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K. Kivenko Comments on CSA Consultation Paper 51-405 – Consideration of an Access Equals Delivery Model for Non-Investment Fund Reporting Issuers
https://www.osc.gov.on.ca/en/SecuritiesLaw_csa_20200109_51-405_fund-reporting-issuers.htm

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I appreciate the opportunity to comment on this consultation. This Consultation provides an excellent forum for discussion on the appropriateness of an access equals delivery model in the Canadian market.

Overview

The Canadian Securities Administrators (CSA) Paper **CSA Consultation Paper 51-405 – Consideration of an Access Equals Delivery Model for Non-**

Investment Fund Reporting Issuers solicits views on the appropriateness of introducing an "access equals delivery" model in the Canadian market. Under this model, delivery of a document would be effected simply 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. According to the Consultation Paper, an access equals delivery model could benefit both issuers and investors. It says 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. The Paper asserts, but does not provide objective evidence, that 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. Some issuer websites are in fact quite difficult to navigate. **In my experience, unsophisticated investors are not aware of SEDAR or how to use it and few access issuers' websites.**

Comments

The consultation states *"In our view, implementing an access equals delivery model for these types of documents is achievable and could meaningfully reduce regulatory burden on issuers."* As a matter of principle, I do not categorize disclosure as a regulatory burden, it is an obligation required by law to protect investors and a privilege to respect those who have invested their savings with the corporation. Disclosure is the critical means for investors to know and understand their investments, and to adequately manage and plan for their retirement security.

Disclosure makes available the information needed for informed investment decisions- thus promoting efficient securities markets which in turn result in better allocation of Canada's capital resources. As a protective device, disclosure prevents the kind of frauds and exploitation of retail investors which depends for its success on nondisclosure, or inadequate or misleading disclosure, by securities dealers or corporate insiders. Better quality disclosure might have prevented the huge losses Canadian Cannabis investors experienced in 2019.Furthermore, forthright disclosure indirectly encourages those in the securities industry and the corporate world to adhere to higher standards of conduct. **The proposal makes no effort to enhance the effectiveness of disclosure as a regulatory strategy – one of the two underlying principles of securities regulation (the second being registration requirements for dealing with the public).**

The idea put forward states that an issuer is considered to have effected disclosure delivery to an investor 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 (presumably free of charge) from the issuer upon request. This idea turns the concepts of "delivery" and "disclosure" on its head. Such an odd approach can be labelled as telepathic disclosure. **I just don't see how this approach will encourage more retail investors to read and use**

disclosures. Perhaps the CSA could share any research it has showing how this approach has worked out for retail investors in other jurisdictions.

As a large majority of investors have gained access to the Internet and become comfortable using it for a variety of purposes, including researching investments, securities firms have sought to reduce disclosure delivery costs by driving the transition to electronic delivery of disclosure documents. Investor advocates like ourselves have also noted the potential for electronic delivery to enhance the quality and timeliness of disclosures, including by promoting greater use of intelligent and machine-readable documents and e-delivery, **but only if the transition occurs in a way that increases the likelihood that retail investors will find, read and utilize those important disclosures.**

I believe any proposal on electronic disclosure must balance the option of electronic disclosure with the preservation of choice over delivery preferences. This balance should take into account the basic fact that the demographics show that significant numbers of individuals still do not have ready access to computers or the internet, prefer paper copies of disclosures or are concerned about privacy and security.

The Consultation Paper has not provided any evidence to support the argument that retail investors prefer to receive prospectus or continuous disclosures electronically or that this proposal would increase the likelihood that investors would read and better understand the regulatory disclosures that are provided to them. Rather, there is a very real risk that the proposed shifting of the current delivery system to *access equals delivery* will make it less likely that certain retirement savers read issuer disclosures and, as a result, these investors could make less informed decisions. In short, the CSA is proposing to seduce a material swath of retirement savers and retirees into a disclosure system that they didn't ask for and which may not work well for them.

National Instrument NP 11-201 *Electronic Delivery of Documents* 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 electronic delivery is already permitted, and despite the guidance provided in NP 11-201 and the introduction of the notice-and-access model, the Paper informs that some issuers continue to incur *significant* costs associated with printing and mailing various documents required to be delivered under securities legislation**.** Is this because these issuers have poor cost controls or because their shareholders prefer receiving printed documents or both**?**

Under the model contemplated, 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. The CSA are considering prioritizing a policy initiative in this area for prospectuses and certain continuous disclosure documents. If investors do not change their delivery options, the cost savings will not be realized so there could be pressure on investors to shift to an unsuitable delivery regime.

