



Canadian Securities
Administrators

Autorités canadiennes
en valeurs mobilières

Notice and Request For Comment

Proposed Amendments to National Policy 11-201 *Delivery of Documents by Electronic Means*

Published April 29, 2011

Introduction

The Canadian Securities Administrators (the CSA or we) are publishing for a 60-day comment period proposed amendments (the Proposed Amendments) to National Policy 11-201 *Delivery of Documents by Electronic Means* and in Québec, *Notice 11-201 related to the Delivery of Documents by Electronic Means* (NP 11-201 or the Policy). If these Proposed Amendments are adopted, they would replace the current version of NP 11-201.

Proposed Text

Annex A sets out the proposed text of the Policy.

Background and Provisions of Canadian Securities Legislation to which the Policy Relates

The CSA recognize that the use of electronic communications can enable market participants to disseminate information in a more cost-efficient, timely and widespread manner than by paper.

NP 11-201 states the views of the CSA on how the obligations imposed under Canadian securities legislation to deliver documents can be satisfied by electronic means. The original version of NP 11-201 *Delivery of Documents by Electronic Means* came into effect on January 1, 2000. The Policy was amended on February 14, 2003 to include guidance on proxy solicitation.

Since the implementation of NP 11-201 in 2000, there have been changes to legislation affecting electronic commerce and transactions, including amendments to corporate legislation and the introduction of legislation governing electronic transactions and protection of personal information. Electronic communications have also become much more common than when the Policy was first drafted.

Substance and Purpose of the Proposed Amendments

We think that it is time to review and update NP 11-201 to recognize the changes to other non-securities legislation and the increased familiarity of market participants and investors with the electronic delivery of documents.

The following are the key changes that would result from the Proposed Amendments:

- Alerting stakeholders to other legislation that addresses the electronic delivery of documents.
- Simplifying guidance on the form and substance of securityholder consents

- Reducing technology-related language to avoid references to particular technologies that may become obsolete.
- Renaming NP 11-201 as *Electronic Delivery of Documents*

Summary of the Proposed Amendments

Interaction with Other Legislation

Since we originally developed NP 11-201, there have been numerous legislative changes that concern electronic delivery of documents. Some of the relevant legislative changes include:

- All jurisdictions except the Northwest Territories have passed electronic commerce legislation (ECAs) that governs electronic transactions.
- Certain corporate legislation now provides explicit guidance on the electronic delivery of documents. For example, the regulations to the *Canada Business Corporations Act* provide guidance on the electronic delivery of documents for corporations governed by that act. The corporate laws of Ontario and of Alberta adopt the requirements under the ECA of the respective jurisdiction for sending electronic documents.
- Self regulatory organizations like the MFDA and IIROC have also issued guidance on the electronic delivery of documents.
- The federal government and governments in other jurisdictions have adopted privacy legislation.

We are proposing to amend the policy to note the interaction of securities legislation with this other legislation. We do not propose to provide guidance on the interpretation or application of non-securities legislation in relation to electronic delivery.

Consent and the Consent Form

Currently, NP 11-201 discusses in detail the manner and form for getting consent from securityholders to facilitate electronic delivery. However, securities legislation does not require a deliverer to obtain the consent of the intended recipient nor does it prescribe the form or content of any consent. Securities legislation instead focuses on requirements to deliver various documents.

Statutory requirements concerning consent are generally provided for in electronic commerce legislation or corporate law. This legislation may require an express consent or may permit a deliverer to rely on an inferred consent for an electronic delivery to be effective.

We therefore propose to reduce most of the guidance to stakeholders on the form and content of a consent, including the sample consent form in Appendix A of the current NP 11-201.

However, we propose to emphasize that the process of obtaining express consent, and then delivering the document in accordance with that consent, may enable the deliverer to achieve some of the basic components of electronic delivery that we have identified in the Policy.

Unpublished Materials

In proposing the amendments to NP 11-201, we have not relied on any significant unpublished study, report, or other written materials.

Request for Comments

We welcome your comments on the proposed amendments to National Policy 11-201. In addition to any general comments you may have, we also invite comments on the following specific questions:

For Industry

- Do you believe that the Policy presents any impediments to electronic delivery?
- The Policy describes four basic components for electronic delivery. Do the requirements of other legislation, including electronic commerce legislation and corporate legislation, impact your ability to satisfy the four basic components for electronic delivery described in the Policy?
- We have proposed amendments to remove guidance on the recommended form and substance of a consent to electronic delivery. Please comment on this proposal.

For Investors

- Are you receiving documents electronically? If not, would you prefer to do so?
- Do you agree that the four basic components for electronic delivery provide an appropriate framework for electronic delivery?
- We have proposed amendments to remove guidance on the recommended form and substance of a consent to electronic delivery. Please comment on this proposal.

