

**BY E-MAIL AND REGULAR MAIL**

August 20, 2003

Rosann Youck  
Chair of the Continuous Disclosure Harmonization Committee  
British Columbia Securities Commission  
P.O. Box 10142, Pacific Centre  
701 West Georgia Street  
Vancouver, BC V7Y 1L2

- and -

Denise Brosseau, Secretary  
Commission des valeurs mobilières du Québec  
Stock Exchange Tower  
800 Victoria Square  
P.O. Box 246  
22nd Floor  
Montreal, QC H4Z 1G3

And to all of the CSA member securities commissions

Dear Ladies and Gentlemen:

**Re: CHANGES TO PROPOSED NATIONAL INSTRUMENT 51-102 *CONTINUOUS DISCLOSURE OBLIGATIONS***

ADP Investor Communications ("ADP") is pleased to respond to the request for comments by the Canadian Securities Administrators ("CSA") on Changes to Proposed National Instrument 51 – 102 *Continuous Disclosure Obligations* (the "Proposed Instrument") and Companion Policy 51-102CP (the "Proposed Policy").

**ADP AND ITS BUSINESS**

ADP has been an industry leader in providing investor communications services in the financial marketplace since 1987. Our investor communication services include beneficial and registered shareholder communications, delivery of documents in compliance with regulatory requirements, and transaction reporting. We service over 230 banks, brokers, and dealers and the majority of the mutual fund industry in Canada. Unique to ADP is our industry, regulatory and data processing expertise. Clients rely on ADP for products and services that comply with securities laws and regulations, and as a result, depend on ADP to ensure they are in compliance. Clients leverage ADP's industry and regulatory knowledge to fulfil their obligations to deliver information to investors. ADP is responsible for distributing the majority of proxy-related materials and continuous disclosure documents to investors in Canada, and is by far the largest provider of fulfilment of mutual fund annual reports, prospectuses and amendments.

**COMMENTS ON PROPOSED INSTRUMENT**

Our primary concern with the Proposed Instrument relates to the provisions dealing with delivery of financial statements and MD&A (sections 4.6 and 6.7). We support the change made to the instrument that places the onus on the reporting issuer to determine if its securityholders want copies of its financial statements and MD&A. However, we have a few questions and comments about the delivery obligations set out in the Proposed Instrument. We also have a few other comments on the Proposed Instrument and Proposed Policy.

**Integration between Proposed Instrument and NI 54-101.** In order to get reporting issuer information to securityholders in an efficient manner, it is very important that the relevant CSA instruments work together as seamlessly as possible. For the purposes of this letter, the two key instruments are the Proposed Instrument and National Instrument 54-101 *Communication with Beneficial Owners of Securities of a Reporting Issuer* ("NI 54-101").<sup>1</sup> In this letter, we identify some places where additional clarification or changes should be made to fit the two rules together better. We would strongly recommend that the CSA personnel responsible for the respective instruments perform a complete analysis using their combined expertise to ensure there are no other gaps or inconsistencies. We would be happy to participate in this analysis if our experience would be of help. It would also be advisable to consider providing guidance to the marketplace on which instrument is paramount in the event of a conflict.

**Whose opt-in must be solicited?** Subsection 4.6(2) says: "*the reporting issuer must ... send the request form to the beneficial owners of its securities other than the beneficial owners that are identified under that instrument as having declined to receive materials.*" However, the actual treatment of beneficial owners under NI 54-101 does not fit neatly into (or out of) "having declined to receive materials". Under the client response form contained in Form NI 54-101F1, a beneficial owner of securities can (a) opt for delivery of all securityholder materials sent to beneficial owners or (b) decline to receive any materials other than proxy-related materials for securityholder meetings at which non-routine business is to take place. If the beneficial owners had accounts with intermediaries that pre-dated NI 54-101 and had not returned client response forms under National Policy 41, they are deemed by NI 54-101 to have chosen the second option. NI 54-101 does not permit anyone to decline delivery of **all** materials. The need for these two rules to fit together seamlessly will be an on-going one and should be kept in mind in the event either instrument is amended in the future.