While the Consultation Paper says that the *access equals delivery* model the CSA is contemplating is not intended to remove the option of having paper copies of documents delivered for those who prefer this option, it does not provide any details on how this right would be exercised. **For greater clarity I would like to put forward some necessary ground-rules (a) The investor must be informed in writing that they have this right. (b)They can exercise this right via written communication (c) There will be no charge for requesting a paper document and (d) Investors will have the right to change delivery instructions at any time.**

Response to Consultation questions

We provide our 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.* As explained in the text, we do not believe it is appropriate. **A good investor experience doesn't just allow shareholders to access disclosure documents -it encourages them, by delivering the documents in an interactive and personalized manner that helps them actually get more out of the information they receive.** This is where I think the CSA should prioritize its e-delivery focus. That would materially impact investor protection. See *Facilitating digital financial services disclosures:* ASIC
https://download.asic.gov.au/media/3798806/rg221-published-24-march-2016.pdf
2. *In your view, what are the potential benefits or limitations of an access equals delivery model? Please explain.* We believe a significant number of retail investors will be disadvantaged. There is no evidence that investors under the current system are demanding *access equals delivery* or that mailing costs incurred by issuers are unreasonable or unjustified. I see only trouble for investors/shareholders. It has been said that disclosure is a foundation for securities regulation. It is therefore logical to conclude that any reduction in disclosure or added delivery constraints is an attack on the foundation. That is precisely how I see "*access equals delivery*". It does nothing to improve the robustness of disclosure, the effectiveness of disclosure or the usage rate of disclosure(s) by investors/shareholders.
3. *Do you agree that the CSA should prioritize a policy initiative focusing on implementing an access equals delivery model for prospectuses and financial statements and related MD&A?* If *access equals delivery* is imposed on investors, these are the documents to prioritize. **I believe the regulatory priority should be on improving disclosure quality, relentless enforcement of deficient/misleading disclosure and making it easier for retail investors to obtain *delivery* in the manner they desire.**

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.)? We do not agree with *access equals delivery* as proposed.
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. Withdrawal rights should begin when the issuer has delivered the disclosure.
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. We cannot provide an evidence-based response. More research is required.

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. The term website is generally understood by the Canadian population.
b. Should we require all issuers to have a website on which the issuer could post documents? The cost of maintaining a secure website may outweigh the mailing costs, so mandating a website is inappropriate. In practical terms, we cannot imagine a public company without a website. The CSA might however consider requiring that if a website is used, the required documents can easily be found, viewed, downloaded and printed.
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? As we have stated, a undirected News Release is wholly inadequate to ensure the document will be accessed and read by retail investors. Only direct communication to the investor will achieve that. **The proposals ignore the behavioural reality of individual investors who are as unlikely to read or access documents electronically as they are to read paper documents delivered to them.**
b. What particular information should be included in the news release? The nature of the document and why it is important to be read.
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? We believe that retail investors will suffer and that such suffering will not pass cost-benefit scrutiny.

While sympathetic to the desire to reduce paper and to minimize mailings that may not be fully appreciated by the recipient, I cannot agree with the "access equals delivery" approach advocated in this consultation paper. Quite simply, online access as proposed does not equal delivery. Many investors do not use computers or have internet access. Many others do not wish to use, or cannot use, computers for this purpose. **If disclosure is to be meaningful, it must be made in a manner that accounts for the range of individual circumstances and that does not put an undue burden on the intended recipient.**

The problem with the proposed "*access equals delivery*" approach is not that it allows for online access instead of paper delivery, with its associated cost and environmental impact. Indeed, we agree that investors should have the option of refusing paper documents and instead relying on electronic disclosures. Rather, the problem is that, by following a "negative option" approach to electronic disclosure, this proposal puts the onus on the wrong party, and thus effectively ensures that the disclosure will not reach many retail investors who might otherwise have benefited from it. It is important not to confuse two distinct issues: that of the content of the disclosure and that of the mode of disclosure. With improved content and presentation of the information in question, it can be expected that more investors will be interested in reviewing the documents. Thus, even if current evidence suggests that few consumers are reading prospectuses, that could well change with the move to more investor-friendly information.

In any case, instead of putting the onus on consumers to "opt-in" to paper disclosure, the default rule should require a mode of disclosure which works for everyone. It should also allow for alternative modes of disclosure, upon clear direction from the investor. These alternatives need not be limited to website postings and full information mailings. Electronic mail delivery, or at least notices of new postings, can be offered, for example. Investors can and should be encouraged to opt-in to electronic disclosures, whether by e-mail or website postings; but their ability and willingness to do so should not be taken for granted by the CSA.

