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Superintendent of Securities, Prince Edward Island
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Comments on the CSA Proposed Amendments and Proposed Changes to Implement an Access Equals Delivery Model for Non-Investment Fund Reporting Issuers

1 INTRODUCTION

This letter is submitted in response to the CSA Notice and Request for Comment (the **Notice and Request for Comment**) on *Proposed Amendments and Proposed Changes to Implement an Access Equals Delivery Model for Non-Investment Fund Reporting Issuers* (the **Proposed Amendments**) issued by the Canadian Securities Administrators (the **CSA**) on April 7, 2022. This letter reflects the views of a working group consisting of issuers having a combined market capitalization of more than CAD $110 billion (the **Working Group** or **we**).

Members of the Working Group welcome the CSA's initiative to implement an access equals delivery model (the **Proposed AED Model**) for delivering certain prospectuses, annual financials, quarterly reports and accompanying management's discussion and analysis (**MD&A**), in a general effort to modernize the way documents are made available to investors while reducing costs associated with printing and mailing for reporting issuers in Canada. With a view to contributing to these efforts, we provide herewith comments in respect to the Proposed Amendments and our responses to the specific questions asked by the CSA in its Notice and Request for Comment. We thank you for affording us the opportunity to comment on this important matter, and we trust that the CSA will consider the views expressed in this letter in finalizing the Proposed Amendments.

2 GENERAL COMMENTS

Regulatory and administrative practices have evolved to allow electronic delivery of documents in a timely and efficient manner. After studying the Proposed Amendments, we are of the view that they are a reasonable extension of this practice. The following comments and suggestions aim at further refining the Proposed Amendments so as to contribute to this general effort based on the Working Group members' practical experience.

In particular, we would like to emphasize the following observations:

2.1 Interaction with other corporate laws and regulations

The Proposed AED Model would operate alongside other securities and corporate laws and regulations, some of which offer different delivery frameworks. For instance, under National Instrument 51-102 *Continuous Disclosure Obligations* (NI 51-102), beneficial securityholders can currently request financial statements and related MD&A, as part of the annual request forms, through an opt-in method. Similarly, National Policy 11-201 *Electronic Delivery of Documents* allows issuers to deliver documents electronically to those registered securityholders who have consented to receive electronic delivery of material from the issuer. Furthermore, corporate law provisions such as those of the Canada Business Corporations Act (**CBCA**) require corporations to send annual financial statements to registered shareholders unless they opt-out. The CBCA also requires intermediaries to send financial statements and certain other documents to beneficial owners to allow their shares to be voted.

We encourage the CSA to consider the compatibility of the regime with the various securities and corporate law provisions and engage with corporate law regulators in order to actively address and solve any potential incoherence or inefficiencies that may arise with the adoption of the Proposed AED Model.

We note that under National Instrument 54-101 *Communication with Beneficial Owners of Securities of a Reporting Issuer* (**NI 54-101**), a beneficial owner may give notice of its choices concerning the receipt of materials. The Proposed Amendments contemplate an amendment to the Companion Policy to NI 54-101 which stipulates, among other things, that a beneficial owner's standing instructions under NI 54-101 in respect of the financial statements will not be overridden if a reporting issuer issues and files a news release in accordance with subsections 4.2.1(2) and 4.4.1(2) of NI 51-102. In an effort to fully optimize the benefits sought through the Proposed Amendments, we respectfully submit that the Companion Policy to NI 54-101 should be amended so as to permit the Proposed AED Model to prevail, subject to the beneficial owners confirming their previous standing instructions. In the alternative, we propose that the Companion Policy to NI 54-101 be amended so as to provide a mechanism through which beneficial owners can revisit their standing instructions if an issuer elects to follow the Proposed AED Model. Ideally, this would be done through a notice-and-access type notice sent by the intermediary to beneficial owners, by way of which they can either confirm or amend their standing instructions.

2.2 Withdrawal rights

Under the Proposed AED Model, the right to withdraw from, or in Québec the right to rescind, an agreement to purchase securities may be exercised within two (2) business days after the later of (a) the date that access to the final prospectus or any amendment has been provided, and (b) the date that the purchaser has entered into the agreement to purchase the securities. As such, the current right of purchasers to withdraw from a purchase of securities within two (2) business days of the delivery of the final prospectus (which includes a supplement) or an amendment thereto, on the surface, does not appear to be affected by the adoption of the Proposed AED Model.

However, the Working Group notes that it is currently unclear whether a purchaser's withdrawal rights under the Proposed AED Model override the withdrawal rights under applicable securities legislation in the context where an issuer has invoked the Proposed AED Model but a purchaser nonetheless requests

a paper copy of the prospectus. We would recommend to amend the withdrawal rights provisions to clarify that the right to rescind may be exercised within two (2) business days of the later of (a) the date that access to the final prospectus or any amendment has been provided pursuant to the AED Model (notwithstanding requests for paper copies), and (b) the date that the purchaser has entered into the agreement to purchase the securities.

