

1.1.2 CSA Consultation Paper 51-405 – Consideration of an Access Equals Delivery Model for Non-Investment Fund Reporting Issuers



CSA Consultation Paper 51-405

Consideration of an Access Equals Delivery Model for Non-Investment Fund Reporting Issuers

January 9, 2020

1. Introduction

On April 6, 2017, the Canadian Securities Administrators (**CSA** or **we**) published a consultation paper¹ to identify and consider areas of securities legislation applicable to non-investment fund reporting issuers that could benefit from a reduction of undue regulatory burden, without compromising investor protection and the efficiency of the capital markets. Enhancing electronic delivery of documents was identified as one area where a broader review may be warranted. Commenters responding to that consultation were generally supportive of developments which would further facilitate electronic delivery of documents. On March 27, 2018, CSA staff published a notice² stating that, among other things, a policy initiative will be undertaken in this area.

We recognize that information technology is an important and useful tool in improving communication with investors and are committed to facilitating electronic access to documents where appropriate. Electronic access to documents provides a more cost-efficient, timely and environmentally friendly manner of communicating information to investors than physical delivery.

The CSA are considering whether electronic access should be expanded to reduce the use of paper to fulfil delivery requirements. A possible regulatory framework that has the potential to significantly reduce regulatory burden on issuers and to enhance the accessibility of information for investors is an “access equals delivery” model. Under the model that we are contemplating, delivery of a document is effected by the issuer alerting investors that the document is publicly available on the System for Electronic Document Analysis and Retrieval (**SEDAR**) and the issuer’s website. We are considering prioritizing a policy initiative in this area for prospectuses and certain continuous disclosure documents.

An access equals delivery model is consistent with the general evolution of our capital markets, including changes in technology and, in particular, the increased availability and accessibility of information. We note that similar models have been implemented in certain foreign jurisdictions for specific documents.

The purpose of this consultation paper (the **Consultation Paper**) is to provide a forum for discussion on the appropriateness of an access equals delivery model in the Canadian market. We encourage commenters to provide any data and information that could help us evaluate the effects of an access equals delivery model on capital formation and investor protection. We are seeking comments on whether and how such a model may affect investor engagement, positively and negatively, including whether it constitutes an efficient way for investors to access information.

The CSA are publishing this Consultation Paper for a 60-day comment period to solicit views on whether an access equals delivery model should be introduced, the types of documents to which this model should apply and its mechanics. In addition to any general comments that you may have, we also invite comments on the specific questions set out at the end of the Consultation Paper.

The comment period will end on **March 9, 2020**.

While this Consultation Paper focuses on access equals delivery to reduce regulatory burden for issuers, the CSA continue to evaluate other options for enhancing the electronic delivery of documents.

2. Current delivery requirements

Securities legislation requires issuers to deliver various documents to investors. These include prospectuses, rights offering circulars, annual and interim financial statements and related management’s discussion and analysis (**MD&A**), proxy-related

¹ CSA Consultation Paper 51-404 *Considerations for Reducing Regulatory Burden for Non-Investment Fund Reporting Issuers*.

² CSA Staff Notice 51-353 *Update on CSA Consultation Paper 51-404 Considerations for Reducing Regulatory Burden for Non-Investment Fund Reporting Issuers*.

materials and take-over bid and issuer bid circulars that are delivered by issuers or those acting on their behalf, such as underwriters, intermediaries and transfer agents.

In general, securities legislation does not prescribe the medium to be used by issuers for providing information to investors. In most instances, an issuer must “deliver”, “send” or “provide” the document. Accordingly, issuers can generally deliver documents to investors in paper or electronic format. National Policy 11-201 *Electronic Delivery of Documents (NP 11-201)* provides guidance to securities industry participants that want to use electronic delivery to fulfil delivery requirements. NP 11-201 sets out the CSA’s view that delivery requirements can generally be satisfied through electronic delivery if each of the following basic components is met:

- the investor receives notice that the document has been, or will be, delivered electronically;
- the investor has easy access to the document;
- the document received is the same as the document delivered; and
- the issuer has evidence that the document has been delivered.

Although securities legislation does not require that the issuer obtain consent from the investor to use electronic delivery, NP 11-201 acknowledges that the process of obtaining express consent may enable the issuer to achieve some of the basic components of electronic delivery. If an issuer does not obtain express consent, it may be more difficult to demonstrate that the investor had notice of, and access to, the document, and that the investor actually received the document.