Please submit your comments in writing on or before June 29, 2011. If you are not sending your comments by e-mail, please send a CD containing the submissions (in Microsoft Word format).

Address your submission to all of the CSA as follows:

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
New Brunswick Securities Commission
Office of the Attorney General, Prince Edward Island
Nova Scotia Securities Commission
Securities Commission of Newfoundland and Labrador
Registrar of Securities, Northwest Territories
Registrar of Securities, Yukon Territory
Registrar of Securities, Nunavut

Deliver your comments **only** to the addresses below. Your comments will be distributed to the other participating CSA.

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Please note that comments received will be made publicly available and posted at www.osc.gov.on.ca and the websites of certain other securities regulatory authorities. We cannot keep submissions confidential because securities legislation in certain provinces requires that a summary of the written comments received during the comment period be published.

Questions

Please refer your questions to any of the following:

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Annex A

National Policy 11-201 *Electronic Delivery of Documents*

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National Policy 11-201
Electronic Delivery of Documents

PART 1 – GENERAL

1.1 Definitions – In this Policy

“delivered” means transmitted, sent, delivered or otherwise communicated, and “deliver”, “delivery” and similar words have corresponding meanings;

“electronic commerce legislation” means the statutes listed in Appendix A and any other federal, provincial or territorial statute of Canada concerning the regulation of electronic commerce, and the regulations, rules, forms and schedules under those statutes, as amended from time to time;

“electronic delivery” includes the delivery of documents by facsimile, e-mail, optical disk, the Internet or other electronic means;

“electronic signature” means electronic information that a person creates or adopts in order to execute or sign a document and that is in, attached to or associated with the document;

“proxy document” means a document relating to a meeting of a reporting issuer, and includes an information circular, a form of proxy, a request for voting instructions, and voting instructions.

1.1.1 Further Definitions – Terms used in this policy that are defined in National Instrument 14-101 *Definitions* have the same meaning as in that instrument.

1.2 Purpose of this Policy

(1) The purpose of this Policy is to provide guidance to market participants who want to use electronic delivery to fulfill delivery requirements in securities legislation.

(2) The Canadian Securities Administrators (the CSA or we) recognize that information technology is an important and useful tool in improving communications to investors. We want provisions of securities legislation that impose delivery requirements to be applied in a manner that accommodates technological developments without undermining investor protection.

1.3 Other Legislation and Rules

(1) Electronic commerce legislation generally prescribes a legal framework for electronic delivery and addresses consent to electronic delivery. The provisions of electronic commerce legislation may vary from jurisdiction to jurisdiction and may not be equally in force in all jurisdictions.

(2) Electronic delivery of documents may also be subject to corporate legislation, SRO rules or stock exchange rules that either directly impose requirements for electronic delivery or incorporate by reference requirements for electronic delivery from electronic commerce

legislation. An issuer's constituting documents, such as its articles of incorporation, may also limit electronic delivery.

(3) Documents required to be delivered under securities laws, including documents sent electronically, may be subject to the protections of privacy legislation. Market participants may need to take additional steps to preserve the confidentiality of personal information under that legislation.

1.4 Application of this Policy

(1) Parts 2 and 3 of this Policy apply to documents required to be delivered under securities legislation. These include prospectuses, financial statements, trade confirmations, account statements and proxy-related materials that are delivered by market participants or those acting on their behalf, such as transfer agents. Part 4 of this Policy provides additional guidance that only applies to the use of proxy documents in electronic format.

(2) This Policy does not apply to deliveries where the method of delivery prescribed by securities legislation does not permit electronic delivery.

(3) This Policy does not apply to documents filed with or delivered by or to a securities regulatory authority or regulator.

(4) For guidance on using electronic communication to trade securities, refer to National Policy 47-201 *Trading Securities Using the Internet and Other Electronic Means*.

PART 2 – ELECTRONIC DELIVERY OF DOCUMENTS

2.1 Basic Components of Electronic Delivery of Documents

(1) Subject to applicable electronic commerce or other legislation, we believe that the delivery requirements of securities legislation can generally be satisfied through electronic delivery if each of the following elements is met:

1. The recipient of the document receives notice that the document has been, or will be, delivered electronically as described in section 2.3.
2. The recipient of the document has easy access to the document, as described in section 2.4.
3. The document that is received by the recipient is the same as the document delivered by the deliverer, as described in section 2.5.
4. The deliverer of the document has evidence that the document has been delivered, as described in section 2.6.

If any one of these components is absent, however, the effectiveness of the delivery may be

uncertain.

(2) The components of electronic delivery listed above are compatible with the legal framework for electronic delivery under electronic commerce legislation.

