

July 5, 2022

BY EMAIL

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 (Québec)
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

c/o

M^e Philippe Lebel
Corporate Secretary and Executive Director, Legal Affairs
Autorité des marchés financiers (Québec)
Email: consultation-en-cours@lautorite.qc.ca

The Secretary
Ontario Securities Commission
Email: comments@osc.gov.on.ca

Dear Sirs/Mesdames:

CSA Notice and Request for Comment – *Proposed Amendments and Proposed Changes to Implement an Access Equals Delivery Model for Non-Investment Fund Reporting Issuers*

We are writing in response to the proposed amendments and proposed changes (collectively, the “**Proposed Amendments**”) set out in CSA Notice and Request for Comment – *Proposed Amendments and Proposed Changes to Implement an Access Equals Delivery Model for Non-Investment Fund Reporting Issuers*.

We strongly support the CSA’s proposal to implement an access equals delivery model as an alternative for satisfying delivery obligations under Canadian securities legislation for prospectuses and financial statements and related management’s discussion & analysis. Detailed reasons for our support are included in our prior comment letter, dated March 5, 2020, in response to CSA Consultation Paper 51-405 – *Consideration of an Access Equals Delivery Model for Non-Investment Fund Reporting Issuers*.

Despite our support for the fundamental terms of the access equals delivery model set out in the Proposed Amendments, we respectfully submit that there are elements of the proposed access equals delivery model for prospectus delivery (the “**Prospectus AED Model**”) that entail unnecessary burden and may undercut the cost-efficiency, environmental and other objectives of the Prospectus AED Model. In addition, we believe the Prospectus AED Model would benefit from certain improvements to better align with market realities. A summary of these problematic elements and potential improvements is included below.

1. Remove or limit paper copy requirement and extend deadline for delivery

- (a) *Remove requirement for delivery of paper copy of a prospectus or limit the types of prospectuses or prospective purchasers to whom a paper copy must be delivered*

Further consideration should be given as to whether to remove or limit the option for prospective purchasers or purchasers, as applicable, to request a paper copy of a preliminary or final prospectus (the “**paper copy requirement**”)¹. On its face, this paper copy requirement seems wasteful, serving no practical purpose. Merely by virtue of being engaged in the offering process, any prospective purchaser or purchaser should be keenly aware that the relevant prospectus is or will soon be filed and available under the issuer’s profile on SEDAR. The marketing materials for the offering and, in the case of the final prospectus, the prescribed news release (which is to include a SEDAR link) will remind purchasers of this. Given it is the quickest and easiest way to obtain the relevant disclosure, if a purchaser chooses not to check SEDAR for the prospectus, it is safe to assume that same purchaser will be in no rush to (and may never) review a paper copy of the prospectus upon receipt. Waiting for actual delivery of a prospectus by mail (which could have been accessed days earlier on SEDAR) does not appear to serve any practical purpose.

If the paper copy requirement is not removed in its entirety, we respectfully submit that it should not be applicable to any short form prospectus. When considering their investment in an offering qualified by a short form prospectus, purchasers invariably access the disclosure documents that are critical to their investment (i.e., the documents incorporated by reference) electronically *prior* to the filing of the preliminary short form-prospectus or prospectus supplement. Investors do not wait for, or rely on, actual delivery of each of the documents incorporated by reference into the prospectus to inform their investment decision. While there has always been an option for a purchaser to request a copy of these documents, anecdotal evidence suggests that these requests are rarely, if ever, made.

In addition (or in the alternative, if the final rules include a paper copy requirement that applies to short form prospectuses), the right to request a paper copy should be limited to the final prospectus document (i.e., the final prospectus, shelf prospectus supplement or supplemented PREP prospectus, as applicable, or an amendment to any of them). Receiving a paper copy of the preliminary version of that prospectus serves no purpose. The necessary investment decision will invariably have been made prior to delivery of the paper copy of that preliminary prospectus document, particularly in the case of a “bought deal” by way of short form prospectus or shelf. In addition, the purchaser will still have two

¹ This requirement is contained in subsections 2A.3(4) of NI 41-101, 6A.3(4) of NI 44-102 and 2A.3(4) of NI 44-103.