The notice-and-access model introduced in 2013 also streamlined delivery requirements for proxy-related materials relating to annual or special shareholders’ meetings. Under the notice-and-access model set out in National Instrument 54-101 *Communication with Beneficial Owners of Securities of a Reporting Issuer* and National Instrument 51-102 *Continuous Disclosure Obligations*, an issuer can deliver proxy-related materials to investors by:

- posting the proxy-related materials on SEDAR and a non-SEDAR website; and
- sending the relevant voting document and a notice informing investors that the proxy-related materials have been posted, with an explanation on how to access the materials.

Although electronic delivery is already permitted, and despite the guidance provided in NP 11-201 and the introduction of the notice-and-access model, some issuers continue to incur significant costs associated with printing and mailing various documents required to be delivered under securities legislation.

3. Access equals delivery

Given widespread access to, and use of, the Internet, we are evaluating whether it is appropriate to adopt an access equals delivery model to satisfy delivery requirements under securities legislation. Our objective is to modernize the way documents are made available to investors and significantly reduce costs associated with the printing and mailing of documents that are currently borne by issuers.

To achieve this objective, a possible regulatory framework could be an access equals delivery model under which, for documents that issuers are required to deliver to investors, providing public electronic access would constitute delivery. Specifically, an issuer is considered to have effected delivery once: (a) the document has been filed on SEDAR; (b) the document has been posted on the issuer’s website; and (c) the issuer has issued a news release (filed on SEDAR and posted on its website) indicating that the document is available electronically on SEDAR and the issuer’s website and that a paper copy can be obtained from the issuer upon request.

An access equals delivery model could benefit both issuers and investors. This model could further facilitate the communication of information by enabling issuers to reach more investors in a faster, more cost-effective and more environmentally friendly manner. SEDAR and the issuer’s website provide ease and convenience of use for investors, allowing them to access and search for information more efficiently than they would otherwise be able to with paper copies of documents.

We note that certain documents are not required to be delivered to investors. For example, a reporting issuer that is not a venture issuer must file an annual information form on SEDAR every year. Another example is timely reporting of a material change to the issuer’s affairs, which is publicly disclosed through the issuance and filing of a press release and the filing of a material change report. In both cases, securities legislation does not require the issuer to deliver the document to investors.

The access equals delivery model that we are contemplating could be implemented for various types of documents. As an initial step, we are considering whether to prioritize a policy initiative to implement this model for prospectuses and certain continuous disclosure documents. In our view, implementing an access equals delivery model for these types of documents is achievable and could meaningfully reduce regulatory burden on issuers.

Prospectuses

We note that access equals delivery models have been implemented for prospectuses in the U.S., the European Union and Australia. Please refer to Annex A of this Consultation Paper for further information.

Some stakeholders are supportive of implementing an access equals delivery model for prospectuses. They note that investors are increasingly accessing these documents electronically. They are of the view that this model would reduce costs for issuers and provide convenient and timely access to information for investors.

We recognize the merits of an access equals delivery model for prospectuses. We would have to determine the appropriate regulatory framework, including: (a) how to address investors' withdrawal rights; and (b) whether a news release should be required for both the preliminary prospectus and the final prospectus or whether one news release for an offering is appropriate.

Financial statements and MD&A

Issuers are required to file on SEDAR annual financial statements and interim financial reports (accompanied by the MD&A) within prescribed deadlines. In addition, issuers must either (i) annually send a request form to investors that investors may use to request a paper copy of the issuers' annual financial statements and MD&A, interim financial reports and MD&A, or both, or (ii) send the issuer's annual financial statements to all investors. Issuers are also required to send a copy of their interim financial statements to investors that request them. If an issuer sends financial statements to investors, the issuer must also send the annual or interim MD&A relating to the financial statements.

We note that replacing these requirements with a requirement to issue and file a news release indicating where these documents are electronically available may meaningfully reduce regulatory burden on issuers.

Other types of documents

We are also seeking comments on whether to extend this access equals delivery model to other types of documents, including rights offering materials, proxy-related materials and take-over bid and issuer bid circulars. However, we are cognizant that introducing this model for documents requiring immediate shareholder attention and participation could raise investor protection concerns and could have a negative impact on shareholder engagement. An access equals delivery model for proxy-related materials could also require significant changes to the proxy voting infrastructure, such as operational processes surrounding solicitation and submission of voting instructions.

