

June 30, 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
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

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

Dear Staff:

We are writing in response to your request for comment dated April 7, 2022 regarding the matters set out in the above-noted CSA Notice and Request for Comment regarding the proposed adoption of an access equals delivery model (AED Model) for non-investment fund reporting issuers. These comments are provided by the lawyers of Torys LLP who are signatories below, in their personal capacities, and not on behalf of the firm or any of its clients.

We appreciate the efforts of the Canadian Securities Administrators (CSA) to introduce an AED Model that acknowledges the impact that technological advances and the digitization of capital markets have had on the methods that issuers use to communicate with their investors. The objective of access equals delivery is to both modernize the way documents are made available to investors (who are increasingly accessing these documents electronically in any event), and reduce costs associated with printing and mailing of documents.

Although the proposed AED Model represents an important step in the right direction, we believe that by excluding medium term note (MTN) programs and other continuous distributions under a shelf prospectus from the AED Model, the Proposed Amendments will fall short of achieving the intended objectives and fail to maximize the benefits that could be had. As we discuss in more detail below, we also recommend that the CSA consider changes to the AED Model to eliminate the unnecessary requirement that issuers issue and file news releases announcing that documents are available on SEDAR. Provided that these documents are accessible on the internet, investors should be considered to have received delivery of these documents.

MTN Programs

We think that issuers conducting MTN prospectus distributions and their investors would also benefit from the AED Model. Issuers with active MTN programs often file multiple pricing supplements each day. Although Part 8 of National Instrument 44-102 – *Shelf Distributions* provides for a relaxed filing requirement for MTN programs whereby pricing supplements do not need to be filed until seven days after the end of the month during which they were sent or delivered to purchasers, it is market practice amongst many MTN issuers to file pricing supplements on the same day they are sent or delivered to purchasers, as is required for issuers using prospectus supplements to distribute securities under a base shelf prospectus. We cannot think of any policy reason why an MTN issuer that has filed a pricing supplement on SEDAR on or before the date it is first sent or delivered to purchasers or prospective purchasers should be prevented from relying on the AED Model. Expanding the scope of the AED Model to include pricing supplements that are filed on the date of first use would benefit issuers without harming or disadvantaging purchasers.

News Release Requirement

The Proposed Amendments provide that an issuer must issue and file a news release on SEDAR announcing that the document in question (e.g., the final prospectus, prospectus supplement or financial report) is available. Although the requirement to issue and file a news release does not seem unduly costly or onerous, we question whether this is the most effective way to alert investors as to the availability of documents and whether that is even necessary in the first place. It also runs counter to market practice to require a news release on the same day that the final prospectus or prospectus supplement is filed. To the extent issuers announce offerings by way of news release, they typically issue news releases on (i) filing the preliminary prospectus, and/or (ii) pricing the offering, which often occurs several hours or days before the final prospectus or prospectus supplement is filed. Requiring a release on the same day, after the final prospectus, prospectus supplement or pricing supplement is filed, will not have any other purpose and may cause confusion amongst investors, particularly when the issuer in question has an active MTN program pursuant to which it files multiple pricing supplements every day – issuers of structured notes under MTN programs do not currently issue any news releases in connection with new issuances because these are not material transactions for the issuers concerned. Further, we expect that most prospective investors will have been made aware of the planned offering and of the availability of (and as necessary, how to source) the offering materials by a dealer or financial advisor. By virtue of their interest in the offering, investors will be just as aware of these filings (if not more aware since they include pricing information and other specific terms for the offering) as they are for any preliminary prospectus filing. As the Ontario Securities Commission (OSC) noted in its cost/benefit analysis for the Proposed Amendments:

“Generally, we expect that prospective purchasers and purchasers under a prospectus are sophisticated investors and are able to access the preliminary prospectus and final prospectus easily through SEDAR. Moreover, we have been advised that, when considering an investment in prospectus distributions, investors are aware that information relevant to their decision making is available on SEDAR and do not wait for, or rely on, paper delivery of a prospectus to inform their investment decision.