If the CSA is looking for ways to improve disclosure to investors, it should laser focus on content. For example, both institutional and individual investors are deeply concerned about ESG. See *The Future of ESG and Sustainability Reporting: What Issuers Need to Know Right Now*
https://www.dfinsolutions.com/sites/default/files/documents/2019-01/dfin_thought_leadership_whitepaper_ESG_Sustainability_Reporting_0.pdf

Bottom line

The CSA is considering the default delivery mechanism from a system that is working, albeit imperfectly, to an *access equals delivery* e-delivery regime. Before proceeding with access equals delivery, the CSA should be able to provide

compelling evidence that there is widespread investor demand for such a regime, that investors are more likely to utilize electronic disclosures than the current system, and that corporations have shown a willingness to innovate by using technology to enhance the quality, effectiveness and timeliness of disclosures whether delivered by mail or electronically**. The proposals ignore the fact that disclosure (full, true and plain) has not been made unless/until the information has been clearly communicated to the recipient and understood by the recipient.**

There is a reference to some issuers still incurring costs due to printing and delivery of paper documents rather than making them electronically available. **That is the issuer's choice. Current policy allows for notice-and-access.** This seems to be working well for those who choose to use it The Consultation Paper has provided no evidence to support a view that such costs are excessive or unreasonable (it does however suggest that some investors prefer reading paper copies!). Even if there are costs savings for issuers , the cost of printing prospectuses and other disclosure documents might simply be passed on to those investors who prefer reading complex documents on paper rather than viewing such documents on screen.

The CSA would do well to focus on how to make disclosure more useful and effective for retail investors. But nothing in the current thinking would actually bring that potential closer to reality, and benefits e-delivery has to offer. Such a consultation provides no incentives for issuers to invest in making regulatory disclosures more attractive and useful. As a result, under the *access equals delivery* regime, investors are likely to receive electronically the same problematic disclosures that they currently receive in the mail and not benefit from the tremendous potential technology result is unlikely to increase the likelihood that investors read and understand these important disclosures.

I cannot see how there can be deemed disclosure unless the investor receives a written notice that the document has been, or will be, delivered electronically and how it can be retrieved. **It is unrealistic to think that individual investors will know that documents have been posted on SEDAR or issuer websites or go to such websites to find them**. Even an approach whereby an email or mail notice is sent to investors which will then direct them to a website where the disclosures are posted has limitations. This mere notice and posting, without a determination of whether participants actually open the notice or access the disclosure, is not enough to be considered a measure reasonably calculated to ensure actual receipt of the disclosed material by investors.

I believe that the CSA should continue to explore alternative approaches to encourage the transition to electronic delivery. In doing so, it should seek to ensure that investor preference regarding delivery methods is respected, including by continuing to distinguish between investors' preferences with regard to research, where a large majority prefer accessing information on the Internet, and delivery of disclosures, where a significant number continue to prefer receiving paper disclosure documents through the mail. In addition, the CSA should encourage development of approaches to electronic delivery that promote, rather than reduce,

the likelihood that investors will see and read the disclosures. And it should engage in testing to help determine, to the extent possible, that its proposed approach has the intended effect.

It should be noted that the retail investor now participates in the market as never before due to the decline of defined benefit pension plans. In addition, the senior population is growing in absolute and proportionate terms. These two statistics suggest that the CSA should tread carefully in any consideration that could reduce access to and use of regulated disclosures. In addition, the CSA should acknowledge that certain households-primarily lower wage workers, workers with lower educational attainment, persons who live in rural communities, racial minorities, older workers, retirees and techno-peasants may disproportionately bear the negative impacts of the proposed rule because they do not have ready access to computers or the internet, suffer from technophobia or are just more comfortable with paper copy for financial disclosures. Those households with only smartphone access will find that accessing disclosures online may not be as useful as for households with other means to access the internet.

A successful transition to electronic delivery will occur only if it is done in a way that ensures retirement savers and retirees prefer to receive and consume disclosures electronically and get real value out of those e-disclosures. **I am all in favour of enabling/facilitating electronic delivery of documents if that is the wish of the issuer/investor but unless the investor actually receives such documents or notice of their easily accessible availability, I don't see how "delivery" has been effectively made.** I do not believe the proposals facilitate the delivery of documents which is apparently what the CSA is trying to do. **The proposal therefore has the effect of undermining investor protection given the unlikelihood of effective disclosure being made to individual investors.**

I recommend that registrants should be obliged to make actual delivery (electronic or otherwise) to their clients and withdrawal rights timed from such delivery.

Approval is granted for public posting of this Comment letter.

Do not hesitate to contact me if there are any questions.