The access equals delivery model that we are contemplating is not intended to remove the option of having paper copies of documents delivered for those who prefer this option. We acknowledge that issuers are in the best position to choose whether to use access equals delivery considering the needs and preferences of their investors. Issuers could continue to deliver documents in paper or electronic form, based on the investors' standing instructions or upon request.

Some legal aspects of electronic delivery fall outside of the scope of securities legislation. We also recognize that different corporate laws and regulations contain specific delivery requirements. We do not view these potential limitations as roadblocks to soliciting comments and considering amendments under securities legislation. However, if the CSA decide to implement amendments to our rules related to electronic access, these amendments would not eliminate the limitations that exist in other laws and regulations.

4. Consultation questions

We welcome your comments on the issues outlined in this Consultation Paper. In addition, we are also interested in your views and comments on the following specific questions:

1. Do you think it is appropriate to introduce an access equals delivery model into the Canadian market? Please explain why or why not.
2. In your view, what are the potential benefits or limitations of an access equals delivery model? Please explain.
3. Do you agree that the CSA should prioritize a policy initiative focussing on implementing an access equals delivery model for prospectuses and financial statements and related MD&A?

4. If you agree that an access equals delivery model should be implemented for prospectuses:
 - a. Should it be the same model for all types of prospectuses (i.e. long-form, short-form, preliminary, final, etc.)?
 - b. How should we calculate an investor's withdrawal right period? Should it be calculated from (i) the date on which the issuer issues and files a news release indicating that the final prospectus is available electronically, (ii) the date on which the investor purchases the securities, or (iii) another date? Please explain.
 - c. Should a news release be required for both the preliminary prospectus and the final prospectus, or is only one news release for an offering appropriate?
5. For which documents required to be delivered under securities legislation (other than prospectuses and financial statements and related MD&A) should an access equals delivery model be implemented? Are there any investor protection or investor engagement concerns associated with implementing an access equals delivery model for rights offering circulars, proxy-related materials, and/or take-over bid and issuer bid circulars? In your view, would this model require significant changes to the proxy voting infrastructure (e.g. operational processes surrounding solicitation and submission of voting instructions)? Please explain.
6. Under an access equals delivery model, an issuer would be considered to have effected delivery once the document has been filed on SEDAR and posted on the issuer's website.
 - a. Should we refer to "website" or a more technologically-neutral concept (e.g. "digital platform") to allow market participants to use other technologies? Please explain.
 - b. Should we require all issuers to have a website on which the issuer could post documents?
7. Under an access equals delivery model, an issuer would issue and file a news release indicating that the document is available electronically and that a paper copy can be obtained upon request.
 - a. Is a news release sufficient to alert investors that a document is available?
 - b. What particular information should be included in the news release?
8. Do you have any other suggested changes to or comments on the access equals delivery model described above? Are there any aspects of this model that are impractical or misaligned with current market practices?

Please submit your comments in writing on or before March 9, 2020. Please send your comments by email in Microsoft Word format.

Please address your submission to all members of the CSA as follows:

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
The Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission of New Brunswick
Superintendent of Securities, Prince Edward Island
Nova Scotia Securities Commission
Superintendent of Securities, Newfoundland and Labrador
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Nunavut

Notices

Please deliver your comments only to the addresses below. Your comments will be distributed to the other participating CSA members.

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The Secretary
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22nd Floor
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We cannot keep submissions confidential because securities legislation in certain provinces requires publication of the written comments received during the comment period. All comments received will be posted on the websites of each of the Alberta Securities Commission at www.albertasecurities.com, the Autorité des marchés financiers at www.lautorite.qc.ca and the Ontario Securities Commission at www.osc.gov.on.ca. Therefore, you should not include personal information directly in comments to be published. It is important that you state on whose behalf you are making the submission.