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business days from the filing of the final prospectus document to exercise its right of withdrawal (or rescission, as applicable).

If the paper copy requirement continues to apply with respect to any preliminary prospectus document, the prospective purchasers who may request a copy should be expressly limited only to those prospective purchasers that were initially solicited by the underwriters for the offering². As currently drafted, the Proposed Amendments would allow any prospective purchasers to make such a request, regardless of whether they have been solicited³. This leaves open the potential for any number of requests, the timing and amount of which are entirely unpredictable.

(b) Extend deadline for delivery of paper copy of a prospectus

To the extent any form of paper copy requirement is preserved in the final rules, ample time should be afforded for sending the requested paper copy of the prospectus so that issuers will not be compelled to print commercial copies in advance of any such request. A failure to provide ample time will result in issuers printing in advance and maintaining an inventory of commercial copies as a precautionary matter (in case of any requests), with all or substantially all of those printed copies never being used, thereby undercutting the intended cost-saving and environmental benefits of the Prospectus AED Model. What constitutes ample time will be a function, in part, of the number of purchasers and the nature of the offering. However, in all circumstances, the dealer or issuer (as applicable) should be afforded significantly more than two business days following a request to deliver a paper copy of a prospectus.

For the reasons noted earlier and in our prior comment letter, there is no basis for requiring that a paper copy be delivered in an expedited time frame. This is true even in the case of a final prospectus, as the delivery of a paper copy of that prospectus does not (and should not) inform the timing of a purchaser's withdrawal right. It is possible that an investor may request a paper copy to help inform its continuing investment in the security it has purchased (however, this should be coupled with that purchaser's ongoing review of the issuer's continuous disclosure filed on SEDAR). If so, it is unclear why the deadline for delivery should be any less than the ten calendar days permitted by securities legislation for delivery of a copy of an issuer's financial statements (following a request for that copy).

(c) Add an exception to the paper copy requirement where the purchaser has consented to an alternative delivery method

The paper copy requirement (if not removed in the final rules) should not apply where the purchaser (or prospective purchaser, if applicable) has previously consented or otherwise agreed to an alternative delivery method⁴. In addition, the final version of the Prospectus AED Model should provide that,

² A corresponding change should be made in any prescribed text with respect to copies of any such materials being available (for example, the new text for marketing materials prescribed by the amendments to subsection 13.7(5) of NI 41-101).

³ See subsections 2A.3(4) of NI 41-101, 6A.3(4) of NI 44-102 and 2A.3(4) of NI 44-103.

⁴ Corresponding edits will be necessary elsewhere to reflect this exception. For example, the disclosure in the prescribed news release that one may obtain a paper copy of the final prospectus document should be qualified to the following effect: "Unless you have consented to alternative delivery arrangements,...."

where a purchaser (or prospective purchaser, if applicable) indicates or confirms its interest in purchasing a prospectus qualified security by email or other electronic means, a dealer may satisfy its delivery obligation by delivering the prospectus to that email address or using those other electronic means (and that purchaser or prospective purchaser, as applicable, will be deemed to have consented to that method of delivery through its indication or confirmation of interest).

2. Do not impose other new and unnecessary burdens

The Prospectus AED Model should not be an instrument for adding burden without a separate objective whose benefits outweigh that burden.