Ken Kivenko P.Eng. (retired)

REFERNCES

Can the Internet improve disclosure for the better?: Consumers Federation of America
https://consumerfed.org/pdfs/can-the-internet-transform-disclosures-for-the-better.pdf

***Delivery* | Definition of *Delivery*:** Merriam-Webster on-line dictionary

": the act or manner of delivering something". Securities lawyers have convoluted the word " deliver" to mean that something is available for the intended recipient of the delivery to pick up should they (a) become aware of its availability and (b) have internet access. In other words, there is no actual delivery or proof of delivery. And some actually call that disclosure which would enable informed retail investor decision making.
https://www.merriam-webster.com/dictionary/delivery

SEC.gov | **Disclosure in the Digital Age: Time for a New Revolution**
I believe new technologies can be employed to improve the investor communications experience, disclosure quality, effectiveness at reduced cost. The CSA is in a good position to provide leadership here.
https://www.sec.gov/news/speech/speech-stein-05062016.html

The Disclosure Process in Federal Securities Regulation: A Brief Review
https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2323&context=hastings_law_journal

The Digital Divide: Stanford U.
https://cs.stanford.edu/people/eroberts/cs181/projects/digital-divide/start.html

10 Principles Of Readability And Web Typography
https://www.smashingmagazine.com/2009/03/10-principles-for-readable-web-typography/

Reading on Paper and Screen among Senior Adults: Cognitive Map and Technophobia
https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5742182/

The 2012 Retirement Confidence Survey: EBRI Issue Brief, No. 369 at 21-22. The EBRI study showed that only a minority of workers and retirees feel very comfortable using online technologies to perform various tasks related to financial management. While this is U.S. data, it likely applies to Canada as well.

FINRA Study A 2016 FINRA study showed that only 31 % of respondents preferred receiving disclosures by email or through internet access; the remainder preferred physical mail (49 percent) or in-person meetings (14 percent). Older respondents preferred paper documents, while younger respondents preferred in person meetings. There was no age differential between those who preferred to receive disclosures by email. FINRA, *Investors in the United States 2016* (Dec. 2016), https://www.usfinancialcapability.org/.
downloads/NFCS_2015_Inv_Survey_Full_Report.pdf

Alegra Howard, ***Consumer Action survey: Given the choice, consumers prefer a paper trail*** https://www.consumer-action.org/news/articles/paper-or-digital-winter-2018-2019#paper_survey

A Primer on Machine Readability for Online Documents and Data - Data.gov
https://www.data.gov/developers/blog/primer-machine-readability-online-documents-and-data

CSA News Release: Canadian securities regulators publish guidance on disclosure expectations for cannabis issuers
http://www.osc.gov.on.ca/en/NewsEvents_nr_20181010_guidance-disclosure-expectations-cannabis-issuers.htm

Canadian securities regulators highlight common deficiencies in issuers' continuous disclosure (July 2018)
In fiscal 2018, 51 per cent (2017 – 43 per cent) of review outcomes required issuers to take action to improve and/or amend their disclosure, or resulted in the issuer being referred to enforcement, cease traded or placed on the default list.
https://www.newswire.ca/news-releases/canadian-securities-regulators-highlight-common-deficiencies-in-issuers-continuous-disclosure-688626711.html

Climate change disclosure needs improvements
In CSA Staff Notice 51-354 *Report on Climate change-related Disclosure Project* [PDF] (the Report), a review of disclosure provided by 78 issuers found that 22% provided no climate change-related risk disclosure and 22% provided only boilerplate disclosure.

Looking Beyond the SEC's New E-Delivery Rule | Article | DFIN
https://www.dfinsolutions.com/insights/article/fast-forward-looking-beyond-sec-s-new-e-delivery-rule

New investment statement still won't expose billions of dollars in fees - The Globe and Mail (fee disclosure is deficient)
https://www.theglobeandmail.com/globe-investor/funds-and-etfs/funds/new-fee-reporting-rules-fall-short-of-full-disclosure/article33663093/

OSC behavioural insights study highlights pathways to better fee disclosure
http://www.osc.gov.on.ca/en/NewsEvents_nr_20190819_osc-behavioural-insights-study-highlights.htm

Are mutual fund investors getting the risk disclosure they need? | Wealth Professional
https://www.wealthprofessional.ca/news/industry-news/are-mutual-fund-investors-getting-the-protection-they-need/231899

It's not just issuer disclosure that needs improvement
Kenmar Associates point out that OBSI fails to provide meaningful information on their performance metrics and no information at all on investor abusing low ball offers and settlements.

APPENDIX I Ken's principles for disclosure delivery by digital media:

1. Ensure positive documented investor consent, either selective or global, is formally obtained and that it is "informed "
2. advise investor directly by e-mail each time a disclosure is made and how to access it or to email disclosures directly to the investor
3. provide access to Adobe Acrobat Reader (assuming PDF is the chosen format) on their web- site with instructions on how to download
4. advise the investor of the system requirements necessary for receipt of documents in PDF format and warn the investor that download time may be slow
5. provide no- cost technical service support via a toll-free line during normal business hours to assist investors with internet access and downloads or to request a paper copy of disclosure documents on a no-charge basis
6. formally advise investors that while electronic delivery is indefinite ,consent can be revoked by mail , email or telephonically at any time without penalty or fee
7. provide easy access to site link –good navigability
8. best practices will be used as regards on-screen readability of disclosure documents