- Does 'declined to receive materials' mean declined **all** materials or would declining some materials be enough?
- Does the phrase mean actively declined to receive materials or does it include those who were deemed to opt for no materials?

Simply changing the delivery options in NI 54-101 so that a beneficial owner may decline all materials will not solve this problem, as most of the executed client instruction forms on record at the intermediaries will contain the current options or those under the predecessor instrument, National Policy 41. If the intention is to require the reporting issuer to send the request form only to those who have indicated they want all materials, it would be clearer to recast the provision in the positive as: "*the reporting issuer must ... send the request form to the beneficial owners of its securities that are identified under that instrument as wanting to receive all materials.*"

**Duplication and Potential for Confusion.** There is a fair degree of duplication and a potential for significant confusion on the part of beneficial owners using the process set out in section 4.6 of the Proposed Instrument. The reporting issuer is going back to beneficial owners who have already indicated under NI 54-101 that they want securityholder materials (which include the annual financial statements) for all reporting issuers in which they have invested and asking "are you sure that you want financial statements and MD&A for this particular reporting issuer?" The effect of a failure to respond to the reporting issuer's request under the Proposed Instrument is not entirely apparent. Does a failure to respond overrule the blanket request under NI 54-101 for all securityholder materials? If the annual report for an issuer, which contained the annual financial statements and MD&A, was being sent to beneficial owners, would a shareholder that didn't return the NI 51-102 request form get the annual report or not? It should be made clear in the Proposed Instrument (and in NI 54-101) which instruction by the beneficial owner takes precedence. The Proposed Instrument should also require reporting issuers to inform beneficial owners what will be the effect of a failure to respond.

There would be less duplication and possibility of confusion if the Proposed Instrument adopted a combination of opt-in and opt-out processes. A failure to return the response form would be interpreted as requesting delivery of annual financial information and declining the material for interim periods. The investor would have to respond to refuse delivery of the annual statements or ask for delivery of the interims. This approach would be consistent with the

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<sup>1</sup> The third instrument that deals with the shareholder communication process is National Instrument 81-106 Investment Fund Continuous Disclosure. Any overall review for consistency should also include this instrument.

investor's standing instructions under NI 54-101 and parallel the requirement under NI 54-102 *Supplemental Mailing List and Interim Financial Statement Exemption* that investors actively ask for interim information.

**Opt-in vs. Opt-out Request Process.** We would caution the CSA that interpreting a non-response from an investor as a conscious answer to the question asked might not be appropriate. We have extensive experience with soliciting responses from investors and have found that the rate of opt-in by Canadian investors is fairly constant regardless of the question asked: about 5% have opted in for electronic delivery of materials and for delivery of financial statements for mutual funds. If the pre-eminent concern is a fully informed investor community, an opt-out procedure would better achieve that aim; that is, shareholders who did not respond would be sent at least the annual audited financial statements and related MD&A.

**Automatic Exemption.** Under NI 54-101, all issuers retain the option of sending securityholder materials to all beneficial owners, despite any stated preference for no materials. Under the Proposed Instrument, even if an issuer decided to send all its financial statements to all securityholders, it would still be required to carry out the annual request process. The Proposed Instrument should provide an automatic exemption from the requirements of s.4.6 (1) if a reporting issuer sends its financial statements and MD&A to all securityholders.

**Continuing Right to Get Financial Information.** The Proposed Instrument should also make it clear that any securityholder (regardless of status as a registered or beneficial owner or what delivery option may have been chosen by a beneficial owner under NI 54-101) retains the right to request that the reporting issuer send that securityholder its financial statements & MD&A and that the issuer must deliver this material without charge to the investor. Simply deleting the phrase "in the request form required in subsection (1)" from the language of subsection 4.6(3) will achieve this result. A parallel change also should be made to subsection 6.7(1) regarding the obligation to deliver the MD&A. Further, reporting issuers should be required to include a statement in its annual information form, proxy circular or annual financial statements telling securityholders how to exercise this right.

**Lack of Guidance on the Form and Timing of the Request.** The Proposed Instrument provides no guidance about the timing of the request process and does not specify the form to be used. We assume that this means that reporting issuers and intermediaries will need to prepare their own form of request form. While we agree that this gives each reporting issuer the maximum flexibility to order its affairs to suit its particular circumstances, we question whether this is in the best interests of investors and marketplace efficiency.