- (a) *Make the Prospectus AED Model an option, not an obligation, for all prospectus deliveries*

The new obligation imposed under subsections 2A.3(2) of NI 41-101, 6A.3(2) of NI 44-102 and 2A.3(2) of NI 44-103 (the “**new final prospectus delivery obligation**”) is a prime example of a new and unnecessary burden imposed by the Proposed Amendments. This new final prospectus delivery obligation should be removed in the final rules as it serves no purpose.⁵ Alternatively, it should be modified (and moved, as appropriate) to clarify that satisfying the prospectus delivery requirement under securities legislation through access to the document is an option and does not preclude other means of delivery that are permitted or not prohibited by securities legislation.

The new final prospectus delivery obligation provides that the relevant final prospectus document “must be delivered or sent by providing access to the document”. On its face, this would make the Prospectus AED Model mandatory for the delivery of a final prospectus document subject only to the very limited exception noted below. It is unclear why this mandatory use of the Prospectus AED Model was built into the Proposed Amendments. The delivery obligation for a final prospectus document is already appropriately addressed within securities legislation of each local jurisdiction and that delivery obligation may be achieved in a number of ways, including by e-mail or other electronic means provided that the requisite elements for satisfying electronic delivery (in NP 11-201) have been met. Further, the new final prospectus delivery obligation would achieve a different outcome than the approach taken in British Columbia, where a dealer clearly has a choice as to how to satisfy its delivery obligation.⁶

In contrast, the new final prospectus delivery obligation only allows for delivery of a final prospectus document by means other than the Prospectus AED Model where that document “is delivered or sent

⁵ In addition, clarifying edits could be made elsewhere in the Proposed Amendments to be clear the Prospectus AED Model is an option, not an obligation. For example, each of subsection 2A.2(2) of NI 41-101, 6A.2(2) of NI 44-102 and 2A.2(2) of NI 44-103 should say that the requirement to deliver or send a prospectus “**may** be satisfied by providing access in accordance with” the relevant subsection in the instrument (as opposed to saying that delivery obligation “**is** satisfied when”, which suggests this may be the exclusive procedure for delivery).

⁶ In British Columbia, a dealer using the Prospectus AED Model would be exempt from the prospectus delivery requirement. Accordingly, it would have the choice of delivering a final prospectus document by way of access or by any other means, including electronic delivery. This different outcome in British Columbia is contrary to the CSA’s Notice which says that the “BC Exemption is intended to achieve the same outcome as the AED Model proposed in the other jurisdictions”.

pursuant to another procedure prescribed by securities legislation”. This exception is too limited as the only other “procedure” for sending or delivering a final prospectus document that is “prescribed” under securities legislation is prepaid mail⁷. Electronic delivery options (which are significantly more efficient and effective than prepaid mail) are either permitted or not prohibited under securities legislation; they are not prescribed⁸. Accordingly, even where a purchaser has previously consented to prospectus delivery via email or other means of electronic delivery, and without regard to whether that alternative is the purchaser’s preferred means of delivery and is permitted by current securities legislation, the Proposed Amendments would (by virtue of the new final prospectus delivery obligation) unilaterally deem such means of delivery to be invalid.

For all the reasons noted in our prior comment letter, an access equals delivery model is the best and most efficient method for prospectus delivery⁹. As a result, we expect that the Prospectus AED Model (when finalized) will be used to satisfy prospectus delivery in most circumstances. However, there may still be discrete circumstances where it is appropriate to satisfy delivery through email or other electronic means. Moreover, although rare, there may be circumstances where SEDAR is not available (due to technical reasons or otherwise), in which case the dealer or issuer, as applicable, must be permitted to use any alternate means of final prospectus delivery then available to it and should not be forced to revert to printing and mailing the prospectus.

The mandatory nature of the new final prospectus delivery obligation is even more concerning when one considers that the obligation to deliver a prospectus under local securities legislation is, generally speaking, an obligation of the dealer¹⁰. In contrast, an action typically taken by the issuer (i.e., SEDAR filing), not the dealer, is necessary in order to effectively provide access under the Prospectus AED Model. At best, a dealer could use its reasonable efforts to cause the issuer to comply with the necessary issuer actions (by filing on SEDAR the applicable prospectus and, if applicable, the prescribed news release)¹¹.