2.2 Consent to Electronic Delivery

(1) Electronic commerce legislation may require the consent of a recipient to electronic delivery. Securities legislation does not require a deliverer to obtain the consent of the intended recipient nor does it prescribe the form or content of any consent. However, the process of obtaining express consent, and then delivering the document in accordance with that consent, may enable the deliverer to achieve some of the basic components of electronic delivery set out in section 2.1. An express consent may give rise to the inferences that, if a document is sent by electronic delivery in accordance with the terms of a consent:

- (a) the recipient will receive notice of the electronic delivery of the document;
- (b) the recipient has the necessary technical ability and resources to access the document; and
- (c) the recipient will actually receive the document.

(2) A deliverer may effect electronic delivery without the benefit of an express consent. However, if a deliverer does not obtain an express consent, it may be more difficult to demonstrate that the intended recipient had notice of, and access to, the document, and that the intended recipient actually received the document.

2.3 Notice

(1) An intended recipient should have notice of the electronic delivery. Notice can be given in any manner, electronic or non-electronic, that advises the recipient of the proposed electronic delivery.

(2) A deliverer intending to effect electronic delivery by permitting intended recipients to access a document posted to a website should not assume that the availability of the document will be known to recipients without separate notice of its availability.

2.4 Access

(1) A recipient of an electronically delivered document should have easy access to the document.

(2) Deliverers should take reasonable steps to ensure that electronic access to documents is not burdensome or overly complicated for recipients. The electronic systems employed by deliverers should be sufficiently powerful to ensure quick downloading, appropriate formatting and general availability.

(3) A document should remain available to recipients for whatever period of time is appropriate and relevant, given the nature of the document. For example, meeting materials delivered by way of posting to a website should remain posted until at least the date of the meeting.

(4) A document delivered electronically should be delivered in a way that enables the recipient to retain a permanent record of it, as is the case with paper delivery.

2.5 Delivery of an Unaltered Document – A deliverer should take steps to prevent alteration or corruption of a document during electronic delivery. This may include adopting security measures to ensure that a third party cannot tamper with the document. Deficiencies in the completeness or integrity of a document delivered electronically may raise questions as to whether the document has in fact been delivered.

2.6 Effecting Delivery

(1) A deliverer should retain records to demonstrate that a document has been delivered or otherwise made available to the recipient.

(2) A deliverer of a document should not conclude that electronic delivery has been effected if the deliverer has any reason to believe that a document has not been received, such as receiving a notification of delivery failure. If electronic delivery is attempted but cannot be accomplished for any reason, delivery should be accomplished by an alternative method, such as by paper delivery.

PART 3 – MISCELLANEOUS ELECTRONIC DELIVERY MATTERS

3.1 Form and Content of Documents

(1) For the sake of consistency, documents delivered electronically may follow the formatting requirements set out in the SEDAR Filer Manual. This includes altering the document to be delivered electronically from the paper version in accordance with these formatting requirements.

(2) As with documents filed under SEDAR, documents proposed to be delivered electronically should be recreated in electronic format, rather than scanned into electronic format. This is recommended because scanned documents can be difficult to transmit, store and retrieve on a cost-efficient basis and may be difficult to view upon retrieval.

3.2 Confidentiality of Documents – Some documents that may be sent by electronic delivery, such as trade confirmations, are confidential to the recipients. Deliverers should take all reasonably necessary steps to ensure that the confidentiality of those documents is preserved in the electronic delivery process.

3.3 Hyperlinks

- (1) The hyperlink function can provide the ability to access information instantly, in the same document or in a different document on the same or another website.
- (2) The use of hyperlinks within a document may not be appropriate for the reasons described in subsection (3), unless the hyperlink is to another point in that same document.
- (3) A deliverer that provides a hyperlink in a document to information outside the document risks incorporating that hyperlinked information into the document and thereby becoming legally responsible for the accuracy of that hyperlinked information. Also, the existence of hyperlinks in a document delivered electronically to a separate document raises the question of which documents are being delivered - only the base document, or the base document and documents to which the base document is linked.
- (4) For documents delivered electronically that contain hyperlinks to other documents, deliverers are encouraged to clearly distinguish which documents are governed by statutory disclosure requirements and which are not. This may be effected, for example, by the use of appropriate headings on each page of the documents.
- (5) Paragraph 7.2(e) of the SEDAR Filer Manual prohibits hyperlinks between documents.
- (6) An attempt to deliver documents by referring an intended recipient to a third party provider of the document, such as SEDAR, will alone likely not constitute valid delivery of the document.

3.4 Multimedia Communications

- (1) Multimedia communications are sometimes used to present information in varied combinations of text, graphics, video, animation and sound.

We recommend that no information presented through multimedia communications be included in disclosure documents required by statute unless it can be reproduced identically in non-electronic form. This will ensure that all recipients receive the same statutorily required information, regardless of their multimedia capabilities.

