar to, but less egregious or obvious, than that which arises in proxy contests. It is therefore appropriate that one-sided soliciting dealer arrangements be prohibited in situations other than proxy contexts as well, with the possible exception of hostile takeover bids. Paying dealers fees regardless of the nature of the vote or outcome, however, is acceptable.

Specific questions

11. *Are there circumstances in which you think it would be contrary to the public interest or inconsistent with a board of directors' fiduciary duties for an issuer to:*

a. Enter into a soliciting dealer arrangement?

It is contrary to the public interest and inconsistent with a board of directors' fiduciary duties to enter into any soliciting dealer arrangements where the payment of fees is conditional on the direction or outcome of the vote or tender, with the possible exception of hostile takeover bids (see below).

12. Can a board of directors comply with its fiduciary duties if it pays soliciting dealer fees for all votes, including votes that are contrary to the board's recommendation as to what is in the best interest of the corporations?

The question reflects a misunderstanding of the respective roles and obligations of the board and shareholders. Corporate and securities statutes establish that certain decisions ultimately belong to shareholders: the right to elect directors, to tender to a bid, to approve a merger or acquisition, etc. The board's role in these circumstances is circumscribed: while directors may recommend a particular course of action and use the company's resources to communicate that recommendation, the decision ultimately belongs to shareholders. As far as CCGG is aware, directors' duties do not require them to ensure that shareholders vote or tender in a specific way. If our understanding is correct, then there would not be a breach of fiduciary duty

if a board pays soliciting dealer fees that are not one-sided and are intended simply to encourage shareholders to exercise their franchise as they see fit.

13. Are there particular transactions which give rise to more or less concern with respect to the use of soliciting dealer arrangements, e.g.,

a. a take-over bid tender

b. a securityholder vote in relation to a merger and acquisitions transaction

c. a securityholder vote in relation to a merger and acquisition transaction, where the fee is contingent on the securityholder voting in favour of the transaction and/or the transaction being approved.

d. a securityholder vote in the context of a proxy contest, or

e. a proxy context, where the fee is contingent on the securityholder voting in favour of management's nominees and/or management's nominees being elected.

From the perspective of issuers and shareholders, the use of soliciting dealer arrangements by hostile bidders differs from target issuers with respect to hostile take-over bids, in that the bidder paying the fees under the arrangement does not have a fiduciary duty to the shareholders whose support is being sought. Consequently, the ethical problem with conditional payments with respect to the bidder's arrangements is restricted to the relationship between the soliciting dealer and the shareholder as the client.

14. what type of communication and disclosure should an issuer make to securityholders respecting the existence of a soliciting dealer arrangements?

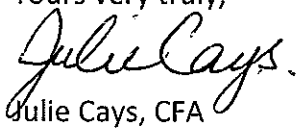
Assuming that one-sided soliciting dealer arrangements are prohibited (with the possible exception of hostile takeover bids, for which the appropriate disclosure is described above), for all other soliciting dealer arrangements issuers should provide full disclosure to shareholders of the arrangements in the proxy circular that describes the issue or transaction to which the arrangements relate: the amount of fees and all material terms of payment (any minimums or maximums etc.).

Conclusion

In summary, CCGG has no objections to soliciting dealer arrangements that pay fees for returning a vote or tender provided that the fees are not contingent on shareholders voting a particular way or tendering or on a specific outcome. We believe that arrangements pursuant to which fees are payable only if the vote or outcome goes a certain way should be prohibited for the reasons outlined above, with the possible exception of hostile takeover tenders.

We thank you again for the opportunity to provide you with our comments. If you have any questions regarding the above, please feel free to contact our Director of Policy Development, Catherine McCall at 416.868.3582 or cmccall@ccgg.ca.

Yours very truly,



Julie Cays, CFA
Vice-Chair of the Board
Canadian Coalition for Good Governance

CCGG MEMBERS – June 2018

Alberta Investment Management Corporation (AIMCo)
Alberta Teachers' Retirement Fund (ATRF)
Archdiocese of Toronto
BlackRock Asset Management Canada Limited
BMO Asset Management Inc.
BNY Mellon Asset Management Canada Ltd.
Burgundy Asset Management Ltd.
Caisse de dépot et placement du Québec
Canada Pension Plan Investment Board (CPPIB)
Canada Post Corporation Registered Pension Plan
CIBC Asset Management Inc.
Colleges of Applied Arts and Technology Pension Plan (CAAT)
Connor, Clark & Lunn Investment Management Ltd.
Desjardins Global Asset Management
Fiera Capital Corporation
Franklin Templeton Investments Corp.
Galibier Capital Management Ltd.
Greystone Managed Investments Inc.
Healthcare of Ontario Pension Plan (HOOPP)
Hillsdale Investment Management Inc.
Investment Management Corporation of Ontario (IMCO)
Industrial Alliance Investment Management Inc.
Jarislowsky Fraser Limited
Leith Wheeler Investment Counsel
Lincluden Investment Management Limited
Mackenzie Financial Corporation
Manulife Asset Management Limited
NAV Canada
Northwest & Ethical Investments L.P. (NEI Investments)
OceanRock Investments Inc.
Ontario Municipal Employee Retirement System (OMERS)
Ontario Teachers' Pension Plan (OTPP)
OPSEU Pension Trust
PCJ Investment Counsel Ltd.
Pier 21 Asset Management Inc.
Pension Plan of the United Church of Canada Pension Fund
Pier 21 Asset Management Inc.
Public Sector Pension Investment Board (PSP Investments)
QV Investors Inc.
RBC Global Asset Management Inc.
Régimes de retraite de la Société de transport de Montréal (STM)
Scotia Global Asset Management
Sionna Investment Managers Inc.

State Street Global Advisors, Ltd. (SSgA)
Sun Life Institutional Investments (Canada) Inc.
TD Asset Management Inc.
Teachers' Retirement Allowances Fund
UBC Investment Management Trust Inc.
University of Toronto Asset Management Corporation
Vestcor Inc.
Workers' Compensation Board - Alberta
York University