We believe that the regulators should mandate certain information be given to securityholders on (or with) the request form. This information should include an explanation of the effect a failure to respond will have on the receipt of financial statements; that the investor may change their choice regarding delivery of financial information at any time; and who to contact to make changes.

The absence of guidance on the content of the form, when the request must be made and the process to be followed will also mean that there will be a wide range of practices across the investment community, resulting in confusion and adding costs to the process. We believe that an effective mechanism to obtain requests annually could be through the annual proxy process (specifically the form of proxy). We would appreciate clarification in the Proposed Instrument that it is up to the reporting issuer and/or the intermediaries to develop the necessary mechanisms to comply with the request form requirement.

**Timing of Delivery of Financial Statements.** Subsection 4.6(3) provides that the reporting issuer must send a copy of any requested financial statements by the later of the filing deadline for those financial statements and 10 days after the issuer receives the request. This flexible timing requirement may pose a practical compliance problem for reporting issuers for the first sending of financial statements after the annual response process. From a practical point of view, the tendency will be to schedule the annual request process to ensure there is plenty of time to get copies of the relevant financial statements printed in time to send out the information. However, while the issuer may control when the response forms are sent to the securityholders, the timing of the receipt of responses from securityholders is less amenable to control. If the requests come in after a filing deadline, the language in subsection 4.6(3) will require the issuer to undertake several separate mailings of materials, thereby increasing overall costs.

**Cost of Request Process.** Subsection 4.6(2) of the Proposed Instrument provides that the requests are to be sent to beneficial owners "applying the procedures set out in NI 54-101". Subsection 4.6(3) goes on to provide that the issuer is required to send, **without charge**, a copy of the financial statements & related MD&A to any registered or beneficial owner of securities that requested the material. Under NI 54-101, intermediaries are responsible for obtaining their clients' overall instructions regarding delivery of materials and reporting issuers are only required to pay for delivery of securityholder materials to non-objecting beneficial owners. Therefore, the fit between NI 54-101 and NI 51-102 regarding costs is not entirely clear. We would appreciate it if the provisions in subsections 4.6(1) and (2) of the Proposed Instrument expressly state that the reporting issuer is responsible for the cost of sending out the requests to **all** registered and beneficial owners.

**Content of Form of Proxy.** Sections 9.1 to 9.3 of the Proposed Instrument clearly refer to the duties of the issuer to its registered securityholders. However, except for subsection 9.4(6), the whole of section 9.4 uses the term "securityholder" without specifying registered or/and beneficial owners. As "securityholder" is not specially defined in any of the Proposed Instrument, National Instrument 54-101 *Definitions* or in the Ontario Securities Act, we are assuming that the requirements in the section apply to both registered and beneficial owners. It would reduce the potential for confusion if the language were amended to refer expressly to both registered and beneficial owners.

#### COMMENTS ON PROPOSED POLICY

**Safeguarding Privacy of Objecting Beneficial Owners.** Section 3.9 of the Proposed Policy says the method used for the return of the request form should not require objecting beneficial owners under NI 54-101 to disclose their ownership identity to the reporting issuer. This language should be expanded to make it clear that any requested financial statements must be sent to objecting beneficial owners through their intermediaries. It would also be better if these provisions appeared in the Proposed Instrument, rather than the Proposed Policy, so that they would be legally binding on issuers.

#### TECHNOLOGY SOLUTIONS

Technology has the potential to enhance both investor protection and the efficiency of the communication process with investors. It can substantially reduce the costs of printing and distribution of material, while ensuring complete information is delivered to investors in a timely fashion. Two examples of the use of technology are electronic delivery of documents and print-on-demand document services.

We welcome the CSA's guidance set out in section 7.1 of the Proposed Policy that all continuous disclosure documents may be delivered electronically so long as the delivery is in compliance with the relevant Quebec Staff Notice and CSA National Policy. Electronic delivery is fast, efficient and eliminates the need for commercially printed documents. However, we would note that the rate of adoption of e-delivery by Canadian investors is very low and shows no sign of increasing quickly.