- (2) Market participants may use multimedia communications to compile and disseminate publicly available information.
- (3) Multimedia communications are subject to provisions in securities legislation regarding misleading or untrue statements and promotional or advertising restrictions. These provisions may be relevant, for example, when the multimedia communications appear on a deliverer's website or are hyperlinked to a deliverer's website.

3.5 Timing of Electronic Delivery – Electronic delivery of materials to recipients should be made contemporaneously with the mailing of the paper version of such materials even though the deliverer may be capable of electronically delivering such materials sooner.

PART 4 – PROXY DOCUMENTS

4.1 Proxy Delivery Requirements

(1) Securities legislation and securities directions contain provisions relating to the proxy solicitation process that have raised questions as to whether the electronic delivery of proxy documents is permitted, and whether proxy documents can be in electronic format. We have identified two types of requirements in securities law that affect the use of proxy documents in electronic format:

1. Requirements in certain securities directions or securities legislation that
 - (a) a form of proxy or proxy be in written or printed form (the “written proxy requirements”); and
 - (b) a registered holder of voting securities vote or give a proxy in respect of such voting securities in accordance with any written voting instructions provided by the beneficial owner of such voting securities (the “written voting instructions requirements”) (collectively with the written proxy requirements, the “in writing requirements”).
2. Requirements in securities legislation that a proxy be executed (the “proxy execution requirements”).

(2) Market participants who are required by securities legislation to deliver proxy documents and wish to use an electronic delivery method should refer to Part 2 of this Policy, which sets out the principles for delivering documents electronically.

(3) Merely making proxy documents available for access on a website will not constitute delivery of these documents in accordance with the four components of effective delivery that are set out in Part 2 of this Policy.

4.2 The In Writing Requirements

(1) Forms of proxy, proxies and voting instructions in electronic format (including an electronic format that makes use of the telephone) will generally satisfy the in writing requirements if the electronic format used

- (a) ensures the integrity of the information contained in the forms of proxy and proxies; and
- (b) enables the recipient to maintain a permanent record of this information for subsequent reference.

(2) In order to ensure the integrity of information, the electronic format of the form of proxy, proxy or voting instructions should not permit the information in the document to be easily corrupted or changed. For example, the written proxy requirements generally would not be satisfied by sending an e-mail with a form of proxy in Word format attached, as this format could be easily tampered with.

(3) In order to assist a recipient to retain a permanent record of the information so as to be usable for subsequent reference, appropriate electronic formats and methods of electronic delivery should be used that include the ability to store and print the record.

4.3 Proxy Execution Requirements

(1) The proxy execution requirements are normally satisfied by a security holder's signature. The use of a signature indicates adoption of the information in the completed proxy, and permits authentication of the security holder's identity. We are of the view that the use of a manual signature is one method, but not the only method, of executing a proxy.

(2) The proxy execution requirements may be satisfied through the security holder using an electronic signature to execute a proxy, including a proxy in electronic format that satisfies the in writing requirements (see section 4.2). Any technology or process adopted for executing a proxy should create a reliable means of identifying the person using the signature and establishing that the person incorporated, attached or associated it to the proxy. The security holder's electronic signature should result from the security holder's use of a technology or process that permits the following to be verified or proven:

1. a security holder used the technology or process to incorporate, attach or associate the security holder's signature to the proxy;
2. the identity of the specific security holder using the technology or process; and
3. the electronic signature resulting from a security holder's use of the technology or process is unique to the security holder.

PART 5 – REPEAL AND EFFECTIVE DATE

5.1 Repeal – National Policy 11-201 *Delivery of Documents by Electronic Means*, which came into effect on February 14, 2003, is repealed.

5.2 Effective Date – This National Policy comes into effect on ●.

Appendix A

Electronic Commerce Legislation

Alberta

Electronic Transactions Act, S.A. 2001, c. E-55

British Columbia

Electronic Transactions Act, S.B.C. 2001, c.10

Manitoba

The Electronic Commerce and Information Act, S.M. 2000, c. E55

New Brunswick

Electronic Transactions Act, S.N.B. 2001, c. E-55

Newfoundland and Labrador

Electronic Commerce Act, S.N.L. 2001, c. E-52

Nova Scotia

Electronic Commerce Act, S.N.S. 2000 c. 26

Nunavut

Electronic Commerce Act, S.Nu. 2004, c. 7

Ontario

Electronic Commerce Act, S.O. 2000, c. 17

Prince Edward Island

Electronic Commerce Act, S.P.E.I. 2001, c. E-41

Quebec

An Act to establish a legal framework for information technology, R.S.Q. 2001, c. C-1.1

Saskatchewan

The Electronic Information and Documents Act, S.S. 2000, c. E-7.22

Yukon

Electronic Commerce Act, S.Y. 2000, c. 10