(b) Remove unnecessary requirement to file prescribed news release

In order for access to be achieved for a final prospectus document, the Prospectus AED Model requires that the prescribed news release be filed (in addition to being issued). In our view, the issuance of the prescribed news release should be more than sufficient given the only purpose of this news release is

⁷ In the case of Ontario, see subsection 71(1) of the *Securities Act* (Ontario).

⁸ The view of the CSA that delivery requirements of securities legislation can generally be satisfied through electronic delivery is set out in a policy (NP 11-201). Per NI 14-101, “securities legislation” is defined only to include the securities act of the local jurisdiction, the regulations and rules under that act and, where appropriate, blanket rulings and orders. Accordingly, electronic delivery is not currently a “procedure prescribed by securities legislation”.

⁹ Electronic delivery is an inferior substitute for an access equals delivery model because it (i) adds unnecessary time and expense, (ii) involves unnecessary risk (both legal and technical) for failed delivery and (iii) exposes recipients to potential cybersecurity risks from, among other things, the use of personal information for delivery of the relevant document and an attached file or link (as applicable) for the delivered document.

¹⁰ In the case of Ontario, see sections 66 and 71 of the *Securities Act* (Ontario).

¹¹ It may be that dealers will coordinate the issuance of the prescribed news release, consistent with practice for a bought deal news release. However, we would still expect that issuers will make the SEDAR filings necessary for providing access per the terms of the Prospectus AED Model.

to provide notice of the availability of the prospectus¹². Requiring that the prescribed news release also be filed on SEDAR adds no incremental value from a notice perspective. As the prospectus itself is already filed on SEDAR, requiring the filing of yet another document right after (whose sole purpose is to refer to that previously filed prospectus) only clutters an issuer's SEDAR profile (as well as the in-boxes of investor and other market participants receiving alerts of the issuer's SEDAR filings). As such, this additional filing obligation is just a burden and another potential source of technical default (were an issuer to fail to file the prescribed news release on time) that may be outside of the control of the dealer obligated to deliver the prospectus¹³.

3. Modify news release requirement to avoid market disruption from multiple news releases

The requirement within the Prospectus AED Model that a news release (the “**prescribed news release**”) be issued on the same day that the final prospectus document is filed (the “**news release requirement**”)¹⁴ should be modified to allow a forward-looking notice of that filing. In a number of circumstances, permitting the prescribed news release to be issued prior to the filing of the relevant prospectus will allow an issuer to issue a single news release that discloses material information with respect to the offering (i.e., pricing related information) and concurrently satisfy the notice objective of the news release requirement. As noted in our prior comment letter, this will avoid a scenario in which there are multiple announcements in respect of an offering, at least one of which (the prescribed news release) would contain no material information in respect of the issuer, its securities or the offering. Unless coupled with corresponding material news, the prescribed news release can introduce disruptive “noise” in the market.

This concern with a multiplicity of news releases is greater in offerings where the pricing is close to, but not concurrent with, the filing of the final prospectus document. For example, marketed deals (where pricing typically occurs shortly before filing of the final prospectus) and take downs from a shelf prospectus (where pricing triggers a two-day period in which to file the shelf prospectus supplement). In these types of offerings, a news release is commonly issued immediately after pricing. However, because additional work must be done to reflect the pricing information in the final prospectus document, it will rarely be practical to file that final document concurrently with the pricing news release. In these circumstances, it should be open to an issuer to satisfy the news release requirement by including a statement in its pricing news release that the final prospectus document “will be” available within a certain time period¹⁵. This approach would not disadvantage purchasers provided the ultimate filing of the final prospectus document was not delayed beyond a reasonable period (e.g., two business days following pricing).

¹² This notice would be in addition to notice an investor may already receive from alerts pushed to them upon any SEDAR filing.