5. Questions

Please refer your questions to any of the following:

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Annex A

The table below highlights the access equals delivery models implemented in the U.S., the European Union and Australia. Information included in this table is not intended to present a comprehensive review of the law in those jurisdictions.

| Jurisdiction | Model |
|----------------|--|
| U.S. | <p>In 2005, the SEC adopted an access equals delivery model for final prospectuses in registered offerings based on the assumption that investors have access to the Internet. This model is intended to facilitate effective access to information, while taking into account the advancements in technology and the practicalities of the offering process.</p> <p>Under applicable rules³, a final prospectus is deemed to have been delivered as long as the final prospectus is filed with the SEC electronically on EDGAR or the issuer makes a good faith and reasonable effort to file the final prospectus within the required timeframe.</p> <p>An underwriter or dealer participating in a registered offering (or an issuer, if no underwriter or dealer is involved) may send, in lieu of the final prospectus, a notice to each purchaser providing that the sale was made pursuant to a registration statement or in a transaction otherwise subject to the prospectus delivery requirements. This notice must be sent not later than two business days after the completion of the sale. Purchasers are permitted, however, to request a copy of the final prospectus.</p> <p>In 2015, the SEC adopted an access equals delivery model to ease regulatory burden for small public offerings that are exempted from the registration requirements (Regulation A offerings). The SEC noted that the expanded use of the Internet and continuing technological developments suggest that the delivery requirements for these offerings should be updated in a manner that is consistent with the access equals delivery model adopted in 2005 for final prospectuses in registered offerings.</p> <p>Under applicable rules⁴, an issuer may satisfy its final offering circular delivery requirements by filing it electronically on EDGAR. The issuer is, however, required to include a notice in any preliminary offering circular informing potential investors that the issuer will rely on access equals delivery for the final offering circular.</p> <p>The issuer (or participating broker-dealer) is required, not later than two business days after completion of the sale, to provide the purchaser with a copy of the final offering circular or a notice stating that the sale occurred pursuant to a qualified offering circular. This notice must include the URL where the final offering circular may be obtained on EDGAR and contact information sufficient to notify the purchaser where a request for a final offering circular can be sent.</p> |
| European Union | <p>In 2019, the new European Union prospectus regulation⁵ came into force. This regulation recognizes that since the Internet ensures easy access to information, and in order to ensure better accessibility for investors, the prospectus should always be published in an electronic form.</p> <p>In order to ensure investor protection, the obligation to publish a prospectus applies to both equity and non-equity securities offered to the public or admitted to trading on regulated markets. Once approved by the relevant competent authority, the prospectus must be made available to the public by the issuer, the offeror or the person asking for admission to trading on a regulated market before the offer to the public or admission to trading takes place. The prospectus is deemed available to the public when published on the website of the issuer, the offeror or the person asking for admission to trading on a regulated market, on the website of the financial intermediaries placing or selling the securities or on the website of the regulated market where the admission to trading is sought. The prospectus must be published on a dedicated section of the website which is easily accessible when entering the website, and must be downloadable, printable and searchable in electronic format that cannot be modified.</p> <p>All prospectuses approved, or at least a list of those prospectuses with hyperlinks to the dedicated website sections, must be published on the website of the competent authority of the issuer's home member state. Also, each prospectus must be transmitted by the competent authority to the European Securities and Markets Authority (ESMA) along with the relevant data enabling its classification. ESMA must provide a centralised storage mechanism of prospectuses allowing access free of charge and appropriate search facilities for the public. Any potential investor may obtain a copy of the prospectus</p> |

³ Securities Act of 1933, Rule 172 and Rule 173.

⁴ Securities Act of 1933, Rule 251 and Rule 254.

⁵ Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC.

| | |
|-----------|--|
| | upon request. |
| Australia | <p>In March 2014, the Australian Securities & Investments Commission (ASIC) published a regulatory guide⁶ to facilitate and encourage the use of electronic disclosure, including the Internet (e.g. posting a disclosure document on a website), for making offers of securities. ASIC notes that issuers are increasingly using electronic means to distribute and present disclosure documents (e.g. prospectuses) to investors and recognizes that this has advantages for both issuers offering securities and investors.</p> <p>ASIC explains its interpretation of the offering provisions under corporate law and clarifies that relief is not required for offers of securities using the Internet, provided that the electronic disclosure document has the same content, presentation, and prominence of information as the paper version. ASIC also sets out good practice guidance for the use and distribution of electronic disclosure documents, including ensuring ease of access and providing free paper documents to investors on request.</p> <p>ASIC recognises that there may be other types of web-based platforms that emerge in the future to distribute and present electronic disclosure documents. The guide is principles-based and is intended to apply to current and emerging forms of electronic disclosure documents.</p> |

⁶ *Regulatory Guide 107 Fundraising: Facilitating electronic offers of securities.*