A print-on-demand service does just what the name suggests: it takes a document as filed on SEDAR, prints a paper copy of the whole document, or specified parts, and delivers that copy to a securityholder promptly in response to a request. It eliminates the need for costly and wasteful printing, warehousing and physical handling of a large volume of commercially printed documents. Only the number of copies actually needed is printed and they can be sent to investors almost immediately after the electronic document is made available, thereby eliminating the long lead-time required for printing commercial copies. For financial statements, this has the potential to significantly reduce the time between when the audited financial statements have been finalized and when they can be sent to securityholders. It also eliminates one of the impediments to shorter filing deadlines if an issuer is required to send financial statements to securityholders no later than the date of filing.

This technology could be particularly valuable for printing and delivery of financial information given the lack of structure around the request process and the delivery timing requirements set out in subsections 4.6(3) and 6.7(1) as it allows for cost effective on-demand printing and delivery of documents, even in response to one-off requests.

However, for the full benefits of print-on-demand and other comparable technology solutions to be realized by reporting issuers, the rules need to be drafted to permit the use of technology without having to get express

exemptions from the regulators. When ADP introduced its "Smart Prospectus<sup>SM</sup><sup>2</sup> product, we had to apply for exemptive relief, which entailed significant costs and delays. Our reading of the Proposed Instrument leaves us uncertain about the degree to which this sort of technology could be used for delivery of continuous disclosure documents, without having to come back to the CSA for relief. The Request for Comments accompanying the Proposed Instrument makes it clear that the CSA declined to require issuers to combine the financial statements and related MD&A in a single document. But what happens if the financials and MD&A are combined with other information in one document, such as an annual report? Will issuers be permitted to extract the financial information and MD&A from the annual report, and send only that information to investors who request it, or, absent a specific relief order, will they be required to send the whole document as filed? The addition of some specific language, preferably in the Proposed Instrument, allowing the delivery to securityholders of only those relevant parts of a filed document would be very welcome. We note that it would both help investors compare information across issuers and reduce costs for issuers using this type of technology if there was some standardization of where certain relevant information appears in continuous disclosure documents and how it is labeled.

Technology is also available that would permit "householding" of the material that a reporting issuer is required to deliver to its securityholders. Householding technology identifies accounts of people living in the same household and delivers one set of information materials, and for proxy-related mailings, individual proxies for each securityholder at that address, in a single envelope thereby reducing costs for issuers.<sup>3</sup> It would be helpful if the regulators acknowledged in the Proposed Instrument or Proposed Policy and in other relevant instruments that this practice would be permissible, provided that the affected securityholders consented.

ADP would welcome the opportunity to consult with the CSA about available technology for their consideration of appropriate methods to deliver continuous disclosure documents to securityholders. ADP has a great deal of experience, information and technological knowledge, which it believes could be helpful to the CSA. ADP appreciates the opportunity to comment on the Proposed Instrument. For further information, please feel free to contact me at 905-507-5336.

Yours very truly,



Sue Britton  
Vice President, Business Development

Copy: A. Cornford, ADP

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<sup>2</sup> The product is described in detail in the MRRS decision document granted on April 21, 2003 (see [http://www.osc.gov.on.ca/en/Regulation/Orders/2003/ord20030425\\_2511\\_adpindependent.htm](http://www.osc.gov.on.ca/en/Regulation/Orders/2003/ord20030425_2511_adpindependent.htm)). In effect, the Smart Prospectus<sup>SM</sup> takes a prospectus filed for a group of mutual funds and extracts from the document the parts of the disclosure that apply specifically to the particular fund(s) that an investor has purchased. These parts are then printed and delivered to the investor in satisfaction of the prospectus delivery requirements under securities legislation.

<sup>3</sup> For a description of householding see the relevant notice issued by the US Securities and Exchange Commission which can be found at <http://www.sec.gov/answers/householding.htm> and the SEC final rule *Delivery of Proxy Statements and Information Statements to Households* (Release Nos. 33-7912, 34-43487, IC-24715; File No. S7-26-99) which can be found at: <http://www.sec.gov/rules/final/33-7912.htm>.