We also note that, since prospective purchasers have either been solicited to purchase under the distribution or have indicated an interest in purchasing under the distribution without having been solicited, they can easily request a copy of the preliminary prospectus. Equally, purchasers that order or subscribe for securities can easily request a copy of the final prospectus.”

This is also the case for structured note offerings, where investors typically receive the specific pricing/terms of any new structured note offering via their investment advisor after receiving electronic delivery of the filed pricing supplement that has been made available to the dealer/advisor network.

We note that the current draft of the Proposed Amendments contemplates that the time limit applicable to withdrawal rights in relation to a prospectus distribution would only begin to run if a news release concerning a prospectus’ or prospectus supplement’s availability has been filed. We think that it should be

sufficient that the relevant offering document is publicly available, and its availability has been made known by the issuer through its website or other electronic communications. For example, other technologies, such as a subscription-based system or email notifications on request) may provide a more effective means of notifying investors that materials have been filed. This would also promote more direct engagement with the investor community.

Investors should be able to access information by any preferred means including electronically (via SEDAR and/or issuer websites for easy viewing on computer, tablet, or other devices), email distribution or paper delivery. Investors should not be restricted by limitations of prescribed regulations.

As other commentators have observed, under the Proposed Amendments investors are assumed to monitor company news releases and track public filings on SEDAR notwithstanding that most investors are not aware of SEDAR or do not use it. Investors will generally be more inclined to search issuer websites for relevant material information before accessing the SEDAR website. And since media outlets do not usually pick up routine news releases of the sort contemplated, they are unlikely to meaningfully “push out” information about an offering.

In terms of financial reports, the OSC indicated that:

“[W]e believe that most securityholders who want to review the financial statements and related MD&A of CF Issuers are aware that the documents become available at regular intervals during the year. Although some stakeholders have expressed concerns that securityholders may be negatively impacted, we generally believe that securityholders that are interested in obtaining financial statements and related MD&A can, with minimal effort, obtain copies of those documents.”

We recommend, therefore, that these news releases be made optional and/or that issuers be given the alternative to provide notifications via their own websites or other electronic means of communication rather than via SEDAR. A similar model has been implemented in the United States. In the United States, an issuer has no obligation to issue a news release if it is relying on access equals delivery. Purchasers have to receive written notice within two business days of the purchase that the sale was made pursuant to a prospectus. Annex A to the CSA’s Consultation Paper 51-405 – *Consideration of an Access Equals Delivery Model for Non-Investment Fund Reporting Issuers* also highlights access equals delivery models implemented in the European Union and Australia. Those jurisdictions do not appear to require a news release.

If, nonetheless, the CSA considered that news releases are an essential element of the AED Model, we think that this requirement could be addressed by either a news release filed on the same day as the related prospectus or other filing or a previously filed news release that disclosed the anticipated filing date of the related prospectus or other filing (e.g., for a bought deal, that the prospectus is expected to be filed on or about [date]).

Similarly, for news releases with respect to the filing of annual and interim financial reports, it should be sufficient if an issuer discloses in its earnings release that the financial reports will be filed on SEDAR. This would avoid the need for additional news releases for issuers that do not file their financial reports on the same day that they issue their earnings releases.

Implementation

The Proposed Amendments should provide considerable benefits to market participants. As the CSA has observed, in addition to being more cost-effective and environmentally friendly, an AED Model will benefit issuers and investors by facilitating faster communication. That said, we believe that accessing the AED model should be optional (as opposed to mandatory) so as to enhance investor access to information while not precluding electronic/email or paper delivery options where that is preferred by issuers and their investors. Given the Proposed Amendments follow a CSA consultation process that was conducted in 2020, and general support for the Proposed Amendments, we recommend that the Proposed Amendments be adopted without delay once they have been finalized, including to address the issues noted in this comment letter.

We appreciate the opportunity to comment on the Proposed Amendments and would be happy to discuss any of our comments set out above with you by phone or by email.

Yours truly,

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