¹³ See footnote 11 above.

¹⁴ See subsections 2A.3(3)(b) of NI 41-101, 6A.3(3)(c) of NI 44-102 and 2A.3(3)(c) of NI 44-103.

¹⁵ Corresponding changes to the news release requirement should be made to accommodate this, including allowing the prescribed news release to be issued “on **or prior to** the day the [relevant prospectus] was filed...” and to say in that news release that such prospectus “is **or will be**” available or accessible, as applicable, on SEDAR.

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While a press release is currently the most practical option for providing immediate notice as to the availability of the final prospectus document in most circumstances, allowing for an alternative form of notice that is sent directly to purchasers (as suggested in our prior comment letter and section 6 of this letter) could also mitigate the market disruption issue stemming from multiple news releases.

4. The Prospectus AED Model should be an option for satisfying prospectus delivery obligations in connection with MTN programs and other continuous distributions

Further consideration should be given to how the Prospectus AED Model may be amended to allow it to be available for prospectus delivery in connection with MTN programs and other continuous distributions under a shelf prospectus. In each case, access equals delivery should be an option for satisfying the prospectus delivery obligation and should never be an obligation (see our earlier comments in section 2 of this letter).

Notably, there is a range of types of distributions that could constitute an “MTN program or other continuous distribution” for purposes of Part 8 of NI 44-102. Some corporate issuers use a pricing supplement to offer debt securities qualified under a base shelf prospectus. The timing for the filing of the final prospectus document and the issuance of the pricing news release in those MTN offerings is no different than for a public offering of debt securities by way of a prospectus supplement. At a minimum, the final rules should clarify that the Prospectus AED Model is an available option for delivery of a pricing supplement (and corresponding base shelf prospectus / supplement) used in connection with any such MTN offering.

We assume that only a subset of MTN programs and other continuous distributions were intended to be excluded from the Prospectus AED Model – namely, prospectus qualified distributions of “structured notes” issued by a financial institution. While it is true that, as currently proposed, the Prospectus AED Model may not be suitable for structured note distributions, this is principally a function of the prescribed access conditions that have been included in the Proposed Amendments. Given the volume of prospectuses delivered in structured note offerings, there would be significant efficiencies in allowing those deliveries to be achieved by way of an access equals delivery model (to the extent those prospectuses cannot be effectively delivered by electronic means). Bearing in mind the significance of those efficiencies, we suggest that further consideration be given as to practical ways to modify the access conditions of the proposed Prospectus AED Model to work for structured note offerings – either in finalizing the Proposed Amendments or in the next round of rulemaking that expands the circumstances in which access equals delivery is available.

In addition to ensuring that use of an access model is an option (not an obligation) for delivery of a structured note prospectus, the other key hurdle in making the Proposed AED Model workable for structured note offerings is the prescribed news release requirement. No financial institution should be required to issue multiple immaterial news releases in a week (or even a single day) simply to draw attention to the availability of a pricing supplement. This goes well beyond the coverage necessary to adequately notify structured note purchasers of the filing of that pricing supplement. Moreover, and as noted earlier, issuing multiple news releases with immaterial information is disruptive from a market perspective. In structured note programs, there is no overriding investor protection rationale for requiring any independent notice (by news release or otherwise) as to the availability of a pricing supplement. However, if it is determined that some notice is necessary, it should be open to the issuer

or dealers of a structured note program to use any disclosure outlet reasonably designed to give that notice directly to the purchasers of a structured note. Issuers of structured notes, and their dealers, should be consulted on this point as they are in the best position to advise as to what methods may be viable for providing this direct notice (as an alternative to a news release).

5. Other amendments are required for the Prospectus AED Model to work

In addition to the more substantive changes noted above, certain technical amendments and clarifications are also necessary in order for the Prospectus AED Model to work in practice.