Proposed section 2A.2(5) of National Instrument 41-101 *General prospectus requirements* does not contain "notwithstanding" language and is drafted permissively, leading to ambiguity as to whether such purchaser's withdrawal right could commence to run from the date of actual receipt or deemed receipt of the document under applicable securities legislation. As such, amending the withdrawal rights provision so as to clarify that the withdrawal right period runs from the later of the issuance and filing of the news release (notwithstanding requests for paper copies), and the agreement to purchase the securities, would provide greater certainty for timing, greater consistency of withdrawal rights across all purchasers and greater certainty to issuers in closing a transaction. Moreover, we note that, in order to rely upon the Proposed AED Model in connection with a prospectus offering, the prospectus would need to contain an additional cross-reference on the front page of the prospectus to alert investors to the section explaining how this withdrawal period is calculated.

2.3 Expansion of the Proposed AED Model

The Proposed AED Model is not available for delivery of documents that may require a response from shareholders within a specified time period such as proxy voting and other security holder meeting-related materials and takeover and issuer bid circulars. The Working Group recommends extending the application of the Proposed AED Model to the management information proxy circular provided by issuers in connection with their annual meeting of shareholders. Omitting such annual disclosure document from the list of documents to which the Proposed AED Model applies greatly reduces its impact and encourages issuers to continue using the notice-and-access model for *all* annual disclosure documents, including financial statements and related MD&A, as they will seek to avoid the burden of managing two distinct delivery models. As noted above, however, engagement with corporate law regulators would be required in order to maximize the potential benefits of the Proposed AED Model; for instance, amendments to the CBCA should be considered so as to exempt intermediaries from sending the proxy circular when an issuer elects to follow the Proposed AED Model so that beneficial owners' shares can be voted on.

Furthermore, the Working Group believes that the CSA should eventually consider including the Annual Information Form (the **AIF**) within the scope of the Proposed AED Model, in light of the CSA's proposed amendments to NI 51-102 to combine the MD&A and the AIF into one reporting document called the "annual disclosure statement". As put forward in our comment letter regarding the *Draft Regulation to amend Regulation 51-102 respecting Continuous Disclosure Obligations and Other Draft Amendments Relating to Annual and Interim Filings of Non-Investment Fund Reporting Issuers* (the **Draft Amendments to NI 51-102**), it would be crucial and most rational for the Proposed AED Model to be in force prior to or concurrently with the entering into force of the Draft Amendments to NI 51-102. Otherwise, the requirement to deliver the annual disclosure statement may be unduly burdensome for issuers.

Finally, the Working Group believes the CSA should expand the Proposed AED Model to prospectuses for rights offerings, medium-term note programs and other securities in continuous distribution under a shelf prospectus. As there is a variety of market practices, further considerations need to be given to how the AED Model would be implemented for such offerings, programs and distributions. The CSA should continue to engage with issuers, dealers and investors on the best solution to balance the need for added efficiency in the delivery of documents with the particularities of such offerings, programs and distributions.

Furthermore, as stated below, the Working Group believes that the progressive rolling out of SEDAR+ may offer new functionalities which may replace a requirement to issue and file a news release by a notification process that would permit a more efficient delivery to market participants.

2.4 Flexible approach

The Working Group recommends a flexible approach to the use of the Proposed AED Model so as to allow issuers and their stakeholders to adjust to it. Issuers should be allowed to use the AED Model for some (but not necessarily all) of the documents covered by the model.

3 SPECIFIC QUESTIONS OF THE CSA

Please find below the answers of members of the Working Group to the questions posed in the Notice and Request for Comment pertaining specifically to financial statements and related MD&A.

3.1 Would the requirement to issue and file a news release be unduly costly or onerous in these circumstances? If so, why? Would the burden differ depending on whether the issuer is a venture issuer or not?

The Working Group does not believe that the requirement to issue and file a news release would be unduly costly or onerous in these circumstances. We note that a majority of listed issuers on the Toronto Stock Exchange already follow a practice of issuing a news release to announce the availability of their annual financial statements and interim financial reports. As such, for these issuers, there would be little to no additional cost to add the disclosure required by the Proposed AED Model to such news releases.

3.2 Should we consider alternative ways to alert investors of the availability of a document that could be less onerous? Which ones and why?

We do not believe that there is a need, at this time, to consider alternative ways to alert investors of the availability of a document that could be less onerous. However, with the progressive rolling out of SEDAR+, alternative ways to alert investors may be considered as it is understood that investors may be able to set up alerts or real time notifications on this new platform, a setting which may render the publication of a press release redundant. We recommend that this rolling out be accompanied by a public campaign to raise awareness and encourage investors who are not aware of the database's existence and/or utility to familiarize themselves with it.[1]

4 CONCLUSION

Thank you again for allowing us to provide comments on the Proposed Amendments. Members of the Working Group appreciate the efforts of the CSA at modernizing the way documents are made available to investors while reducing costs associated with printing and mailing for reporting issuers in Canada. We hope that the comments and suggestions set forth in this letter will further contribute to provide meaningful information to the market, in a user-friendly format.

Yours truly,

(signed) Norton Rose Fulbright Canada LLP

[1] The general lack of public awareness as to the existence and utility of SEDAR is a concern raised by Jean-Paul Bureaud and Edward Waitzer in their opinion published in the Globe and Mail on June 20, 2022. See Opinion: CSA's proposal for company disclosures has downsides for investors - The Globe and Mail. In support of this argument, the authors cite a True North Canada investor survey commissioned by Broadridge Financial Solutions which found that 82% of retail investors are either not aware of SEDAR or do not use it. See com_20210917_51-102_broadridge.pdf (osc.ca).