Generally speaking, the prospectus delivery obligation under current securities legislation is an obligation of the dealer, not the issuer. However, certain of the access conditions under the Prospectus AED Model involve actions traditionally taken by the issuer. Accordingly, clarifications or changes should be made in the final rules to make clear that a dealer may satisfy any of the access conditions of the Prospectus AED Model on behalf of, or independently from, the issuer. For example, a provision could be added in the final rules to clarify that the prescribed news release may be issued directly by the dealer to satisfy its prospectus delivery obligation.¹⁶

The Proposed Amendments would also benefit from additional precision or clarification, as applicable, to avoid ambiguity in their application. For example, references to the “right to withdraw” and the “right to rescind” in the Proposed Amendments¹⁷ should be defined with reference to the specific subsection under the securities legislation of each local jurisdiction under which that right arises.

In addition to the changes within the Proposed Amendments, for the Prospectus AED Model to work in practice changes may also be necessary in related provisions of securities legislation and in the SEDAR filing manual to address the use of a SEDAR filing as the trigger for deemed delivery / receipt of a prospectus. For example, for purposes of establishing the date on which access has been provided under the Prospectus AED Model, NI 13-101 should be modified to clarify that the 5:00pm local time cut-off in subsection 2.7(3) does not apply. Access should be deemed to have been provided to a prospectus document (and, as a result, a purchaser or prospective purchaser should be deemed to have received that document) on the date it is actually filed on SEDAR, provided that it is filed (and, in the case of a final prospectus document, the prescribed news release has been issued) before midnight on that day. Requiring filing by 5:00pm is impractical for offerings pricing in the afternoon. In addition, we submit that there is no principled basis for extending the withdrawal right period (and delaying closing of any such offering by an additional day to afford time to allow the withdrawal rights to expire before closing) merely because the relevant final prospectus document was not filed by 4:59pm. Investors do not stop working at 5:00pm local time.

¹⁶ Other changes are required in the Proposed Amendments to clarify that certain access conditions may be satisfied by the issuer and not the dealer. Section 2A.1 of 41-101CP errantly notes that “a dealer must provide access”. In contrast, Item 30 of 41-101F1 and Item 20 of 44-101F1 both say “if the issuer intends to issue ...” the prescribed news release. As noted above, it may be that this prescribed news release is issued by the dealer, not the issuer.

¹⁷ See subsections 2A.2(5) of NI 41-101, 6A.2(5) of NI 44-102 and 2A.2(5) of NI 44-103.

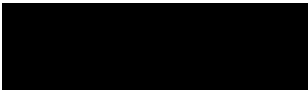
6. In future rulemaking, consider alternate means for providing notice of a filed final prospectus document

For the reasons noted in our prior comment letter, a news release is more than sufficient to alert purchasers that a prospectus is available. In fact, a news release goes well beyond the coverage necessary to adequately notify purchasers of the filing of a final prospectus document, as the only persons who need to be notified are the purchasers for that public offering. Accordingly, we would urge the CSA not to foreclose on alternative methods of notifying purchasers as to the availability of the relevant final prospectus document. In our view, it should be open to the issuer or dealers to use any disclosure outlet reasonably designed to give that notice to purchasers. While the prescribed news release should be sufficient in all circumstances, it should not be the only means for providing that notice.

That said, given the significant benefits to swift adoption of the Prospectus AED Model, we suggest that an expansion of the available methods for notice of the filing of a final prospectus document (in lieu of the prescribed news release) is a matter that could be delayed to a subsequent round of rulemaking that expands on the scope of this initially implemented access equals delivery model. However, as noted earlier, consideration should be given in the near term as to alternative means of notice that would allow an access equals delivery model to be used for the delivery of a final prospectus document for structured note programs and in other circumstances where use of a prescribed news release would result in an inappropriate amount market disruption.

The following partners at our firm participated in the preparation of this comment letter and may be contacted directly should you have any questions regarding our submissions.

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